EDJ 1989/1607

Tribunal Constitucional [Spanish Constitutional Court] Courtroom 1st, S 15-2-1989, No. 37/1989, BOE [Spanish Official Bulletin] 52/1989, dated March 2, 1989, rec. 235/1989

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Resumen

The Spanish Constitutional Court [TC] considers the appeal for legal protection lodged against the Court decision which ordered the adoption of consistent proven enquiries (among others: the medical examination of the appellant to find signal of a possible abortion. The TC considers that the appellant's right to privacy has been violated. Following this supposition, the TC examinants the doctrine applied to the subject of the physical privacy and the protection of the fundamental right to privacy.

LAW APPLIED

LO [Spanish Organic Law] 1/1982 of May 5, 1982. *Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen* Art.8.1 [Right to respect, right to family and personal privacy and right to one's image]

CE of December 27, 1978. Spanish Constitution.

Art.9.3 , Art.10.1 , Art.15 , Art.18.1 , Art.18.2 , Art.18.3 , Art.24.1 , Art.24.2

D [Decree] 3096/1973 of September 14, 1973. TR Código Penal [Spanish criminal Code], pursuant to the L [Act] 44/1971

Art.413

RDLeg. [Royal Decree] of September 14, 1882. Year 1882. Ley de Enjuiciamiento Criminal [Criminal Procedure]

Art.118, Art.141, Art.399, Art.433, Art.478, Art.552

CONTENTS

CLASSIFICATION ACCORDING TO LEGAL CONCEPTS

ABORTION

Offence

In general

SPANISH CONSTITUTION OF 1978

CONSTITUTIONAL BODIES

Tribunal Constitucional

CONSTITUTIONAL PROCESS

Appeal for legal protection

Object

Acts or omissions of a judicial body

Imputable to the judicial body

Sentence

Favourable decision

Nullity of decision, act or decision contested

FUNDAMENTAL RIGHTS AND PUBLIC FREEDOMS

FREEDOM AND SECURITY

Detention

Legal aid

PRIVACY AND INVIOLABILITY

Right to respect, privacy and one's image

Investigations and physical examinations

In general

Right to dignity

In general

PRIVACY AND INVIOLABILITY
RIGHT TO RESPECT, PRIVACY AND ONE'S IMAGE
Appeal for legal protection
INVIOLABILITY OF THE HOME
ENTRANCE AND SEARCH OF THE HOME
In general

DOCTORS
FORENSIC SCIENTISTS
Forensic medical examination
Legal proof

LEGAL RULING
PARTICULAR RULES
Spanish Constitution of 1978
CONSTITUTIONAL BODIES
Tribunal Constitucional
CONSTITUTIONAL PROCESS
Appeal for legal protection
Fundamental right alleged
Judicial protection
Defense and legal aid

CRIMINAL PROCEEDING
PRELIMINARY INVESTIGATION AND PREVIOUS ENQUIRIES
Enquiries or actions
PROCEEDING
Proof
Legal proof
Entrance and search of the home

TECHNICAL DATA
Proceeding:Appeal for legal protection
Legislation
Implementing Art.8.1 of LO 1/1982 of May 5, 1982. *Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen*
Implementing CE of December 27, 1978. Spanish Constitution.
Implementing D 3096/1973 September 14, 1973. TR Código Penal, pursuant to L 44/1971
Implementing RDLeg. de 14 septiembre 1882. Año 1882. Ley de Enjuiciamiento Criminal
Bibliografía
Mentioned in "¿Puede compelerse físicamente al imputado, para la obtención de una muestra biológica, ordenada por el juez de instrucción en el curso de la investigación de una causa penal?. Public forum"
Mentioned in "El ADN en la fase de instrucción del proceso penal"
Mentioned in "Uso del velo islámico por testigos en sus comparecencias en actuaciones judiciales ¿Pueden los Jueces y Tribunales obligar a retirar dicha prenda? Si el testigo se niega ¿puede incurrir en delito?. Public forum"
Mentioned in "Pericias informáticas: aspectos procesales penales (2ª Parte)"
Mentioned in "Determinación de la edad en el sujeto vivo, algunas cuestiones jurídicas"

FACTUAL BACKGROUND

FIRST.-, According to a written procedure registered by February 25 1987 in this Court by Mr. Luciano Rosch Nadal, attorney of the Courts, which lodged a recurso de amparo [constitutional appeal for legal protection] in the name and on behalf of Ms. Ximena, against – as it is described above in the heading of the claim- ″final judicial judgment, consisting of proven enquiries agreed in the indictment 88/1986 of the Juzgado de Instruccion [Court of First Instance and Preliminary Investigations] No 10 of Málaga″. The facts exposed in the request for the defense are, in short, as follows:

a) As a result of the institution of the indictment 88/1986, followed by the Juzgado de Instruccion No 10 of Málaga and by means of appealing to the Juzgado de Instruccion No 2 of Jerez de la Frontera, the plaintiff was summoned before the last judicial body. After its submission she was informed that it was about the practice of certain measures of inquiry under that prosecution of the claim, and aiming, as it quotes, at:

Hearing of the plaintiff, ″whose full content we do not possess, but clearly aimed at obtaining a real confession based on certain facts that may involve my client in an alleged offence of abortion, punishable under the Spanish Criminal Code.″

″Expert evidence, which involves the medical examination conducted by the medical examiner, aiming to detect signs of a possible interruption of pregnancy″ by the appellant.

b) The plaintiff – ″after having testified as she considered appropriate″- was summoned again on February 11 1987, in the same Juzgado de Instruccion for the purpose of a medical examination, requirement neglected by the appellant, invoking her fundamental human rights to her personal privacy, assistance of counsel and be informed of the indictment, to effective legal protection and presumption of innocence, all of them violated by the judicial act concerning the warrant of the Juzgado de Instruccion No 2 of Palos de la Frontera.″ Particularly, it is said now that the infringement of personal privacy was alleged (art. 18.1 CE) because of "seizure of her clinical history, in the Clinic archives of the Doctor S. in Málaga" and because of "the characteristics of the expert evidence.″

It is also said that the right to legal aid and to the information of the accusation against her were violated, because she was called to give evidence, in such a way as taking evidence of the witnesses in appearance, the appellant was interrogated about her own acts, which also would have entailed inability to defend herself (art. 24.1 CE), as the appellant "may be accused of an offence of abortion as a result of not have been informed of her right to not testify or doing it without pleading guilty, in the course of a process where, otherwise, she was not offered to be part of. To conclude, the right to the presumption of innocence would have been violated, as it is now said that during interrogation it was assumed that "due to the mere existence of a given clinical history (…) my client went to terminate abortion voluntarily."

In the legal substantiation of the action, it is reiterated that the contested judicial act "is the measure of inquiry determined by the Juzgado de Instruccion No 10 of Málaga, in the indictment 88/1986, consisting of the recognition of my represented by the medical examiner, in order to determine possible evidence of having terminated abortion voluntarily", despite not existing any charges against the person that sues. The fundamental rights that have been violated are those mentioned before, in respect of which it is reaffirmed that, in this part of the claim, the argumentation that has just been summarized:

a) Violation, in this way, of the right to personal privacy would be due to the fact that the proof agreed did not aim at confirming or investigating "those responsible of a true crime," but to "prove if there has been a crime, investigating for it to some people that, due to their sex, which is essential, and for having gone on gynecological examinations, could have, perhaps, committed the supposed crime whose verification is being investigated." In addition, it is recognized in the claim that if this

breach of law had not happened, the infringement of this same right to privacy would have happened by means of the decision that established the right to examine clinical histories before mentioned, as this medical histories are part of privacy and also of medical professional secrecy and also because, in this case, there would be no evidence of having committed any crime that could be attributed to the appellant.

b) Also, as it was said, the appellant's right to be presumed innocent would have been infringed, violation due to the interrogation which she was subject to and also to the expert evidence mentioned before, to which it is reproached in this sense being "a massive gynecological examination agreed in the prosecution (…) to a great number of women (...) in order to determine if they had an abortion, which there is no proof of it."

c) The right to effective legal protection (art. 24.1 CE) would have been also violated because the appellant was not called to criminal proceedings as part of it and only as witness, starting with this the consequent inability to defend herself and, likewise, ignoring the right to assistance of counsel, to be informed of the accusation, to not testify against herself and not plead guilty (art. 24.2 CE). In this sense, it is observed that the plaintiff, indeed, did not testify as witness (art. 389 of LECr.), but she was "interrogated, as if she were an accused person, except from not having the security that the Law envisage for this cases" and also without being informed of the fundamental rights before mentioned.

We refer to the SS June 27 1984 and April 11 1985 of this Court (ff.jj. 6 and 8 respectively). It is illustrated this quote claiming that, in this present case, there was no conflict between the right to life and the rights now cited, "every time that there is no evidence of having violated the right to life and it cannot be allowed, in this case, that the way to confirm it is by violating other fundamental rights."

It is implored to give notice of legal protection against "judicial acts by virtue of which it is agreed to take statement (…) and in the way that this statement is; It is also necessary to have the expert evidence consisting of an examination of my client by the medical examiner and also by the judicial act consisting of seizuring her medical history (...), this last arises from the indictment 88/1986 (…) and also those from the same indictment and contained expressly in the appealing to the Juzgado de Instruccion No 2 of Jerez de la Frontera (…)." In adittion, it is claimed that the suspension of the contested acts has to be agreed, "specifically the act which has not been complied yet and consisting of the examination of my client by the medical examiner, in view of the fact that in case of execution, the purpose of legal protection may be lost."

SECOND.- Based on a Court order dated March 18, the Section No 2 agreed revealing to the client's representative and to the Public Prosecutor the possible existence in the appeal brought of the following causes of inadmissibility :

1. Regulated by art. 50.1.b) with regard to art. 44.1.c), both LOTC [Spanish Organic Law Constitutional Court], due to no sign of having cited in the previous judicial process the constitutional right allegedly violated ;
2. That related to art. 50.1.b), with regard to art. 44.1.a), of the same Spanish Organic Law, due to not having used all resources available in judicial proceedings:
3. That related to art. 49.2b), also LOTC, because there was no copy, notification or certification of the decision appealed. It was also agreed that the demand for suspension would be decided once it had been solved according to the admissibility of the appeal.

In his/her allegations, the representative stated that everything informed by the Courtroom as first and third reason of inadmissibility could be due to the lack of remission of legal interventions, in which would be stated the plea to fundamental rights violated, independently of, as it was expounded in the lawsuit, this plea was not, in this case, required. On the other hand, it was enclosed the summons received by the appellant together with the statement of claim, which would be the only documents in her possession. Regarding to having informed of not having used all resources available in judicial proceedings,

the appellant observed that which had been appealed for legal protection was a measure of inquiry established in certain proceedings, a measure of inquiry which only solution was disobedience or taking this constitutional remedy, as there was no other appeal against it.

The Public Prosecutor highlighted, on its side, that it was necessary the contribution to what was done with the plaintiff in the indictment 88/1986, suggesting the Courtroom to obtain those conducts, in accordance with art. 88 of the LOTC, notified to Public Prosecutor.

THIRD.- Based on a Court order dated May 27 Sec. 2 agreed requesting the Juzgado de Instruccion No 10 of Málaga the emission of the certification or certified photocopy of the conducts corresponding to the indictment 88/1986, using this power that art. 88 of the LOTC conferred on it. Through a new order dated September 23, Sec. 2 agreed submitting to the Public Prosecutor the conducts received and spare it 10 days to present its defense mentioned in art. 50.1.b) of the LOTC.

In its allegations the Public Prosecutor observed that the invocation of the precepts supposedly violated on the side of the appellant, in compliance with art. 44.1.c) Spanish LOTC. However, the providence subject of this action was appealed in accordance with the provisions of art. 216 LECr, because while it is true that the appellant was not called to testify as defendant but as witness, could have been constituted acting, in her judicial declaration, as she did in her written procedure dated February 11 1987, which did not allow her forensic examination. The appellant was interested in passing sentence agreeing to dismiss the case as inadmissible as it is presented in art. 50.1.b) LOTC, in connection with art.44.1.a) of this same Spanish Organic Law.

FOURTH.- Based on a Court order dated November 23 Sec. 2 agreed to deem legal protection to be acceptable and as it is stipulated in art. 51 LOTC, communicate with the Juzgado de Instruccion No 10 of Málaga informing about this decision and the need to summon, for those who may appear in the appeal for legal protection, to those participating in the proceedings, except from the appellant under legal protection, stating in this summons the exclusion of those who are interested in contributing with the appellant or making any challenges and if the deadline established to appeal by the Spanish Organic Law of this Court would have already ended.

As of January 13 1988, the 1st chamber agreed, after the processing corresponding to the separate inquiry, the suspension of the judicial decision that stated the execution of certain evidentiary proceedings of the plaintiff, in the side still not executed.

FIFTH.- According to a written procedure registered by May 3 1988, The solicitor Mr. Jacinto Gómez Simón appear in Court on behalf of Ms. Ana and Ms. Elena, requesting to understand the proceedings through him. Based on a Court order dated July 12, the Section No 2 agreed to add to the proceedings the previous document and give 10 days to the representation appeared in Court to declare the stance that his clients wanted to take and the procedural stance they assumed. According to a written procedure registered by July 29, the solicitor Mr. Jacinto Gómez Simón expressed that he was appearing in Court as intervener of the appellant, as his clients represent a legitimate interest in the appeal, trying to support with his own arguments the appeal for legal protection

SIXTH.- Based on a Court order dated September 12 1988 Sec. No 2 agreed not to allow the solicitor Mr. Jacinto Gómez Simón to appear in Court on behalf of Ms. Ana and Ms. Elena, every time that they expect to assume the position of appellant ("intervener" they said), having ended the 20 days established in art. 44.2 LOTC to be able to appeal. It was also agreed meeting with the solicitor and the Public Prosecutor to, in a 10 days period, be able to present relevant observations, in accordance with art.52.1 of the same Spanish Organic Law.

SEVENTH.- Within the period of time given for allegations, the Public Prosecutor was the only institution that

presented them. The Public Prosecutor informed in them that, firstly, the five reasons for legal protection mentioned in the claim could be combined in the three following ones: the referent to the presumption of innocence, secondly, that concerning the rights of defense of the appellant and her counsel, and finally, the right to privacy.

As regards the presumption of innocence, this is violated only when it is pronounced a decision that sanctions or restricts rights without having evidence that could be considered as a charge. However, in this current case, any decision of this kind was taken, so in the current conditions of the proceedings, it is unlikely that we could say that this fundamental right has been infringed.

Regarding the rights of defense, its alleged violation would have happened -as it is stated in the claim- for two reasons: for having taken the plaintiff as witness and not as a party (but for testifying concerning matters that would directly and personally accuse her), and secondly, for avoiding in this way respect for fundamental rights, legal assistance, being informed of the indictment, not pleading and pleading not guilty, rights, all of them, that derive from having the right to be informed of the indictment. However, the statement whose unconstitutional nature is doubted was made before the indictment was pronounced and, therefore, before the proceedings against the appellant was addressed. It was a simply taking of pretrial evidence to find out if there were enough elements that show prima facie cases of crimes against the plaintiff.

She was called as a witness because, in that stage of the proceedings, that was her condition, which prevent her from asking for assistance of a counsel, that she testified her completely disconnection with the acts under investigations or even that she refused to undergo forensic examination, as she did, although it could bring evidence against her that could be, as it happened, in an indictment. It is mentioned, in this respect, by February 15 1988 (issue 1243/1987), according to which the right to be informed of the charges does not arise completely until there is an indictment, and this is what happened exactly to the appellant. Therefore, the rest of the rights of defense, which precisely have recourse to the formulation of indictment, have not been violated either. In any case, and in view of the fact that the sentence has no been passed yet, clearly the hypothetic irregularities in the defense cannot have expressed negatively for the one claiming legal protection, with respect to January 20 1988 (issue 1312/1987).

Finally, it remains to be seen that concerning outrages against personal privacy of the appellant, larger statements than those already examined. Firstly, it is alleged that violation of the declared right in art. 18.1 CE due to having agreed through the courts intervene the plaintiff's clinical history, which was in power of the doctor that saw her, also accused for an offence of abortion in the same indictment. We ought to start by saying, in this respect, that it is true that the clinical history is a document that the interested has the right to remove it so anybody has access to it, being the doctor that produced it binding on its professional secrecy at all times.

However, there is no sense in sharing the opinion of the side that says that her right to privacy was violated by the seizure, with the purpose of investigating the offense, the clinical history of a person suspected of having committed an offense of an inducted abortion. It is also important to know that the privacy of communications or the inviolability of the home are clear manifestations of the right to personal privacy, in spite of the intrusions that may be verified in these fields by virtue of the judicial order are not unlawful. There are no unlimited rights and personal privacy is not an exception, as it is restricted by justice procedures, as establishes ATC 257/1985. In these judicial procedures it is manifested that the seizure of the plaintiff's medical history was because of a warrant conferring powers of entry and search in the clinic where the offense of abortion had taken place (November 5 1986). Thus, the right to personal privacy has not been violated because of this cause.

It is also adduced that violation of the right to personal privacy was caused as a result of the court judgment that agreed the forensic examiner of the appellant in order to determine possible indications of having inducted abortion voluntarily

by her, allegation that is formulated stating that this measure undermines the personal privacy as there are investigation facilities that means an intrusive into the personal privacy of the human being. There is no doubt that, in fact, we come to a measure that affects to personal privacy, but the problem arises when it comes to decide if the intrusive is legitimate or not. The Convention on Human Rights and Fundamental Freedoms was passed in 1950 established in art. 8 that"everyone has the right to respect for his or her private life» and in its second paragraph says Public authorities may interfere with the exercise of that right only in accordance with the law and where necessary in a democratic society, inter alia , in the interests of national security or public safety, for the prevention of disorder or crime. "

Furthermore, art. 339 LECr. states that "if it were necessary and advisable to receive an expert report on evidence of any kind the judge will order it immediately," being established in art. 344 of the same Law that "with the name of forensic examiner there will be in each Court of First Instance and Preliminary Investigations a doctor responsible for helping the Administration of Justice everytime considered necessary or convenient his or her intervention and services that his or her profession provides." On the other hand, art. 478 states that "the expert report will consist of, if possible: 1. Description of the person or thing subject to this expert report, as he or she is in that moment." Therefore, there is no doubt that within the broad terms contained herein, our Spanish Code of Criminal Procedure envisages the forensic examiner's expert report of the person that the judge orders and aiming to determinate the current state of the same person." The appealed action is established exactly in our Spanish legislation and it does not have to be an inconvenient its nature of necessary measure in a democratic society for investigation and crime detection.

On the other hand, LO 1/1982, which explains art. 18.1 CE, states in art. 8.1 that "shall not be reputed, generally, conducts authorized or established by the competent authority a according to Law illegitimate interferences." Even though legal text aims to protect civil personal privacy, there is no doubt that about its analogical applicability to public powers (ATC 257/1985) when putting into practice this provision in an instance of limitation of the right to personal privacy by the judicial authority, due to requirements deriving from justice. The considerations before mentioned guarantee the view that states that interference in the appellant's personal privacy was, in this case, legitimate because it was ordered by the competent authority (the examining magistrate) in the course of pretrial investigations in a n assumption envisaged by the Law, and aiming to investigating a criminal action, representing a necessary measure to obtain the evidence for inquiry purposes.

In the claim it is requested that the infringement of this judgment by the appellant should not be considered defiance of authority, but as we are facing a legitimate judgment, its transgression could lead, undoubtedly to a crime of disobedience (art. 237 CP).

It is also affirmed in the claim, as it is stated the refusal of the appellant to obey the repeated judicial judgment, so it arises the difficult problem concerning the enforceability of the agreements of a legitimate authority against the wishes of the interested party, this means the possibility to use physical violence or compulsive violence to avoid that a unnecessary judgment for the investigation of a criminal conduct remain without performing because of the default of the obliged person. We do not have to forget that we are in the sphere of a certain legal protection as it is also important the repercussion that the doctrine that will be established could have on other similar fields, and currently very discussed. For example the possibility to search drug dealer women that bring in to the national territory drugs by hiding them in their genital organs, searches, customs records, requiring fingerprints to people that might be involved in the criminal acts, etc., in case, it is quite common, the interested people refuse to do it.

It is about considering the opposing values herein, as they are on the one hand, for example, liberty and privacy, and on the other hand, respect to Law (art. 10.1) or obedience to judicial orders (art. 118 CE). The problem lies in the limits, being

obvious that there are justification cases of the use of violence (for example, detention by armed forces of a criminal or claimed person), whereas in other cases the refusal can only lead to establishing evidence or suppositions (biological examinations for paternity investigation, when the person concerned refuses to pass them, despite what is stated in art. 127 of the Spanish CC). The decision (73) 7 of the European Council, relating to the repression of the infringements committed when driving a motor vehicle under the influence of alcohol, states that "anyone can refuse to have a breath sample, blood sample or medical examination." A.2.2.c)-. The resemblance to the case in question is such that it is allowed the use of this same for the criteria before mentioned.

Finally, it is unacceptable what is stated in the claims regarding to inhuman and degrading treatment, proscribed by art. 15 CE, which would entail the medical-forensic examination ordered by the judge. The STC 65/1986 stated, following the doctrine of the European Court of Human Rights, that "inhumanity implies a level of special intensity, and that it only can be qualify as "degrading" which causes a particular humiliation and debasement and which is not applicable in this case. There was a special interest in passing sentence refusing legal protection because the invoked fundamental rights had not been infringed.

EIGHTH.- Based on a Court order dated November 21 1988 it was fixed January 12 1989 as the date to deliberate and vote the appeal and concluding it this same day.

LEGAL RATIONALE

FIRST.- As it has been explained in the factual background, the various judicial acts the appellant considers adversely affecting her rights took place during the examining actions performed by the Juzgado de Instruccion No. 10 de Málaga. These were actions following certain forensic research that seemed to conclude that crimes defined in Art. 413 CP (abortion) may have been committed in a certain hospital in the same town. All the resolutions contested by Ms. Ximena in this appeal were, therefore, pronounced in the preliminary investigation 88/1986 of the abovementioned Juzgado de Instruccion, and now it is necessary to clearly identify –as it is not always done this way in the lawsuit– which were such acts, before examining the specific appeals for legal protection herein alleged.

In chronological order of pronunciation, the first resolution that we should have to consider herein as contested –although the appellant's representative does not affirm it explicitly with these words– is this A 5 November 1986, by which the Juzgado de Instruccion No. 10 ordered the entry and the search of the hospital where allegedly criminal actions were taking place. Data or notes regarding the appellant, among other people, (her "medical history", as quoted) have been written down in the said record. Such an apprehension –as described by the appellant– constitutes an unlawful interference in her constitutional right to privacy (Art.18.1). In the second place, the measure of enquiry ordered by the same Juzgado de Instruccion by an order of November, 21, 1986 is also contested; under which, (by order of the same date, sent to the Juzgado Decano of Jerez de la Frontera) it was of interest the appellant to give evidence about if she took operation or not for abortion in the center suspected of the said actions, as well as for the date and order aforementioned so as to let Ms. Ximena "to be examined by the medical examiner on that point", an examining enquiry which, from the point of view of the appellant, represents a new injury to her right to privacy.

Furthermore, and in the third place in the line of contests, the appellant alleges her appeal facing the circumstances in which she testified, in compliance with the abovementioned order, by the Juzgado de Instruccion No. 2 of Jerez de la Frontera, on the grounds that during the questions she was asked she was unaware of her right to be presumed innocent (Art. 24.2. CE),

and that, furthermore, the statement was taken without the guarantees required defined in this constitutional rule (right to legal protection and representation, right to be informed about her indictment and to be informed about her privilege against self-incrimination and right not to incriminate herself), which, to the detriment of the deponent, would have led to injury to her fundamental right "ex" Art. 24.1 CE.

These judicial actions are the object of this appeal, which is not lodged against other resolution –which is important to be stressed from now on– that have been pronounced in the preliminary investigation 88/1986 nor, in particular, against the appellant indictment, dated February 27, 1987, (which means once the appeal for legal protection was lodged). We will examine her claims below, paying attention to the different motivations supported by the Spanish Constitution that are at the base of these claims; considering, in the first place, the infringement of the right to presumption of innocence and then analyzing if the appellant's rights to legal protection (with the various guarantees required by the Spanish Constitution) and to privacy were violated or not.

SECOND.- The infringement of the appellant's right to be presumed innocent (Art. 24.2 Spanish Constitution) is attributed, as written in the lawsuit, to "the questioning to Ms. Ximena" as well as to "the expert examination that consisted of the medical examination"; an enquiry that is said to have constituted "an investigation line of the crime without having even been aware of the said alleged crime, that maybe have never happened."

From another judicial-constitutional point of view, whatever it may be the description of the judicial procedures herein contested, it is true that these never infringed the appellant presumption of innocence, since, as the Prosecutor has reminded, the law now referred to ensure, according to constant jurisprudence of this Court, that every indictment must be preceded by an investigation legitimately performed that proves the charge (for every resolution in this sense, STC 44/1987, f.j. 2º). Moreover, it is obvious that the applicant for legal protection, prosecuted just after lodging this appeal, has not alleged nor she couldn't, to have been condemned a results of the testimony before the Juzgado de Instruccion 2 of Jerez de la Frontera, either based on her negative to undergo the gynecological examination ordered by the judicial body. Independently, in short, from the possible pieces of circumstantial evidence that led the examining magistrate to order these enquiries, the presumption of innocence of the applicant is still unharmed in the procedure phase regarding this appeal, and it is sufficient to prove it to see the inconsistency on this point, of this appeal for legal protection.

THIRD.- It is also stated in the appeal that the appellant's testimony on February 4, 1987, before the Juzgado de Instruccion No. 2 of Jerez de la Frontera, was offered without ensuring the rights required by Art. 24.2 CE —information about the charge and information to the defendant about the right to legal protection, the privilege not to self incrimination and the right not to incriminate oneself. These so-called injuries may have caused, according to the appellant, the defenselessness banned by Art. 24.1 CE. To sum up: the appellant thinks that in compliance with the order of November 21, 1986 (in which she was ordered to testify), actually the procedure was "an interrogation equal to that made to someone accused, just without ensuring the rights foreseen by law for these cases". It is stated that Ms. Ximena should have been called to the trial playing a different role: not as a witness, but as one of the parties.

In order to settle this claim we have to start from the information abovementioned: the appellant was not yet accused at the time when she testified. Thus some of the rights she mentions now are not fully respected –in particular the right to be informed about the charge–, whilst there is no indictment specifying the charge (ATC February 15, 1988, in the case E243/1987). It is true that, together with this, the person accused but not prosecuted holds the constitutional right for defense too, since described now in Art. 118 LECr and in accordance with what we stated in the STC 44/1985 (f.j.3º). So it must be ensured to report anyone involved in the object of this process (ATC 215/1987, f. j. 1º) on such a right before he or she testifies

as well as every time it is conclude out of the regularity activities that the said person, although not having been declared prosecuted, is considered guilty by the Examining Magistrate or is suspected, at least, of committing a crime.

No doubt, this is how she was recognized by the Juzgado de Instruccion No. 10 of Málaga, as the judicial body ordered the adoption of the measure of enquiry in question. Only from such a suspicion, originated from the data about the appellant already existing during the activities, it could be understood the questions presented to Ms. Ximena (if she had an abortion in the healthcare centre investigated or not) and the order itself to make her to take a medical examination on that point. It seems to be clear, therefore, that the consideration that Ms. Ximena should have been given when she was called to testify and during the interrogation itself, was "charged", more than "witness". Nonetheless there is no record in the registry of her statement which says that the judicial authority, who then followed an order, had warned the deponent about its actual condition as accused and about the rights she had in this role. It was a compulsory reminder in such a situation similar to this occurring, so as to avoid any risk of material defenselessness of the person called to give evidence.

The printed minutes with the statement of the appellant shows the traditional expression corresponding to the statement of a witness (Art. 433 LECr, training in the obligation of being truthful, and training about the punishment imposed by the Spanish Civil Code against false statement when being prosecuted) and it has just been said that according to the enquiries and activities performed this is not the consideration that corresponded to the applicant.

Following the above mentioned, we conclude that in practice, her procedural rights were violated as she was not reported on her rights nor, in particular, on the possibility to receive assistance of a lawyer (Art. 24.2 CE and Art. 118 LECr.). This violation of a right supported by the constitution, although it led to the review of the appeal to legal protection, does not permit to give another scope to the positive decision, it is just declaratory in nature and is not completed with any annulment measure. The appellant's ignorance in relation to the rights she held has not affected her actually in a negative sense nor in any sentence in particular and as it is clear, the irregularity originated from performing the interrogation without fulfilling the corresponding requirements and preventions only can lead to the quashing of the corresponding activities when a conviction or an enforcement of the sentence arises from it; as it would be the same case in which this Court could consider the judgment which was based on the contents of a testimony given without meeting the rights required by the Spanish Constitution. Therefore, being able to quash the judicial decision which, in this hypothetical case, has its foundation within an statement offered by the prosecuted that, obtained unlawfully, could be used against her in no way. Actually this is not the case. We are dealing with a case where there is no sign that proves that the irregularities noticed have had negative consequences for Ms. Ximena, which may need to be quashed now.

FOURTH.- The appeal, as already said, was lodged to defend the right to privacy hold by Ms. Ximena (Art. 18.1 CE). This right might have been infringed by virtue of the collection of data about the appellant at the time when it was carried out the search in the medical center which is being investigated, following the order of [sic.] on November 5, 1986. Moreover, it might have been infringed due to the warrant aimed to make the appellant take a medical examination in order to verify the hypothesis of abortion (order of November 2, 1986).

The first of these statements cannot be accepted. Far from a defense of the confidentiality of her medical history (ensured without any doubt between doctor and patient), what the appellant actually wants to express is the controversy, direct or implicitly, about the judicial decision (on November 5, 1986) that ordered the entrance and search in the medical center where, allegedly, criminal activities took place. Anyway it is obvious that the warrant permitting the entrance and search in a house (Art. 18.2 CE) is justified, in the criminal law, by the need to investigate and if appropriate to take whatever relevant to

the preliminary investigation, without being object any secret that, facing such an inquiry ordered legitimately, inside the house being investigated, imposes itself to the judicial acts in course (Art. 552 “in fine” LECr).

The data whose seizure the appellant is reporting (according to the actions, only related to identification data and the date when a supposed appointment with a doctor took place), were recorded, in short, by carrying out a search of a house agreed by the judicial authority by a decision whose accordance with the Spanish Constitution and with the Ley Procesal [procedural law] has not been discuss herein. We cannot thus offer, on that point, the protection the appellant applied for since the warrant has not injured her privacy; it was sufficiently motivated and it has not led to actions that did not have immediate relationship with the aimed pursued.

FIFTH.- By the same order of November 21, 1986, signed by the Examining Magistrate to carry out the interrogation of some people, among who the appellant, it was agreed to carry out a "medical examination of the latest on this point" (abortion), and so it was communicated by order of the same date sent to the Juzgado Decano of Jerez de la Frontera. It has also been stated in the factual background that Ms. Ximena did not appear in person to the said medical examination on the date established by the Court. As a result, this judicial body pronounced order of February 10, 1987, which reiterated the order to medical examination of the appellant. She answered to it by sending, in writing, her “respectful refusal to take the medical examination in question”, –dated February 11– to the Court; as well as she declared her willingness to start the proceedings to lodge an appeal for legal protection to her right to privacy (Art. 18.1 CE).

The appellant, in short, did never take the gynecological examination since she considered it –as expressed in that document and in this appeal– an adversely affecting act to her privacy. Now she justifies that the aim of her appeal is “to protect the said right, and because the well-founded fear she has to see it violated”. She asks this Court therefore to, by quashing the decisions already made, to declare the inadmissibility as of any other new judicial measure ordering the performance of such controversial medical examination, as of any hypothetical charge of defiance that may arise as a result from her refusal to carry out the judicial order.

This appeal is lodged, apparently, not as a reaction against an effective injury commited to the privacy of the appellant, but –as described in the appeal– as an expression of a well-founded fear to negative consequences –an eventual charge of defiance– following the defense by the appellant of what she considered to be her right. Nonetheless, it is obvious that this reasoning, which seems to be preventive, constitutes an initial problem when examining the contents of the appeal.

SIXTH.- As reiterated in the Constitution, we all know that, judging with legal protection, this Court cannot declare itself against or in favour of simple hypothesis or statements related to suppositions that have not occurred yet (STC 68/1985, f. j. 5º), since this appeal does not represent a preventive or precautionary remedy to which one can turn in order to take precaution against future feared injuries (ATC 65/1985, f. j. 1º). That being the case, it is easy to understand that now we cannot say anything about this appeal if its exclusive aim were to express de agreement or disagreement with the right appealed in a prosecution by defiance and disobedience never proved, since in this procedure there is no place for an indictment regarding if an act of public authority that has not occurred would be in accordance with the fundamental right.

Books, although presented this way, do not prevent this appeal to be considered. It must be considered, to this end, the fact that there is already an act of public authority (order of November 21, 1986) that affected directly to what the appellant considers out of her privacy, although that act has not been effective in the view of the actions we have in possession. If in these actions it is stated that that decision led to the adoption of the order of February 10, 1987, by the Juzgado de Instruccion No. 2 of Jerez de la Frontera, in which, following the absence of the appellant to the medical examination, it was reiterated what was interesting for the judicial body issuing the order. Thus, the mandatory nature of the decision ordering such

examination was left clearly declared. It means a warrant to be respected by Ms. Ximena while lodging this appeal for legal protection.

In this appeal we are asked to declare if the judicial measure that ordered her to take –within the preliminary investigation– a gynecological examination was in compliance with the right to privacy of the appellant. But this Court, which always has to take into account the major effectiveness with regard to the appeal for legal protection, cannot refuse now this trial since it can be carried out simply by contrasting the existence of a warning but not executed act of a public authority, against which it is appealed the protection of a fundamental right. On this point, the appeal for legal protection is not merely preventive as it is not debatable that the guarantee to enjoy and pursue the fundamental rights freely (Art. 9.3 CE) serves as reasoning and gives sense to the claim supported by the Spanish Constitution, formulated to protect any of such rights and freedoms against decisions of the authorities that affected them directly and that are just waiting to be implemented.

SEVENTH.- The Spanish Constitution ensures privacy (Art. 18.1), included herein the physical privacy, which –within the judicial public relationships now affecting– is exempt from any investigation or inquiry regarding the body that may be imposed against the wish of the person whose sense of modesty is left protected by the regulations, as long as it reflects the estimation and criteria deeply-rooted in the culture of the community.

This statement in principle obviously requires adding some riders. The first one, implicit in what has already been said, is that physical privacy, which is supported by the Constitution, is not coextensive with the physical reality of the human body, because it is not a physical body but cultural and defined, consequently, due to the major criterion in our culture regarding body modesty. This is why we cannot consider forced interferences to privacy those actions that considering the areas of the human body where they are carried out or the instruments used, do not constitute a violation of a person's modesty, according to a sound judgment. The second one is that, although we are talking about actions affecting the issue protected, it is also true that, as pointed out by the Prosecutor, privacy can give in some specific cases and in any of its different expressions, facing public requests, because this is not an absolute right, although the Constitution, when defining it, has not expressly established the reserve of the judicial intervention described in the regulations that state the inviolability of one's premises or of the confidentiality of communications (No. 2 and No. 3 of the same Art. 18). Such an affectation to privacy is only possible by judicial decision that should foresee a carrying out respecting personal dignity and not constituting a degrading treatment, once considered the circumstances of the case (Arts. 10.1 and 15 CE).

It must be said that in the supposition with which we are dealing, these precautions were here adopted. The verification of a gynecological examination carried out by a professional cannot be considered to be degrading or against human dignity, independently from the fact that, in this case, that examination never took place. Actually, what we can state is that privacy was affected or compromised in this supposition since when identifying the constitutional protection, "private" must be those areas of the body to be submitted to the examination.

Nonetheless, in order to evaluate if a judicial action similar to this, respected the privacy of the individual or not, it is not just to notice that in that action the interests to which every decision of the authorities must serve –also public interests by definition– were put on top; since constitutional protection finds here its limits, once recognized its aim and having into account the public demands in presence and it is well understood that if it was just simply to confirm this public interest so as to justify the sacrifice of the law, constitutional guarantees would, being put into context, lose its effectiveness.

Therefore, what protection of privacy claims is not only the formal regularity of the judicial decision to be limited by a well motivated and a legally reasonable legislative precaution, but also –regarding the substantive aspect– the reasonable appreciation by the playing authority of the situation lived by the subject who might be affected. Such an appreciation must be

done regarding the demands of the current judicial action, as the decision limiting the privacy of those who do not live a specific situation or have an specific position with regard to that action, would not actually be in accordance with the fundamental right. Likewise, the guarantee we consider to be violated by the measure, any estimation of proportionality between the sacrifice of the right and the situation lived by the person subject to the measure.

It is obvious, therefore that the consideration about if the fundamental right was violated or not, cannot be based –in cases like this– on the mere verification of what the Art. 8.1 LO 1/1982 foresees; because such rule, mentioned by the Prosecutor within his/her declaration, only states: "In general, actions authorized or agreed by the corresponding authority in compliance with law, will not be deemed unlawful interferences." And it is exactly the later (if the controversial action, obviously the constitutional action too, was legal or illegal) what has to be examined within the current appeal.

EIGHTH. - By order of November 21, 1986 and the acts that, by way of exhort, completed this resolution, it was ordered to the appellant, among others, to undergo, as we have said, a gynecological examination in order to determine by the forensic surgeon the realization of a possible surgical intervention during pregnancy, which, in the context of summary proceedings, should confirm the verification of the presumed offense. We must now appreciate, in response to the appellant requests, if the said mandate was legitimate, for which purpose we must consider, first of all, if an order of this nature could be passed in the course of preliminary investigation and, in case it was possible, if the order that in this case was estimated can be deemed adjusted to guarantee constitutional rights.

The fundamental right involved here certainly does not protect the claim of privacy of the accused or prosecuted against the judicial resolution that, in the case of a criminal investigation, provides the obtaining or the identification, on the body, of possible traces of the possible crime, without prejudice, according to stated above, of the necessary respect for the dignity of the person and the privacy against any treatment in the circumstances of the case that could be considered degrading (Articles 10.1 and 15 CE). Even privacy can not, in such cases, hold on to being an insurmountable obstacle against the pursuit of material fact that can not be obtained otherwise, nor should it be ignored, along with this, the legal powers that belong to the examining magistrate, and that the Attorney General recalls, to order, in the course of the inquiry, the realization of expert examinations that, among other things, may focus on "description of the person (...), which is the subject of it (the expert report), in the state or the manner in which it is (Articles 399 and 478 LECr.), these legislative entitlements would give no legitimate basis to police action because of its generic and indeterminate nature, but they can provide a basis for the judicial resolution, here enforceable, that has the affectation, when necessary, of the scope of physical intimacy of the accused or defendant.

And we should not ignore for this purpose, that the judgment passed on November 21, 1986, was guided, in the end that matters now, towards the determination of a fact that might constitute an offence and for which the appellant for legal protection already appeared, according to prior observed, with the effective accused condition, being of relevant consideration for this purpose, that judicial suspicion on the execution of the actions did not lack of rational basis, as can not be unknown that the data concerning Ms. Ximena was already held by the examining judge, which made possible their consideration as accused.

However, the above mentioned is not enough to establish the conformity of the impugned decision to the constitutional guarantee of personal privacy. It is not enough, for this purpose, to recognize that the action affected a person already accused, along with the fact that the judgment was rendered after reasoned weighting, in one part, the severity of the intrusion which the operation entails and, on the other, the essential nature of such meddling to ensure the defense of public interest that is to be defended by exercising the "right to punish". The first of these magnitudes can only be calculated by

reference, not only by the socially dominant criterion, but also by the conduct which, under serious evidence, is attributed to the same passive subject of the proposed action, while the second term of the weighting can not ignore the palpable difference between a performance driven, for example, to identify the suspect of a crime whose existence is certain and one that seeks simply to obtain an additional evidence to be added to those of evidential nature that are already believed to be possessed about the actual commission of a crime which existence is suspected.

According to a well settled constitutional doctrine, the rule of proportionality of the sacrifices (Constitutional Court Judgment 26/1981, f. j. 5th), must be performed when proceeding to the limitation of a fundamental right (Constitutional Court Judgment 13/1985, f. j. 2nd), and it is well understood that the respect of this rule imposes the motivation of judicial resolution that makes exceptional the right or restricts it (Constitutional Court Judgment 62/1982, f. j. 2nd), because only such ground will allow to be appreciated, in the first place, by the affected that can be controlled, and in the second place, by the reason that justified, according to the judicial body, the sacrifice of fundamental rights.

Clearly, the decision here challenged did not comply with these requirements. The judgment passed on November 21, 1986, was an unmotivated resolution, despite the fact that, as stated above, any judicial decision restricting or limiting fundamental rights must be adopted with the corresponding grounds, a constitutional requirement that, in the order of the criminal process, already imposed, the existing Article 141 LECr., by requiring the form of "resolution" and the consequent motivation, for the resolutions that decide “essential points affecting the defendants in a direct way”, the latter being a reference of the accused which has to be considered comprehensive when it comes to affect the scope of his fundamental rights.

The injunction making the appellant undergo a forensic medical examination was presented, for this lack of motivation, as a decision unrelated to any weighting of the necessity of the measure, and its proportionality, by reference to the right that was so harshly agreed to be limited, because such mandate was formulated in the body of an exhort that indicated only, in what here matters, “it is interesting to examine her (the appellant) by the forensic surgeon on that end”. These lacks are, in addition, also evident in the judgment of February 10, 1987, passed by the Court number 2 of Jerez de la Frontera in compliance with the interested in the exhort, limiting the resolution of the Judge then urged, before the initial failure to appear of Ms. Ximena to order for an identity card to be issued for examining her the next day, by the forensic surgeon.

From the above follows, as we know, the incompatibility in their way, either from the contested decision, as from the one that in its compliance was passed, with the fundamental right of the appellant that his privacy was not affected but with the guarantees that are reported, which imposes the grant, as to this end, of the legal protection requested, thus preserving the applicant against any execution of the measure here examined, execution which might otherwise be compelled by a warning of punitive consequences that may arise from their refusal or the valuation that this can be done in relation to the already existing evidences, but not, of course, in any case, by using physical force, which would be in this course degrading and incompatible with the prohibition contained in Article 15 CE.

WE DECIDE

In attention to the above, the Constitutional Court, by the authority conferred by the Constitution of the Spanish Nation, has decided:

1st. To estimate partially the appeal filed by Ms. Ximena and therefore:

a) To recognize the right of Ms. Ximena for the statement that she presented before the Judge of Instruction number 2 of Jerez de la Frontera to be preceded by warnings and cautions that the Law commands respect of the accused.

b) To cancel the part of the forensic medical examination of the appellant of the judgment of November 21, 1986, passed by the court number 10 of Malaga, as well as the judgment of February 10, 1987, passed by the court number 2 of Jerez de la Frontera.

c) To recognize the right of Ms. Ximena to personal privacy and the inadmissibility, therefore, of any restriction of that right without the assurances provided on the last foundation of this judgment.

2nd. To dismiss the action in all other grounds.

Passed in Madrid on February 15, 1989. Francisco Tomás y Valiente, Resporting judge. - Francisco Rubio Llorente. - Luis Díez Picazo y Ponce de León. - Antonio Truyol Serra. - Eugenio Díaz-Eimil. - Miguel Rodríguez-Piñero and Bravo-Ferrer, Judges.