The Constitutional Court, in full bench, composed of the Honour Judges Francisco Pérez de los Cobos Orihuel, President, Adela Asua Batarrita, Luis Ignacio Ortega Álvarez, Encarnación Roca Trías, Andrés Ollero Tassara, Fernando Valdés Dal-Ré, Juan José González Rivas, Santiago Martínez-Vares García, Juan Antonio Xiol Ríos, Pedro González-Trevijano Sánchez and Enrique López y López, has pronounced

IN THE NAME OF THE KING

the following

J U D G M E N T

In the Amparo appeal no. 9530-2005, filed by Mr Orkatz Gallastegi Sodupe, represented by the Attorney, Javier Cuevas Rivas and assisted by the Lawyer Alfonso Zenon Castro, against the Judgment delivered by the Criminal Chamber of the Supreme Court no. 1311/2005, October 14, which dismissed cassation appeal no. 739-2005 P filed against the Judgment delivered by the Third Section of the Criminal Chamber of the *Audiencia Nacional* on April 7, 2005, in connection with Court Roll no. 10-2004 arising from Abridged Proceedings no. 95-2002, from the Central Investigation Court no 4. The Public Prosecutor has been party to these proceedings. The reporting judge has been the President Francisco Pérez de los Cobos Orihuel, who expresses the view of the Court.

II. Grounds

1. The Sentence number 1311/2005, October 14, pronounced by the Criminal Chamber of the Supreme Court, is contested in this Amparo appeal, considering that such Judgment had dismissed the cassation appeal issued by the plaintiff against the Sentence given by the Third Section of the Criminal Chamber of the *Audiencia Nacional* on April 7, 2005, in the summary procedure no. 95-2002, which sentenced the appellant as the material author of terrorist offences to the term of six years imprisonment, loss of voting rights and total disqualification from public office for six years, payment of court costs and payment of civil damages to the institution who had sustained the damages for an amount of 17,199.21 euro.

The appellant considers that the challenged judgments entail a breach of his fundamental rights to equal treatment before the law (Article 14 of the Spanish Constitution), because the Supreme Court, in its Judgment (in Spanish: *Sentencia del Tribunal Supremo*, hereinafter STS) 501/2005, of April 19, had reached a different conclusion revoking the conviction which had been applied to the appellant by a Judgment also delivered by the Criminal Chamber of the *Audiencia Nacional*; likewise, he claims that his right to privacy [Article 18(1) of the Spanish Constitution] had been breached, because it had confirmed a genetic profile analysis ordered by the Basque Police Forces (Ertzaintza) matching it with a biological sample obtained from some clothes found in the crime scene without judicial authorization; and also the protection of personal data [Article 18(4) of the Spanish Constitution], considering that the police forces had included the DNA profile of the appellant in a file without any type of supervision, in breach of the established guarantees by the legal system in order to handle this personal data; the appellant also invokes the violation of the presumption of

innocence [Article 24(2) of the Spanish Constitution] because his conviction has been based on this illegal evidence, stating in the appeal submission, that such DNA analysis lacks any value as evidence because the biological samples had been obtained without any judicial supervision in its collection (spit gathered from the cell floor), and the police forces had not respected the required "chain of custody" guarantee; additionally a breach of effective judicial protection and due criminal process [Articles 24(1) and 25(1) of the Spanish Constitution] is claimed, because the conviction imposed on the appellant is harsher than the one foreseen by law, which states a three year term of imprisonment.

2. The first pleading filed by the appellant invokes a breach of equal treatment before the law (Article 14 of the Spanish Constitution) considering that he had been treated differently in the challenged Judgment and in STS 501/2005, issued both by the Criminal Chamber of the Supreme Court, which, with regard to other circumstances, had absolved the appellant on that occasion because the judicial authorities had determined that the DNA analysis obtained from the same biological sample (saliva) of the accused, the required guarantees were not fulfilled because the measure had been practiced without judicial authorization.

As we have repeatedly stated, the first necessary requirement in order to identify if two judicial resolutions have provided an unequal treatment with regard to the application of the law is that they should refer to two different individuals. We have demanded, among other requirements, the "existence of otherness in the cases examined, such as a 'reference to the other' which excludes therefore any self-reference" [Judgments of the Constitutional Court (in Spanish, *Sentencia del Tribunal Constitucional*, hereinafter STC in singular and SSTC in plural) 339/2006, December 11, ground (in Spanish, *fundamento jurídico*, hereinafter FJ) 4, and 62/2009, March 9, FJ 2, among others). Therefore, in view that the challenged Judgment and the one considered for the comparison refer to a conviction of the appellant himself in both cases, his complaint may not be examined in terms of whether equal treatment before the law has been observed. However, the fact that such otherness does not exist in the judgments compared does not diminish in any way the right of the appellant to effective judicial protection, a fundamental right which essential content is tied to the requirement that judicial resolutions include legal arguments that support them (in this sense, STC 61/2006, February 27, FJ 3 and FJ 4). And those arguments do not exist when a judicial body gives a Judgment which is clearly opposite in its essential terms to another one which had been delivered for an identical case in terms of the legally relevant facts, without providing the reasons in such ruling for the change of legal standard (SSTC 61/2006, February 27, FJ 4; 212/2009, November 26, FJ 6, and 38/2011, March 28, FJ 7).

The two decisions put on the file by the appellant not only discussed the key issue of whether a judicial authorization was required in order to obtain the biological samples discarded by the appellant in order to practice a DNA test, but moreover the biological sample obtained for the comparative DNA analysis with the biological samples found in clothes gathered at the crime scene was the same in both cases: spit expelled by the appellant on the floor of the cell where he had been confined during his arrest. On these basis, STS 501/2005 revoked the conviction of the instance court (Third Section of the Criminal Chamber of the *Audiencia Nacional*) considering that the DNA analysis had lacked the required judicial authorization to carry it out, entailing therefore

a procedural defect which made such evidence illegal. The Court considered (ground 4, section 3) that article 363, paragraph 1 of the Criminal Procedure Law, applied in its former wording, included DNA test within the framework of "chemical analysis" that may only be carried out by the judicial authorities. Moreover, and this is what is particularly relevant to compare this judgment with the one challenged in this Amparo appeal, it was stated that in these cases it was particularly important to obtain the sample beyond any reasonable doubt (as in the case of forensic examination of handwriting) and therefore, when such tests are practiced to be used as evidence, the Judge must authorise this type of procedural activities (STS 501/2005, FJ 3). Nevertheless STS 1311/2005, the judgment challenged in this appeal, has adopted a completely different standard, stating in ground 1, section 2, that such judicial authorization is not required to carry out DNA test because we "are not before a case of obtaining body samples directly from the accused, but before a surreptitious measure gathered in the course of a voluntary act of disposal of organic matter made by the person being investigated, without any methods or conducts which have a bearing on his physical integrity." Concluding, on such basis, "in these cases, the consolidated case-law that requires judicial intervention in order to authorise a potential trivial and non-aggressive sample gathering is not necessary. The recollection of biological samples is conducted on a random basis and in view of a wholly unforeseeable event. The remains of the spit must deem as an object obtained from the body of the suspect but obtained on a wholly unexpected basis."

Wherefore we are before two judicial resolutions which invoke two different criteria for the key issue (whether or not judicial intervention is required for the recollection of biological samples voluntarily abandoned by the accused). Thereby, the judgment challenged in this Amparo appeal has explained the reasons why it changes the criteria of the Supreme Court, based on the voluntary abandon by the accused of biological sample (spit), a standard which had not been considered in the previous resolution and which is the cornerstone of this matter. Thus, we must refuse that the resolution adopted by the Supreme Court was arbitrary, because it was given in view of being considered in the future for other cases that may be heard before that Court. This statement is further supported not only by subsequent rulings from the Supreme Court which followed this standard set out in STS 1311/2005, as highlighted by the Public Prosecutor in his pleadings, but it was also adopted by the Criminal Chamber of the Supreme Court in its non-jurisdictional agreement adopted on January 31, 2006, when it provided that: "the Judicial Police is empowered to collect genetic remains or biological samples which have been abandoned by the accused without any judicial authorization." Consequently, the complaint filed by the appellant on an alleged violation of his right to an effective judicial protection, must be rejected.

3. The second pleading of the appeal invokes a breach of the presumption of innocence [Article 24(2) of the Spanish Constitution] based on the fact that the conviction of the appellant is substantially based on a DNA analysis obtained from spit expelled by the appellant when he abandoned the cell where he had been arrested and matched with the biological remains collected from a sleeve of a T-shirt used by the offender and abandoned by him when he fled from the scene of the crime. The appellant contends that such evidence had been obtained in breach of the fundamental rights of the appellant because no judicial authorization had been required for the recollection of the spit abandoned by the appellant during his arrest or with regard to the DNA comparative analysis. Therefore, if the main incriminating evidence must be dismissed,

pursuant to Article 11(1) of the Organic Law of the Judiciary, which foresees that "no legal effects arise, directly or indirectly, from evidence obtained in breach of fundamental rights or freedoms," and as there are no other relevant evidence which would base the conviction, a violation of the presumption of innocence [Article 24(2) of the Spanish Constitution] would have occurred.

Following the order of the pleadings of this appeal, we shall examine first the alleged lacked of guarantees in the way which the saliva of the appellant was obtained while he was arrested, and, on the other hand, the complaint against the DNA analysis carried out and its comparison with the one obtained from the piece of clothing found in the scene of the crime. Finally we shall discuss whether the invoked breach of the fundamental right stated in the Article 18(4) of the Spanish Constitution has occurred.

4. The issues arising from the gathering of saliva are set out in sections one and three of the second pleading included in the Amparo appeal.

a) In the first section the appellant invokes that a judicial resolution would have been necessary in order to gather saliva by means of Articles 326, 334, 332 and 336 of the Criminal Procedure Law in its former wording (that in force at the time the offence took place), but no reference in these sections is made to the fundamental right which would have been breached because of the lack of a judicial authorization for the gathering of the biological samples. In other words, the appellant simply quotes the provisions of the Criminal Procedure Law which set out a number of competences and duties vested in the investigating judge while preparing the investigation file, among others, the gathering of traces of the crime or pieces of evidence which contribute "to ascertaining and determining the material authors of a crime and all circumstances surrounding the offence perpetrated and the guilt of the offenders, ensuring that they are captured and that the civil liability arising from their offence is satisfied" (Article 299 of the Criminal Procedure Law). But the complaint does not include any arguments why it would have been constitutionally binding that a judge has to authorise the collection of a biological sample. We must once more make a reference to the repeated case-law of this Court (set on, among others, STC 162/2001, November 2) according to which "the function of this Court is not to redraft *ex officio* the complaint in order to make up for the lack of legal arguments of the parties, because is the plaintiff who has the burden of not only showing in which such constitutional protection may be granted but also he must provide with the factual and legal arguments which may be reasonably expected from him as part and because of his duty to cooperate with the exercise of justice by the Constitutional Court."

b) With regard to the second section aforementioned, it has been invoked that the plaintiff did not consent to the gathering of the sample, as it was obtained surreptitiously while he was detained, which entails a breach of his fundamental right of no self-incrimination and of not cooperating with the investigating authorities.

In this sense, we must also point out that a watertight doctrine in this area exists (set on, among others, STC 197/1995, FJ 6), which considers that "the right of no self-incrimination and not admitting guilty ... are guarantees or instrumental rights to the general right of defence, to which they provide cover passively, that is to say, the exercise of a right which takes place when the person who is or may be charged with an offence does not engage in any action, and therefore may choose to defend himself in

the trial proceedings in the way which he deems best suited to his interests, and under no account such person may be forced or induced, by any type of pressure or threat to declare against himself or make a confession of his guilt."

However, in this case we do not find that the appellant has made any self-incriminating statement. Even if we considered that the issue is not raised in connection with a statement made by the plaintiff (and this is the scope to which such fundamental right invoked is restricted, as pronounced in STC 103/1985, October 4, and STC 76/1990, April 26, FJ 10), but in the action of spitting, we do not find that such action was carried out by the plaintiff under duress or any moral coercion. He was not forced to spit when he was detained and there does not seem to have been any deceit to induce him to do so. Therefore, the freedom surrounding the action of spitting when he abandoned the cell implies that his fundamental right of not incriminating himself has not been breached. Not even from the ample viewpoint we have adopted with regard to the prohibition of any duress in obtaining evidence which have or may have an incriminating effect on the offender —arising from the right of defence and the legal presumption of innocence— would it be possible to consider that such breach exists. In first place, because "such guarantee does not entail that the presumption of innocence right excludes that a person may be exempt from the prevention, investigation or discovery of evidence proceedings proposed by the Public Prosecution or by the judicial or administrative authorities. If a general right was stated of not having to undergo any of these proceedings, the public authorities would be powerless in the exercise of their legitimate functions regarding the protection of freedom and coexistence, damaging the value of justice and the guarantees surrounding an effective judicial protection;" and, in second place, because "the same effects of procedural imbalance, in detriment to the pursuit of justice, and interference of the legitimate functions of the public authorities, at the expense of public interest, would arise from extending the right of not cooperating to any other activity or proceeding regardless of its content or nature, or if the nature of such acts as directly incriminating would be left to the judgment of the party whose cooperation with justice is requested" (STC 161/1997, October 2, FJ 6).

c) Finally, with regard to the collection of the saliva sample, section four of the same pleading number two of the Amparo appeal invokes that there is no record that an adequate chain of custody existed for the saliva. Therefore it is not possible to determine whether the saliva gathered when the accused was detained is the one that was used for the subsequent comparative analysis with the DNA found from a piece of clothing found in the crime scene. Such an important issue, according to the appellant, may not be considered proven simply by the statement of one witness. This would entail a breach of the presumption of innocence because it has immediate impact on the evidencing value given to the forensic test which was the basis for the conviction.

The matter of whether the saliva analysed is or not exactly the same as the one cast by the plaintiff when he was arrested, was already discussed in the sentence delivered by the *Audiencia Nacional* which convicted the appellant, on the grounds that there was absolutely no doubt that the saliva sample analysed was the one collected because in the hearing the police officer who gathered such sample delivered his statement on the matter. Therefore we are before a fact which may not be subject to any reconsideration by this Court [Article 44(1)(b), of the Organic Law of the Constitutional Court], except with regard to whether the incriminating evidence complied with the law and was sufficient to justify such fact. Thus, unlike what has been invoked by the

appellant, the testimony of this police officer as witness has been considered sufficient to override the presumption of innocence (even when the only witness is the victim herself; among others, STC 347/2006, December 11), a statement which is even more solid if we consider that the fact to which such evidence refers to is not strictly the criminal action, but a partial aspect of one of the means of evidence. The consolidated case-law of this Constitutional Court (STC 126/2011, July 18, FJ 22, among others) states that "the fundamental right to the presumption of innocence may not invoked successfully to cover each and every episode, occurrence, event, fact or element which is discussed in a criminal proceeding, or which is included partly in the final judgment. The limits of our supervisory faculties do not allow us to fragment or probe into each piece of evidence. On the contrary, a general and contextual examination must be carried out regarding the means of evidence to determine in each case whether such right was respected, specifically in guilty verdicts, but considering the discovery of evidence as a whole (S STC 105/1983, November 23, FJ 10, 4/1986, January 20, FJ 3; 44/1989, February 20, FJ 2; 41/1998, March 31, FJ 4; 124/2001, June 4, FJ 14; and Constitutional Court Order 247/1993, July 15, FJ 1)."

5. The core of the breach of fundamental rights invoked by the appellant is based on the DNA analysis carried out. In particular, he contends that the test was carried out without any judicial authorization. He mentions that on the date in which the criminal actions took place, the second paragraph of Article 363 of the Criminal Procedure Law had not been introduced (it was included by Organic Law 15/2003, November 25), which entitles a judge to agree by means of a judicial resolution duly motivated and in accordance with the principles of proportionality and reasonability, the DNA analysis of a suspect from his biological samples. This provision, according to the appellant, must be applied retroactively because it affords more guarantees, but in any case, paragraph 1 of the same provision was in force at the time which states that "courts and tribunals shall request to carry out chemical tests only in the cases which are deemed absolutely necessary for the judicial investigation and the adequate administration of justice." On the basis of STS 501/2005 already mentioned, the plaintiff considers that a judicial resolution was required in order to carry out the DNA analysis, and, as it was not secured, this procedural flaw would render such evidence illegal.

The argument provided above by the appellant has no support whatsoever in the constitutional doctrine, because it does not identify which fundamental right had been breached in order to demand judicial intervention, and it simply makes a passing reference to procedural flaws observed in the judgment cited above, which included a doctrine different from the one contested in this Amparo appeal. However, such reasoning must be completed with the provisions of the third pleading of the complaint, whereat the appellant invokes an alleged breach of Article 18(4) of the Spanish Constitution because he considers that the DNA analysis carried out entails a breach of his privacy right, even if such analysis refers to the "non-coding" regions of DNA, because it cannot be excluded that "in the future the genetic information included in the coding regions of DNA" and moreover, "because there is a potential risk for abuse and ultra vires actions." The appellant invokes the doctrine ruled on STC 207/1996, December 16, and STC 25/2005, February 4, which refer to a breach of the right to privacy as independent from corporal integrity, and that such breach may ensue depending on the purpose envisaged for the data obtained through the different types of analysis.

The complaint as set out in the above terms, entails that we must discuss whether the plaintiff's DNA analysis, construed as an invasion of his privacy, should have required a judicial authorization in order to obtain the analysed sample. Consequently, the constitutional approach of this matter requires that we examine the requirements established by this Court for any limitation to the right to privacy.

6. Logically, on a prior exam, we must recall the doctrine stemming from this Court regarding the right to privacy, in particular with regard to judicial resolutions issued in connection with matters which bear some resemblance to the one we are now examining, in order to determine the specific circumstances of this case.

a) This Constitutional Court has stated that the right to privacy "flowing from the principle of human dignity [Article 10(1) of the Spanish Constitution) entails the existence of a specific and private area excluded from access and knowledge by third parties, required, according to our cultural standards, in order to ensure a minimum quality of life standard" (among others, STC 207/1996, December 16, FJ 3 B; 186/2000, July 10, FJ 5 and 196/2004, November 15, FJ 2). Therefore, privacy "is a matter which has become a fundamental right [Article 18(1) of the Spanish Constitution] and which may not be enforced or even envisaged, if the human dignity is not upheld, such being the purpose of the constitutional provision" (STC 20/1992, February 14, FJ 3). In any event, "what Article 18(1) guarantees is the right to secrecy, to be unknown, to exclude other persons from knowing what we are or what we do. Such persons, either individuals or public authorities, are prevented from determining what are the limits of our private life, and each person is entitled to his own space screened from outside scrutiny, regardless of the contents of such space (STC 127/2003, June 30, FJ 7, and STC 89/2006, March 27, FJ 5). In this sense, STC 119/2001, May 24, states that "these rights have also acquired a positive dimension in connection with the development of personality focused on a full efficacy of these fundamental rights. In fact, taking into account that our constitutional text does not enshrine merely theoretical or fictional rights, but real and effective ones, it is essential to guarantee their protection not only against the aforementioned events but also in connection with the risks arising from a technologically advanced society" (FJ 5). We have therefore stated that "the right to privacy includes information regarding the physical and psychological life of individuals" [STC 159/2009, June 29, FJ 2 a) which follows in this line the doctrine of the ECtHR, among others Judgment October 10, 2006, case *L.L. v. France*].

b) With regard to events which are close to the case examined by us, we have stated that physical search or examination, even if due to their characteristics and intensity may not be considered an invasion of the individual's physical integrity, may entail a breach of the constitutionally protected right to privacy in view of their purpose, that is to say considering what such practices attempt to discover, when they refer to an area of private information which the person does not want to disclose. In the case examined by STC 207/1996, December 16, we reached the conclusion that the privacy of the person was being invaded when it was attempted to ascertain by examining a hair sample if "the accused in a criminal trial had consumed cocaine or other drugs, and for how long." In other words, it referred to information objectively relevant to the private sphere of the individual which disclosure could have a particular impact because "that person was a member of the Guardia Civil when he had been indicted and if the results from such test were positive, in the sense of establishing that he had consumed cocaine or other drugs, even if such matter was not relevant for the criminal trial as such, it

might led to other type of disciplinary proceedings" (FJ 3 B). This is the same conclusion advanced by STC 196/2004, November 13, when the urine of a worker was analysed to determine if he had taken drugs and we ruled that "a medical test carried out in the same objective conditions may have consequences in the right to privacy of a person" (FJ 5). On the other hand, STC 25/2005, February 14, states that information regarding consumption of alcohol invades the privacy of a person, and therefore, a judicial resolution which agreed to include the blood test of a person available in the medical history so that the forensic physician could determine the alcohol level in the blood of that person entailed a breach of that person's privacy. Finally STC 206/2007, September 24, the Guardia Civil ordered a blood test for an accused on the samples obtained at the hospital for therapeutic purposes in order to determine alcohol levels in his blood, and we ruled that a test taken to determine whether that person had consumed alcohol and what his effective alcohol levels were at that time entailed a breach of his right to privacy.

From all the foregoing, it must be noted that all the events we have described, the information obtained through the actions carried out by the public authorities against appellants, referred to aspects that have an impact on the private sphere or intimacy of the persons involved (consumption of drugs, alcohol, etc.), and this is the reason why we stated that an invasion of the right to privacy had ensued in view of the purpose which had led to such investigations. Once it had been ascertained that such investigations had a bearing on the privacy of that person, we then examined if such invasion was or not constitutionally justified, a matter which concluded with varied results.

c) Regarding the use of DNA tests as an investigation and gathering of evidence procedure for criminal proceedings, this Court has only so far issued a number of rulings on incidental aspects of this matter (conviction due to refusal of being subject to such tests: Constitutional Court Order 405/2006, November 14), which are not relevant for this case. However, we do have certain decisions by the European Court of Human Rights on matters which although they are not identical, provide useful criteria in order to reach a decision on this Amparo appeal in the term foreseen under Article 10(2) of the Spanish Constitution, and which evidence that the European Court of Human Rights considers that private life is compromised by the mere action of preserving and storing biological samples and DNA profiles.

In ECtHR Judgment *S. and Marper v. the United Kingdom*, December 4, 2008, it was discussed whether the right to privacy was breached as a consequence of the fact that the police retained indefinitely finger prints, cell samples and DNA profiles of two persons (obtained while they had been arrested), once the trial had been finished without having entered a conviction against them (one of these individuals was acquitted, and in the case of the other individual the complaint filed against him was withdrawn). In sections 68 to 77, the European Court of Human Rights considered that the information retained in the finger prints, cell samples and DNA profiles were personal data because they refer to identifiable or identified persons. With regard to cell samples, the Court established that the amount of personal information stored in them makes us consider that the mere preservation entail a breach of the right to privacy, and therefore it is irrelevant whether the public authorities use or extract only a small part of such information for the creation of DNA profiles, or that any damage is not effectively ascertained in a specific case. With regard to DNA profiles, the European Court

considered that they hold much less personal information, but their computerised treatment allows them to go beyond a neutral identification and conduct family genetic patterns research which provide clues as to the genetic ties between persons, as well as their ethnic origin and therefore they may potentially interfere with the privacy right of any individual. Therefore, the European Court concluded that "preservation of cell samples or DNA profiles of the plaintiffs is deemed to be a breach of their legitimate right to privacy in the sense of the Article 8(1) of the Convention."

The European Court of Human Rights issued on December 7, 2006 a non-admission order in the case *Van der Velden v. Netherlands*, 29514/05. The Court dismissed the claim filed in connection with the extraction of a biological sample of a person who had been convicted for a major offence in order to store his DNA profile, including it in a data base and use it in order to prevent the perpetration of further offences. The European Court of Human Rights accepts that obtaining a sample from his mouth entailed a breach of the plaintiff's privacy and highlighted that in connection with obtaining and compiling fingerprints such action would not have entailed a breach of the person's intimacy, but considering the use that may be made of cell samples in the future, the systematic withholding of this material exceeds the scope of neutral identification of patterns such as finger prints, and is sufficiently invasive to be considered as an invasion of privacy in the terms of Article 8(1) of the European Convention of Human Rights.

As follows from the above, the European Court of Human Rights considers that the breach takes place by the fact of storing biological samples and DNA profiles for identification purposes, because this implies an invasion of privacy for its potential use to obtain sensitive information such as ethnic origin or family relationships. Wherefore, once it has been affirmed that such breach of private life exists, the matters now lies in justifying such measures in a compatible way with the European Convention of Human Rights. And, therefore, in the first judgment quoted above, when examining the existence of a legitimate purpose for such invasion, it appropriately stresses the existing difference between the case examined —preserving biological samples and DNA profiles for the identification of the authors of future crimes— from other cases in which "the initial extraction is aimed at linking a specific person with a crime which it is suspected he has committed" (§ 100). The criticism by the European Court of Human Rights is addressed to the indefinite filing by the police of biological samples and DNA profiles of persons who have not been convicted in order to identify the authors of future crimes, but such criticism is not addressed to the authors of crimes by comparing the DNA obtained from biological samples of the suspect "with prior traces kept in the data base" (§ 116). The prohibition is therefore related to the storage of personal data, because the European Court considers that "the mere fact that public authorities may retain or memorise personal data, regardless of the way in which they have been obtained, may have direct consequences on the privacy of the person concerned, regardless of whether such data are used or not at a later stage" (§ 119). In its turn, the decision of non-suit in the previously mentioned judgment by the European Court of Human Rights, considered that interferences in the right to privacy sanctioned by law are reasonable considering that the charges filed against the indicted parties were for major offences and that, finally, it might inure to their benefit to be excluded from a potential list of suspects.

From an examination of the case law stemming from the European Court conducted above, it must be noted that for that Court the potential danger of disclosure or access to data which may have impact on its personal sphere is in fact a breach of anybody's right to privacy (whether or not justified is a matter to be examined at a later stage). And this is precisely the case in the matter examined now by this Court, because the analysis of the biological sample of the appellant, in whom we now focus our discussion, is in fact an interference with his privacy right considering the potential risks that may arise from such analysis. On whether if such risk finally does not materialise is a relevant issue or not, we shall examine this point later, but it suffices at this stage to highlight the fact that an interference with a fundamental right has effectively taken place.

7. Once we have ascertained that the DNA analysis of the person requesting the Amparo appeal entails a breach of his privacy rights because it may place such rights at risk, we must now examine if such invasion of his privacy has taken place in compliant with constitutional standards or otherwise.

Our legal doctrine in this sense, on the basis that fundamental rights are not unlimited, as has been stated in many rulings (among others, STC 173/2011, November 7, FJ 2), which consider that it may not be deemed as illegal any interference or invasion in privacy rights which is based on the need to preserve the scope of protection afforded to other fundamental rights or constitutionally protected matters (STC 159/2009, June 29, FJ 3). In this same judgment, we recalled the fact that "although Article 18(1) of the Spanish Constitution does not expressly foresee the possibility of a legitimate sacrifice to the right to privacy —unlike what happens in other cases, as with regard to the rights acknowledged under Articles 18(2) and (3) of the Constitution— its protection scope may be curtailed in those cases with a constitutional interest which prevails over the right of the person to maintain certain information as private. Delimiting this doctrine, we referred to in STC 70/2002, April 3, FJ 10 (summarising the arguments included in STC 207/1996, December 16, FJ 4), that the requirements for an objective and reasonable constitutional endorsement to an interference on privacy rights are the following: the existence of a legitimate constitutional purpose; the measure adopted that limits such right is foreseen by law (principle of legality); that as a general rule it has been agreed by a judicial resolution duly argued (admitting however that as the Constitution does not expressly grant this faculty to a judge, the law may authorise the judicial police to carry out inspections, examinations and even minor physical checks, provided that the principles of proportionality and reasonability are complied with), and finally, the strict observance of the proportionality principle enshrined in three conditions: "if such measure is able to attain the envisaged objective (suitability standard); if additionally, it is necessary, in the sense that there is no other more moderate measure which could attain such purpose with equal effectiveness (necessity standard); and finally, if such measure is balanced or suitable, in the sense that from its application more benefits or advantages follow for the general interest than damages to other matters or conflicting values (proportionality standard in a strict sense)" (STC 89/2006, March 27, FJ 3).

8. With regard to the requirement that the measure which entails an invasion of privacy should be aimed at a constitutionally legitimate purpose, in this sense we have stressed that the investigation of a crime and, in general, the discovery of relevant facts for a criminal trial meets this standard (STC 25/2005, February 14, FJ 6, and STC

206/2007, September 24, FJ 6), "because the prosecution and punishment of a crime is a goal worthy of constitutional protection and allows for the defence of other values such as living in peace and safety, such values are likewise recognised in Articles 10(1) and 104(1) of the Spanish Constitution." [STC 127/2000, May 16, FJ 3 a); STC 292/2000, November 30, FJ 9, and STC 173/2011, November 7, FJ 2]. In the same sense and precisely regarding DNA tests, we have already remarked that the European Court of Human Rights has considered legitimate such analysis when "intended to find the link between an individual and a crime which he has allegedly committed (Judgment of the European Court of Human Rights of December 4, 2008, case *S. and Marper v. United Kingdom*, § 100, already quoted).

Therefore, the specific forensic evidence consisting in obtaining DNA from the appellant's saliva was carried out with the purpose of comparing it with a biological sample obtained from the sleeve of a T-shirt used in the crime, and therefore its purpose was to discover who was the person that was wearing the sleeve and had perpetrated certain major criminal acts, such as terrorist damage, a crime for which the appellant was finally convicted. Therefore, there is no shade of doubt as to the fact that the measure adopted by the judicial police was intended for a legitimate purpose.

9. With regard to the legal framework of the forensic proceedings carried out by the judicial police, we must consider that at the time in which the criminal acts were carried out there was no specific provision in our legal system regarding DNA analysis in the course of criminal proceedings, and such analysis was not considered to be a different procedure from any other forensic means of evidence. It was only after Organic Law 15/2003, November 25, was enacted, that the Criminal Procedure Law included a specific regulation of this matter: on one hand, a paragraph was added to Article 326 of the Law ordering the investigating Judge to adopt the required measures for collection of such samples either personally or through the forensic physician or the Judicial Police, and this provision also applies to the custody and examination of biological remains or imprints found in the scene of the crime; and on the other hand, a second paragraph was added to Article 363 of the Law which enables the investigating Judge to issue a resolution in order to obtain biological samples from the suspect in order to determine his DNA profile, even by some acts of interference with privacy such as inspection, examination or bodily checks which may be adequate in compliance with the proportionality and reasonability standards. The legislative framework was completed with the Organic Law 10/2007, October 8, of Police Data Bases on DNA identifiers, whose Third Additional Provision under the caption "Obtaining biological samples" establishes that in the investigation of the offences contemplated by the law "the judicial police shall take biological samples and physical fluids from the suspect, or the person arrested or indicted, and likewise from the scene of the crime." Obtaining samples which require bodily inspection, examination or checks, without the consent of the affected party shall requires in any case judicial authorization by motivated order in compliance with the provisions of the Criminal Procedure Law.

Up to the aforementioned legal reforms (and therefore, at the time in which the events examined hereunder took place), Article 363 of the Criminal Procedure Law maintained its original wording consisting in one paragraph, according to which, "the Courts and Tribunals shall order the execution of chemical tests only in those cases in which they consider that they are absolutely indispensable for the judicial administration and the adequate provision of justice." This provision may not be

construed as a requirement demanded by the Spanish Constitution that only the investigating Judge may order the carrying out of a chemical analysis, which would include from a broad standpoint a DNA analysis, regardless of the substance to be analysed (soil or water, for example), but a mere caution, considering the cost, complexity and timeframes involved in conducted a chemical analysis in 1882, when the Criminal Procedure Law was enacted, and this argument is further supported by the contents of the preceding articles 356 to 362 of the Criminal Procedure Law. The understanding of this provision is consistent with the regulations which authorise the Judicial Police to prepare forensic reports for the investigation of offences, provided, obviously, that this is carried out under the supervision of the competent judicial authority who is hearing the case in order to incorporate such findings to the trial. In this sense, we have referred to the aforementioned STC 173/2011, including the doctrine arising from STC 70/2002, April 13, FJ 10, which states that "the applicable rules are in first place, Article 282 of the Criminal Procedure Law which establishes that the obligations of the judicial police are 'to investigate criminal offences perpetrated in their territory or district; conduct, within the sphere of their competencies, the required procedures to pursue them and discover the perpetrators, collecting all items, instruments or evidence of the crime which may be destroyed and make them available to the Judicial Authorities'. In this sense, Article 11(1) of the Organic Law 2/1986, March 13, of Police and Security Forces, which includes as part of their duties, among others, 'f) prevent the perpetration of criminal acts,' 'g) investigate criminal acts and discover and arrest the alleged offenders, custody the items, instruments and evidence of the crime, surrendering them before the competent Court and draft the appropriate technical and forensic reports' ... According to the aforementioned judgment (same FJ), there exists, therefore, 'a specific legal authorization that enables the police to gather the items, instruments and evidence of a crime and make them available to the judicial authority, and conducting the required proceedings for the inquest of the crime and arrest of the offender'." We also highlighted that the law does not provide a case by case listing of the proceedings to which it refers, but it does delimit them in order to subject them to a specific purpose, wherefore "it may be stated that the legal provision governing them complies in principle with the requirements of legal certainty and safety arising from the principle of legality, notwithstanding a more specific regulation in future legal reforms." Such legal reforms, as we have discussed in the matter examined hereunder, took place after the criminal acts then tried.

From the above, it follows that even if at a later stage the legislator chose to regulate this matter in a more specific manner, the forensic procedure consisting in the analysis of the saliva of the appellant is protected by a legal provision set out in the aforementioned enactments, considering on one hand, that the technical and forensic reports mentioned in Article 11(1)(g) of Organic Law 2/1986, March 13, of Police and Security Forces, cited above; and on the other hand, these procedures tie in conveniently with the faculties vested in the police forces by the legislator, that is, to inquiry crimes and surrender the alleged offenders before the competent Judge, and finally, because the minor intensity of the interference in the fundamental right, which we will discuss here below, allows for a certain degree of compromise as to the mandatory requirements provided by the legal provision which acts as the legal cover for the requirement demanded by the European Convention of Human Rights. This has been our criterion, quoting the Judgment of the European Court of Human Rights in case *Éditions Plon v. France*, March 18, 2004, in STC 34/2010, July 19, regarding the less intrusive nature

considering that cautionary measures limiting a fundamental right are limited in time [in this case, those protected by Article 20(1) of the Spanish Constitution].

10. With regard to the requirement of a judicial authorization, we noted in STC 70/2002, April 3, FJ 10, (and recently, STC 115/2013, May 9), that "unlike other restrictive measures regarding fundamental rights which may be applied in the course of criminal proceedings [home entry and search warrant in the terms foreseen in Article 18(2) of the Spanish Constitution, or monitoring communications, Article 18(3) of the Spanish Constitution], regarding restrictions to the right to privacy [Article 18(1) of the Spanish Constitution] there is absolutely no mandate in the Constitution of previous judicial authorization. However, STC 37/1989, February 15, with regard to conducting procedures limiting the sphere constitutionally protected of right to privacy, established that they were only possible following a 'judicial resolution' (FJ 7), although this does not preclude the possibility in certain cases and subject to an appropriate legislative mandate (which in that case did not concur), such procedures may be undertaken by the judicial police (FJ 8)." In particular, we have accepted that police intervention may be necessary in view of the urgency of the proceedings, the manner in which the crime was perpetrated or the seriousness of the offence (STC 173/2011, November 7).

In this case, exceptional circumstances concur which allow us to conclude that although the analysis of the DNA carried out was not ordered judicially, no breach of the fundamental right to privacy ensued. The reasons for this are the following:

— In first place, due to slight (if any) material impact on the privacy of the appellant, which would have been consisted in the risk that the DNA analysis could go beyond a mere neutral identification. In fact, both the Amparo appellant as well as the judgment from the Supreme Court here contested, admit that the analysis carried out of the appellant's saliva referred to the non-codified DNA areas, wherefore no other information was obtained than the one allowing for the identification of the person to whom it belonged (regardless of whether such information could be used to obtain information as to the race or family tree by means of supplementary analyses that could compromise his privacy). The appellant himself admits that the DNA analysis carried out did not have any noticeable impact on his privacy considering that the core argument of his complaint refers to the hypothesis that "it cannot be excluded that in the future, the non-coding DNA sectors may be used to obtain genetic information" or "there is a potential risk of abuse and ultra vires actions." However, there is no mention whatsoever in the complaint to any information that may have been disclosed through the identification analysis carried out that could compromise the appellant's privacy. Therefore, this shows that the damage invoked in the Amparo appeal refers to a potential breach which could ensue due to the preservation and future use of the DNA profile obtained from the appellant's saliva, but not from the neutral comparison purely for identification purposes of the DNA profile of the appellant carried out from the biological samples found in the scene of the crime. Therefore, although it may be accepted that there is a danger of future unwarranted uses of the DNA profile obtained from the appellant which could entail an effective invasion of his privacy as an abstract risk, this matter may not be discussed within the framework of an Amparo appeal as in the case at hand, because it does not have any bearing to the specific circumstances of the case as such.

In other respects, not only does the appellant admit that the genetic profile obtained from the non-coding regions of the DNA is solely for identification purposes, but that such statement has a solid scientific support. This is also the standpoint on a strictly factual basis of the judgment delivered by the Supreme Court of the United States in the case *Maryland v. King*, June 3, 2013 (identification of the author of a rape offence from the DNA analysis of a person who had been arrested for another major offence occurred after the rape), when stating that beyond any doubt, the markers used for DNA identification are located in the non-coding sections of the DNA which do not disclose any genetic characteristics of the individual under arrest. Although the progress of science is a fact and such progress may have an impact from the perspective of the Fourth Amendment, the Combined DNA Index System (CODIS) loci "do not actually supply any other information than the identity of the subject."

To conclude, the limited impact of the purported DNA analysis and which effectively took place in the privacy of the appellant, entails that in this specific case the fact that a judicial authorization had not been secured is acceptable, particularly, as we have already noted above, because there is no direct constitutional mandate in this sense.

— In second place, because the forensic activities were focused on the non-coding regions of DNA, and were carried out according to the proportional standards advanced by the Spanish and international legislation on forensic use of DNA to ensure that its analysis does not go beyond a neutral identification of the subject. Such legislation at the time of the events was embodied in the Resolution of the Council of Europe, June 25, 2001, on the exchange of DNA analysis results (2001/C 187/01) — subsequently updated by Resolution of the Council of November 30, 2009—, which recommended member states to limit the DNA analysis results to chromosome regions which do not include any factor that reveals genetic information, i.e., the ones that do not include any specific hereditary characteristics. In the corresponding Annex, there is a list specifying the DNA markers which are considered not to hold any specific hereditary characteristics, recommending member states to monitor carefully scientific progress in this field and be prepared to erase any DNA analysis results if such results include information with specific hereditary characteristics. In the international sphere, the Treaty between the Republic of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the Republic of France, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping-up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration. The Council Decision 2008/616/JHA of 23 June 2008, stepping-up cross-border cooperation particularly to combat terrorism and cross-border crime, ratified in Prüm the 27 may 2005 ("*Boletín Oficial del Estado*" -Official Gazette- 307, 25.12.2006) obliges member states to use "exclusively DNA profiles established from the non-coding regions of DNA."

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— In third place, because even if a legal analysis of each of the matters raised requires an individual examination of each of the disputed police procedures, it must be borne in mind that in view of the specific circumstances of the case, considered as a whole, an urgent action was required. In fact, collecting the saliva suddenly expelled by the appellant required its quick gathering and urgent submission to the adequate laboratories for its preservation and fast analysis, avoiding any risk of degradation of the biological sample, contributing to ensure the chain of custody and diminishing the

possibilities of polluting the sample by treating it according to the established action protocols.

— In fourth place, because the existing legal framework at the time, unlike what happens with other fundamental rights regarding which both the Spanish Constitution and the Criminal Procedure Law demand judicial authorization in the event of any invasion [Article 18(2) and (3) and 20(5) of the Spanish Constitution], in this case does not establish judicial authorization as strictly necessary. Objective dimension or perspective of the existing legal system at that time which considers that actions carried out by the public authorities in compliance with such legal framework were constitutional with regard to the right to privacy [art 18(1) of the Spanish Constitution] and, as we wish to highlight again, there is no express constitutional mandate for judicial authorization (*mutatis mutandi* STC 22/2003, January 10, FJ 10, within a sphere in which there is a constitutional mandate for judicial authorization).

— In fifth place, because the lack of judicial control which could have arisen from the absence of a judicial authorization is not relevant because the comparative analysis was submitted to the proceedings as soon as it was available (this fact has not been contested by the parties in the trial proceedings a quo), and as from that moment it was up to the judicial authority to conduct a judgment assessing the forensic evidence carried out, and likewise it could have ordered a new analysis or complete the one already carried out, either at its own initiative or at the request of the procedural representative of the Amparo appellant. Unlike what happens in the case of evidence which cannot be examined twice, for example monitoring telephone calls, the forensic nature of this test and the fact that samples existed for analysis implies that such evidence may not be discussed in terms of its conclusions, and in fact it could have been repeated again by means of a judicial authorization.

11. Finally, with regard to the proportionality standard of the measure discussed hereunder, as we have already advanced, it must be verified that the measure adopted was capable of achieving the envisaged goal (suitability standard); necessary, in the sense that there was not another more moderate measure available to obtain the same purpose with the same efficacy (necessity standard); and finally, that is must be balanced or reasonable, meaning that more benefits or advantages arise from such measure for the general interest than damage to other matters or conflicting values (proportionality standard in a strict sense).

The application of the aforementioned criteria leads us to affirm that the proportionality standard concurs with regard to the DNA analysis of the Amparo appellant because: i) its comparison with the one obtained from a biological remain found in the sleeve used by one of the persons involved in the perpetration of the criminal acts was an adequate procedure to ascertain his identity (suitability); ii) there was no alternative procedure to verify if the appellant had participated or not in the criminal acts for which he was being tried (necessity), and such acts refer to rioting which the appellant himself admitted in the statement made before the police authorities, stating that he had been the instigator and had also participated in certain actions by preparing home-made explosive devices with gunpowder used for fireworks, camping gas cartridges, gasoline and a fuse. Although such statements were not ratified in the hearing of the trial and, as a result, the Court didn't use those statements to constitute its conviction (page 8 of the Judgment delivered by the *Audiencia Nacional*),

they provided at that time a link between the appellant and the events being investigated by the police; and iii) finally, the manner in which the DNA analysis was carried out was the less invasive to the privacy of the appellant, because it referred only to non-coding regions of his DNA, i.e., those areas which only provide identification data by means of a comparative analysis from DNA obtained by means of another sample, excluding any disclosure of a personal trait which might affect his privacy. In other words, the invasion of a fundamental right consisted in the risk of compromising the privacy of the appellant in the future, a risk which did not effectively take place.

12. Likewise, we have to dismiss that a breach of the right to not disclose personal information enshrined in art. 18.4. of the Spanish Constitution has taken place, as claimed by the appellant when his DNA profile was included in a police data base which is not filed before the Spanish Data Protection Agency and without having secured the consent of the interested party or an authorization from the Court as required by Order of September 2, 2003, issued by the Counsellor of Interior of the Basque Government regulating such files.

The case-law of this Court has discussed the limits to privacy and data protection in its judgment STC 292/2000, November 30, and on the basis of this ruling it has delimited the faculties and limits of the data protection right. In this sense, we stated that "the data protection fundamental right is not only limited to intimate details regarding the private life of an individual, but to any personal data, intimate or not, which if known or used by a third party could comprise his rights, whether fundamental or not, because the subject matter of this right is not only privacy, which is protected by Article 18(1) of the Spanish Constitution, but personal data. Therefore it includes public personal data, which due to the fact that they may be accessed by anyone, does not imply that they are outside the control of the affected party, because such protection is granted by the personal data legal framework. Thus also, the fact that such data are personal data, does not mean that such protection refers only to the intimate or private life of a person, on the contrary, the data protected refers to any data which identifies or allows for the identification of a person and may be used to generate an ideological, racial, sexual, financial or any other type of profile, or which may be used for any other purpose that in certain circumstances may pose a threat to that person."

In the judgment quoted above, we delimited the content of such right by stating that it "consists in a power of disposal and control of personal data which entitles the person to decide which information he will provide to a third party, either the State or a private individual, or which data may that third parties gather, and also to the right of such individual to know who holds his personal data and for what purpose, being entitled to oppose himself to such possession or use. These disposal and control powers over personal data are part of the contents of the fundamental right to data protection which from a legal point of view they include the faculty to consent in the gathering, obtaining and access to personal data, their subsequent storage and treatment, and its potential use or uses, either by the State or by a private individual, as well. And this right to consent the disclosure and treatment, by data processing techniques or otherwise, of personal data, requires as an essential counterpart on one hand that it must be known at all times who is effectively holding such personal data and for what purpose such data is being used, and on the other, the faculty of refusing such storage or treatment." However, as is the case of other constitutional rights we have been examining hereunder which are not unlimited, and in particular, with regard to right to

privacy discussed in this ruling, in STC 292/2000, November 30, we considered that "the Constitution provides in Article 105(b) that a law shall regulate the access to administrative registers and files 'except with regard to the State security and defence and investigation of crimes and privacy of individuals' [with regard to Article 8 and 18(1) and (4) of the Spanish Constitution], and this Court has on repeated occasions resolved that the prosecution and punishment of a crime is a constitutionally protected goal because it allows for the protection of other paramount values such as peaceful coexistence and citizenship safety. These values are also enshrined in Articles 10(1) and 104(1) of the Spanish Constitution [and to quote some recent judgments by the Spanish Constitutional Court, STC 166/1999, September 27, FJ 2, and 127/2000, May 16, FJ 3 a); Order of the Spanish Constitutional Court 155/1999, June 14]. And also SSTC 110/1984 and 143/1994, which considered that an equitable distribution of public expenditure and supervisory activities regarding taxation (Article 31 of the Spanish Constitution) are also legitimate constitutional values and matters which may restrict the rights granted by Article 18(1) and 4 of the Spanish Constitution."

Therefore, according to the abovementioned doctrine, there is no doubt that the DNA profile of the Amparo appellant obtained from his saliva made his identification possible. Moreover, in the case referred to us, such sample was obtained solely for identification purposes given the DNA non-coding regions which were analysed. However, it cannot be said that in the aforementioned genetic profile (the one obtained from a neutral identification code) other data have been incorporated which may lead to creating or generating a profile or a characterization of an individual on the basis of "ideological, racial, sexual, or other aspects, or which may be used for other purposes that in certain circumstances may be considered as a threat to the individual" (STC 292/2000, quoted above), which is the scope of protection afforded by Article 18(4) of the Spanish Constitution.

In second place, it must be highlighted that identification of the Amparo appellant as the same person who was wearing the clothing used as a hood to perpetrate the criminal acts that led to the criminal trial at the court ex quo, did not arise from incorporating the genetic profile identifying the appellant to a data base of potential suspects, but from comparing the DNA profiles corresponding to unknown persons with ones gathered from biological remains found in traces of different criminal actions (please refer to the trial hearing, p. 131 of the Court Roll). In the judicial resolutions delivered in connection with this matter, it is not stated that the appellant has been convicted because his DNA profile was incorporated to a data base of potential criminal suspects, and this is the reason why our discussion regarding this issue should not move further, because even if such hypothetical inclusion had taken place we would be before an action which has no impact with regard to the act carried out by the public authorities against which Amparo protection is sought.

In other respects, the appellant is not prevented from reacting against such hypothetical storage of his DNA profile and he could have requested its cancellation from the data base where according to him it had been included, but there is no record of such request, wherefore the alleged breach is not built on facts which have been effectively ascertained, and additionally all the available remedies in order to seek redress before the public administration and, where applicable, before the ordinary courts in terms similar to the case decided by the European Court of Human Rights on December 4, 2008, *S and Meyer v. United Kingdom*, have not been exhausted.

In third place, as we have already pointed out, the identifying characters of the appellant was carried out from the analysis of non-coding DNA sectors for a constitutionally legitimate purpose such as the investigation of a major offence of rioting which the appellant admitted to have taken part as we have discussed above. Therefore, "the data protection right is not unlimited, and although the Constitution has not imposed expressly specific limits on such rights, nor has made a referral to the public authorities for their delimitation as is the case with other fundamental rights, there is no doubt that such limits must be found in connection with the remaining fundamental rights and constitutionally protected values and matters, because the unity principle of the constitution so demands it (SSTC 11/1981, April 8, FJ 7; 196/1987, December 11, FJ 6; and with regard to Article 18 of the Spanish Constitution, STC 110/1984, FJ 5)." But there is no evidence either that the profile obtained has been used for a different purpose than the one for which it was obtained, or that it has been subject to an assignment or treatment other than the one for which it was gathered.

In consequence with the above, we consider that neither in the process of obtaining the biological sample of the appellant which he cast away voluntarily, or in obtaining the DNA profile from the same, or finally in the matching of DNA from biological samples found in the scene of the crime, it may be said that fundamental rights invoked in the appeal were breached which would have made the illegal the key piece of evidence which was the basis for convicting the appellant. Therefore the alleged illegal nature of the evidence used in the trial must be dismissed in which is based the alleged breach of the presumption of innocence right

13. Finally, there remains only the last alleged breach of fundamental rights invoked by the Amparo appellant regarding the breach of the principle of legality [Article 25(1) of the Spanish Constitution). Such breach would have occurred, according to the appellant, because he had been convicted to six years imprisonment when the legal system at that time contemplated a maximum term of three years. The Supreme Court would have in fact completed the omissions of the judgment of the *Audiencia Nacional* justifying the six-year conviction on the basis of the reference made in Article 266 in fine of the Criminal Procedure Law to Article 351 of the same Law. However, according to the appellant's pleading, there is no reference in the judgment delivered by the *Audiencia Nacional* of such article in the Criminal Procedure Law and moreover, the facts as found mention only an explosion without any specific reference to arson which is included in the wording of Article 351 of the Criminal Procedure Law. Therefore, the appellant considers that the only conviction applicable would be the one arising from Article 266(1) and (4) with regard to Article 568 of the Criminal Procedure Law which establishes a maximum term of three years.

The Constitutional Court has repeatedly stated (STC 153/2011, October 17, is an example of many others that could be cited), "that our jurisdiction precludes an exhaustive interpretation of the contents of each actus reus of an offence and supervision of the process of allocation of the corresponding legal provision to each fact as found, as this is a faculty vested in the ordinary Judges and Courts in the terms of Article 117(3) of the Spanish Constitution (among many judgments on this matter, STC 60/2008, May 26, FJ 7)." Consequently, the examination of any pleading regarding the rules followed in order to determine a conviction is a matter that lies with the ordinary courts and therefore constitutional control in this area is limited to the requirement of a

reasoned judgment that makes it possible to examine the arguments which have led the court to impose such conviction in the judgment delivered. Such interpretation must meet with the standards of soundness, absence of arbitrary decisions or manifest error. It must be taken into account that "any application of the law which due to its methodological approach —an illogical or extravagant chain of arguments, or axiological —invoking values which are alien to our constitutional system, lead to solutions that are diametrically opposite to the rational purpose of a legal provision, and consequently, entail unforeseen consequences for its recipients must be rejected from a constitutional point of view." (STC 328/2006, November 20, FJ 6).

Therefore, in this case the Supreme Court has argued that the term of imprisonment of six years imposed by the Provincial Court was in line with the application of the legal provisions by the *Audiencia Nacional*. Arguing that the reference included in the last indent of Article 266 of the Criminal Procedure Law to Article 351 of the same Law (and notwithstanding a typing error which the appellant has also acknowledged to be such), in the event that such criminal action entailed any threat to the life or to the physical integrity of individuals, it was possible to impose a six-year conviction on the basis of the reduction foreseen in such article taking into account the extent of the damage and other circumstances. Therefore, the Supreme Court completed the legal arguments used by the judgment delivered by the *Audiencia Nacional* which when determining the conviction had made a general reference to Article 266 of the Criminal Procedure Law without any express reference to a specific section within that article in terms of the grounds for conviction, but it was easily ascertained that when discussing the applicable conviction it was considering the major threat for individuals and assets arising from the method employed to perpetrate the crime (an explosive substance), and the results arising from the use of an explosive-inflammable device identified in the facts as found of the judgment. Therefore, considering that the judgment delivered by the Supreme Court contains accurate arguments and that they may not be considered in any way as unreasonable, arbitrary or clearly mistaken, even when the appellant may dispute the fact of whether the cross reference to different sections of the criminal code was apt or not, there are no grounds to consider that a breach of the right to a fair criminal trial has ensued. Finally, it is fitting to highlight that on the basis of the second legal consideration of the Supreme Court ruling regarding the cassation appeal "no arguments filed by the plaintiff regarding this point," it may be said that the plaintiff did not avail himself of all the remedies that he could have used in order to present this matter to the Supreme Court in the terms and with the perspective which he has used to lay this case before us.

Wherefore, considering the foregoing, this Court rejects the Amparo appeal.

RULING

For all of the above, the Constitutional Court, BY THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To reject the amparo appeal filed by Mr. Orkatz Gallastegui Sodupe.

Let this Judgment be published in the Official State Gazette.

This Judgment was handed down in Madrid, on December, 5th 2013.

DISSENTING OPINION of the Judge, Adela Asua Batarrita in connection with *Amparo* appeal no. 9530-2005, deferred to the Plenary Session of the Court, with whom Judge Luis Ignacio Ortega Álvarez joins.

Pursuant to the faculties granted to me by Article 90(2) of the Organic Law on the Constitutional Court and with the utmost respect for the opinion of the majority in the Plenary Session, I wish to place on record my dissent regarding the grounds and the decision reached in the Judgment. In my opinion, on the basis of the arguments which I put forward in the Plenary Session, and which I set out here below, the *amparo* appeal should have been upheld.

1. My discrepancy refers not only to the decision which dismissed the *Amparo* appeal sought but, in particular, to the manner in which the constitutional standard of review has been developed in connection with the case examined, which is particularly relevant because this is the first time that this Court has the opportunity to issue a decision on the guarantees that must be observed in the surreptitious gathering of biological samples cast away voluntarily by a person who is being investigated for a crime, and which is being held in custody by the police. The majority avoids the discussion on fundamental rights which is the very reason for our jurisdiction, such being the protection of these rights and not a mere review in third instance of whether a criminal conviction is fair according to legal standards. Our role is to define and delimit the fundamental right to privacy which has been compromised in this case, and therefore it is essential to refer to our case-law, as the starting point in order to set out the specifics of a case such as the one examined in this *amparo* appeal.

According to our case-law, the invasion of a person's privacy to the purposes of investigating a crime requires generally and in first place that a legal mandate exists to allow such invasion and, in second place, the appropriate judicial authorization is required (STC 37/1989, regarding bodily search; and STC 207/1996, which refers to a hair cut in order to detect if the person had consumed cocaine), and at all times the principle of proportionality in such invasive acts must be observed. We have stated that only due to reasons of urgency duly established, the second requirement –judicial authorization– may be excluded, in the cases of inspection or search, or a minor bodily examination, upholding at all times the principles of proportionality and reasonability (STC 70/2002). As I shall refer to later with greater detail, the decision adopted by the majority provides a hazy picture of these standards and does not establish clearly which are the limits to DNA tests regarding the collection of samples and the authority to issue an order requesting their analysis. The interpretation followed is rather timid regarding the requirement of a judicial authorization, and on a subjective basis it is said that in this case the urgency of the situation justified the police actions concerning the gathering and analysis of the saliva samples at the precinct.

2. In Ground 2, the complaint regarding breach of Article 14 of the Spanish Constitution, it is stated that the appellant himself had been tried on two occasions in

the course of few months for the same offences of rioting and that he had filed a cassation appeal due to breach of the law and of constitutional provisions, leading to his acquittal of the first offence in the STS 501/2005, April 19 (Judge-Rapporteur: Delgado García), because the Court considering that the DNA analysis conducted on the basis of a saliva sample —in identical conditions to the case examined hereunder—, was not carried with due guarantees due to lack of judicial authorization. While in the case of the second offence, STS 1311/2005, October 14 (Judge-Rapporteur: Martín Pallín), now examined in this appeal, it was considered that such analysis had been carried in compliance with the law.

The Judgment considers that no breach of the right of equal treatment before the law has ensued because reference to a comparison standard is lacking, but in view of the right to due process, it accurately highlights in line with our case-law that it is not possible to consider that a judicial ruling has been adequately argued when it runs counter in its essential terms to another ruling given for an identical case in terms of its relevant parameters, unless the reasons are given or may be inferred for such change of criterion. However, the contested Judgment in question concluded that no such breach had ensued because "it provides reasoning for such change of criterion." This is a very forced conclusion because if we read both rulings we find that the arguments are provided very differently —the first decision is very extensive and detailed whereas the second one is very brief and pithy—, and it may be gathered that in this last ruling there is not even a passing reference to the former ruling which criterion is being disregarded. The only explanation provided to consider that a judicial authorization was not required is simply limited to "in these cases, the consolidated doctrine of the required judicial intervention to authorise, in certain circumstances, a potential and non-aggressive and simple action is not considered necessary. The gathering of samples for control purposes is carried out on a random basis and in light of a totally unpredictable event. The saliva remains therefore must be treated as an object from the body of the suspect, but obtained in a fully unexpected manner" (Ground 1, Section 2). Likewise, it simply highlights the difference between obtaining a sample surreptitiously against obtaining such sample by bodily invasion to a greater or lesser extent. It is an obvious difference between this case and other cases which require the inspection of internal bodily organs where evidence of the offence may have been concealed. But the uniqueness of this case lays not so much on the privacy intrusion by means of bodily inspection or examination, which if required could be done almost unobtrusively, but on the nature of the biological remains which may provide genetic information and therefore this matter is within the constitutionally protected sphere of privacy. This uniqueness coupled with the DNA forensic analysis has been dealt with in a detailed manner by STS 501/2005 throughout its extensive grounds (3, 4 and 5), which stresses that although there was no legal regulation thereon until Organic Law 15/2003 this does not prevent "that such evidence like any other may be obtained and submitted to the trial with all the guarantees foreseen in the Constitution and in the procedural laws. And this matter must be controlled by us (the Supreme Court), as we have already stated, in this cassation appeal, when as is the case with pleading number (4) which we are discussing, invokes a breach of a constitutional provision (Articles 5(4) of the Organic Law on the Judiciary or 852 of the Criminal Procedure Law) with regard to Article 24(2) of the Spanish Constitution in its section which refers to the presumption of innocence" (Ground 3, Section 1). Next the Judgment examines the different provisions of the Criminal Procedure Law (Articles 326, 332, 334 and 336) which decree that the investigating judge or the person acting as such must gather any remains or evidence from the crime,

and place them on record by means of the corresponding procedural actions so that they may be used as preliminary evidence obtained with the legal guarantees. And it also reminds us that police investigation is only valid as preliminary evidence when they refer to urgent actions carried out because otherwise such evidence would be lost or destroyed or for similar reasons which prevent the judge from ordering such actions himself. The Judgment also stresses that judicial intervention is mandatory in principle and as a general rule, on the basis of STC 303/1993, FJ 4, such urgent cases are exceptional in which the police forces act "as surrogate to the judicial authorities."

The same STS 501/2005, also highlights further that "we should not forget, moreover, that when conducting DNA tests, the process to obtain the authentic sample is particularly relevant, so that in this procedural step, the object gathered, the place where it was located and all other circumstances which duly established that it belonged to person to whom it allegedly belongs are duly placed on record, so that these samples may be considered, with the adequate guarantees, as an authentic sample." The line of argument then moves on to the hypothesis that even if urgent circumstances concurred that would have made it necessary for the police to act and gather the biological sample from the cell of the appellant, the lack of judicial authorization to request a DNA analysis thereon would also lead to making such evidence illegal. Although as from Organic Law 15/2003, it has been specified in Article 363(2), that the Investigating Judge, by means of a reasoned decision may order that biological samples be gathered in order to determine the DNA profile, providing the arguments for such decision, the wording of this Article 363, first paragraph, itself referred to "chemical analyses" affords sufficient support to consider that DNA analysis ought to be subject to the same legal treatment (Ground 4, Section 3).

In view of the detailed arguments of STS 501/2005 regarding the need for judicial authorization both in the gathering of biological samples and in obtaining the DNA profile of them, I beg to dissent regarding the conclusion of the Judgment delivered by the majority of my colleagues regarding the sufficiency and reasonable arguments provided by STS 1311/2005 to justify the change of criterion. The sole fact that the arguments afforded by this latter judgment compared to the former ruling delivered by the Criminal Chamber of the Supreme Court on a virtually identical matter should have been sufficient to uphold the *Amparo* appeal.

The concern regarding the scope and legitimacy of the DNA analysis within the scope of the criminal proceedings has been evidenced in the Non-Jurisdictional Decision adopted by the Criminal Chamber of the Supreme Court on July 13, 2005, which addressed the following question: Is judicial authorization sufficient to obtain samples for a DNA analysis of a person who has been arrested and who has not been informed of his right of not delivering any testimony against himself and to legal aid?. As follows from the above Resolution the doubt cast did not refer to the need for judicial authorization which is considered as evident but on any shortfall in the legitimacy of such actions arising from lack of legal cover for other additional requirements such as the nature of the crime or the need of obtaining informed consent.

The subsequent Non-Jurisdictional Decision taken by the same Chamber of the Supreme Court on January 31, 2006, was adopted precisely due to the different criterion adopted in the two judgments which referred to the *Amparo* appellant. This last decision, only refers to part of the controversy, the one regarding "taking or collecting"

samples, regarding which, it is stated that the "Judicial Police may gather genetic remains or biological samples abandoned by the suspect without any judicial authorization." A statement which does not exclude the applicability of the general rule which demands that the judicial authorities are immediately informed and, in any event, only by means of a judicial authorization it would be possible to conduct any DNA analysis on the samples.

3. Regarding the matters raised by the gathering of saliva, the appeal invoked that the incriminating evidence which led to the conviction of the appellant had been illegally obtained, due to four reasons, a) absolute lack of judicial intervention in obtaining an authentic sample; b) absence of a judicial authorization in order to conduct a DNA analysis on the sample; c) analysis of samples obtained and retained surreptitiously; d) no reliable documents attesting to the gathering of the sample and its change of custody. In fact, Ground 4 of our Judgment dismisses the first objection perhaps too swiftly, because the appellant did not base his complaint on any breach of a fundamental right, but solely on certain provisions of the Criminal Procedure Law, which is not sufficient for this Court to discuss the merits of the complaint. However, from the text of the *Amparo* appeal considered as a whole, it is clearly inferred that the appellant invokes the breach of due process with all guarantees and breach of right of defence, on the grounds of an extensive citation of our STS 501/2005, mentioned above, which acquitted the appellant upholding the grounds for a cassation appeal based on breach of constitutional provisions.

Regarding the surreptitious gathering of the sample, the appellant basically complaints that this entails a breach of his right to process with full guarantees and a breach of his right of defence, and also of his right to not self-incrimination and not to collaborate with all the authorities involved in the investigation, which are the only issues discussed in detail in our Judgment. To this purpose, he cites in part STC 161/1997, which applicable to the case at hand seems dubious, because it refers to a question of constitutionality against the criminalisation of the refusal of a subject to take part in an alcohol test. The connection is very thin because there is a legal provision authorising such tests and because the Court had provided solid arguments regarding the duty of drivers to be subject to these alcohol tests. Therefore the extensive quote of Ground 6 of STC 161/1997, which has been reproduced in the Judgment delivered by the majority of my colleagues [Ground 4(b)], does not add anything to the decision on this *Amparo* appeal because the plaintiff has not at any time refused to be part of any preventive measure, investigation or test procedure. The plaintiff invokes something quite different; the surreptitious gathering of a biological sample while he had been arrested entails a breach of right of non-incrimination.

4. Regarding the absence of a judicial authorization to conduct the test, an essential aspect of the *Amparo* appeal, our Judgment states that the arguments invoked have no constitutional bearing, a remark which is due, once again, to a fragmentary reading of the different complaints included in the aforementioned *Amparo* appeal. If we read the second pleading of the appeal we may gather that the complaint refers to the breach of a due process. The Judgment given links this matter with the breach of Article 18(4) CE [which is found in Pleading 3 of the complaint which invokes also a breach of Article 18(1) of the Spanish Constitution] in order to examine it from this perspective. From the analysis conducted, the following issues should be taken into account:

a) There is a reference to STS 25/2005 and STS 206/2007, which include the doctrine and the relevant criteria for this case, as well as the guarantee standards on any privacy invasion, which are in fact: a) that a legal statute foresees such measure that limits a fundamental right; b) the measure must be adopted by a judicial resolution providing the arguments for such decision; and c) it must suitable, necessary and proportionate with regard to a constitutionally protected objective. These are the key issues which should have been considered in connection with our case-law, but the Judgment does not refer to them, and only discusses the differences between the cases examined in those judgments and the case at hand. In that line, it highlights that they referred to aspects related to the intimate sphere or privacy of the persons involved, for example in the case of consumption of drugs or alcohol, omitting however, that both Judgments established that a legal mandate and a judicial control should be in place in order to conduct such tests which refer to the privacy of the individual without his consent (in both cases it referred to the use of drug samples by the police that had been obtained for purely therapeutic purposes, in order to establish that drug or alcohol consumption had taken place).

b) A detailed overview is provided of the case-law by the European Court of Human Rights according to which private life is already compromised by the mere preservation and storage of biological samples and DNA profiles; a case-law which also foresees that a link must exist between the suspect whose DNA profile is being analysed and a specific offence which is being investigated, excluding the validity of analyses carried out for general or future investigations. However, our Judgment does not fully assume all the consequences arising from such case-law, and paradoxically it reaches precisely the opposite conclusions on the back of doubtful arguments. For example, when it states that the gathering of samples has had little or no impact on the privacy sphere of the appellant, because the analysis had focused on non-coding DNA regions. On the contrary, the case-law of the European Court of Human Rights considers that the mere possibility of identification is already an invasion of privacy. And in second place, the Judgment given by the majority, stresses that the samples taken were not related to a specific offence, but to the generic identification of the plaintiff in order to ascertain a potential coincidence of his DNA with the one found in objects that had been abandoned when perpetrating violent acts in the streets. In fact, Ground 11 of the Judgment specifically acknowledges that the DNA profile obtained from the biological sample taken surreptitiously at the police precinct from the plaintiff was subject to "matching with DNA profiles corresponding to unknown persons obtained from biological samples found in remains from different criminal actions".

In summary, it seems clear that the police obtained the biological sample and DNA profile of the plaintiff (as well as from other individuals who had been arrested) in order to conduct a prospective analysis from an indeterminate group of biological samples found in a number likewise indeterminate of criminal actions. And it is certainly striking that as may be gathered from the facts as found of the aforementioned Judgments 501/2005 and 1311/2005 of the Supreme Court, within the short period of six months, the Basque police arrested the plaintiff twice (April and October of 2002), and that on both occasions, biological samples were taken from him without any judicial authorization and subject to the same surreptitious procedure, which would then be used as incriminating evidence in both criminal proceedings for the actions perpetrated on November 3, 2011 and March 15, 2002, respectively.

c) Regarding legal cover, or better said, the absence of legal cover, the Judgment (Ground 9), based on STC 173/2011, in relation to the seizure and examination of a laptop in connection with a case of child pornography; but, in that case, the laptop had been voluntarily surrendered by that person to a technical repair centre without any limitations as to its examination, and this circumstance makes it different to the case examined hereunder because the saliva sample was obtained without the person's consent. Regarding the urgency of accessing personal data, in that case it was argued that the data could disappear immediately or be erased from another terminal. This risk of loss of data in the case at hand is not argued by the Judgment examined hereunder at any moment. Additionally, there is no reference to any impossibility or difficulty which may have hindered the police from informing the judicial authorities immediately regarding the actions carried out.

d) Finally, the arguments invoked to dismiss the need of a judicial authorization to conduct a DNA analysis on the grounds of the existence of exceptional circumstances run counter to the doctrine established by the European Court of Human Rights regarding the Judgment which I differ from. On the other hand, the arguments are merely subjective statements made in a very general manner such as “the specific circumstances of the case, considered globally” without any further specification “demanded urgent action,” to avoid the risk of impairment of the biological sample and guarantee the chain of custody.

Likewise, when it is stated that “the lack of judicial control which could have arisen from the absence of a judicial authorization is not relevant (*sic*) because the comparative analysis was submitted to the proceedings as soon as it was available ... and as from that moment, it was up to the judicial authority to conduct a judgment assessing the forensic evidence carried out, and likewise it could have ordered a new analysis...”, this Court is reverting the established constitutional standard of protection, based on a prior judicial authorization as a general rule before conducting any forensic evidence tests which could compromise fundamental rights; relaxing such provision could entail that the judges could become excluded from the prior authorization process and that the police forces would have the initiative to gather and analyse biological samples and, additionally, they could be excluded from controlling the process subsequently when negative results are not reported to the judicial authorities or submitted to the trial; in other words, the judicial supervision and authorization for these proceedings could be excluded, and they would be left in the hands of the police authorities.

5. The Judgment delivered by the majority of my colleagues does not deal with the main issue: guarantees which are to be observed in the surreptitious gathering of biological samples expelled voluntarily by the individual arrested at the police station. In lieu of such discussion, it chooses to develop a thin line of arguments which are secondary to the matter discussed, providing even judgments from our Court out of their context. Together with this forced accumulation of arguments that have a very fragile basis, the Judgment provides essentially three criteria: a) no prior judicial authorization is required; b) the provisions of Articles 282 of the Criminal Procedure Law and 11(1) of the Organic Law of Police and Security Forces, are sufficient as a legal framework to legitimate the gathering and analysis of samples (without taking into consideration the peculiar nature of such samples in view of their impact on the privacy of an individual); and c) the proportionality standard evidenced in the collection and analysis of samples,

considering the limited impact *de facto* or *a posteriori* (subsequently) in that person's right of privacy. In summary, it is stated that the invasion was irrelevant (a mere gathering of a sample, without duress), considering further than the concrete use of the information obtained from the DNA gathered was limited to simply identifying that person and that the potential risk for any disclosure of additional information did not take place; it also states that there is no record of any storage of data and in that manner the complaint regarding a breach of Article 18(4) of the Spanish Constitution is avoided.

The Judgment from which I dissent avoids making any comparison with the constitutional provisions, minimizing the normative force of the Constitution, as if the binding relationship between the public authorities and the Constitution was simply a passive one. However, there is no doubt that the bond between the public authorities and the rights and freedoms enshrined in the Constitution [Articles 9(1) and 53(1) of the Spanish Constitution) is precisely the opposite of a negative one. Fundamental rights not only include rights of defence of the individual against the public authorities, but also axiological decisions stemming from the Constitution itself, from which a mandate of protecting such rights arises for the State bodies. It is clear that the Constitution simply states that such protection is a basic fundamental right which must be further specified by legal provisions by the competent governmental bodies who have an ample discretion in implementing such protection obligations. Therefore, an argument as the one used by the majority of my colleagues in the Judgment is not acceptable, because it leads to the statement that the Constitution was not breached because it does not expressly include a specific mandate regarding judicial authorization for any invasion of privacy and because the legislator at that date had not yet regulated or had issued very few regulations on this matter at the time the trial was conducted.

The perspective which must be adopted in view of granting efficacy to the fundamental rights and considering further the obligation vested in this Constitutional Court regarding their protection may not be the one adopted by the majority of judges in the Judgment. The incumbent legislator of the fundamental rights has an unswerving commitment to regulate in a precise manner the cases in which a breach of privacy as the one examined in this relief appeal has taken place. The role of the legislator in this matter is essential and this Court should urge the legislator to issue the appropriate provisions in view of this legal vacuum.

The Judgment of the majority (Ground 6 *in fine*) admits that the analysis of the biological sample of the appellant implies a breach of his right to privacy due to the potential risks arising from the same. But it does not set out the juridical-constitutional consequences arising from the above statement, because if we admit that such analysis led to a breach of the scope of protection of a fundamental right, the necessary legal consequence should be to require the relevant legal rule that establish when the police may take or not biological samples from suspects who have been arrested in the course of investigation proceedings, in order to identify the perpetrators of the crimes investigated. It is essential that a parliamentary statute establishes the criteria regarding the type of offence and its degree in terms of conducting an investigation that may justify the gathering of biological samples in order to identify the DNA profile and also lists the type of circumstantial evidence or suspicions that must concur in order to allow such invasion of privacy. In line with the proportionality principle, such legal provision must include criteria for an adequate balancing of the constitutional rights at stake.

Finally, its regulation must include the necessary guarantees with regard to its core principles. The lack of an adequate statutory regulation entails that the necessary guarantees and essential parameters to avoid any interference or intrusion in the protected core of a person's privacy are lacking, particularly, with regard to our case, to avoid that genetic analyses may be carried out indiscriminately in view of prospective investigations without sufficient evidence.

6. The general provisions, which provide legal cover for police actions, as are mentioned in the Judgment of with I have expressed my dissent, are not provisions relating the intrusion, but simply provisions which afford a very general description of police functions. The fact that Article 282 of the Criminal Procedure Law points out that the judicial police is obliged to conduct investigations regarding offences and engage in the necessary procedures for such duty, is not sufficient from a constitutional point of view: does not contain any statement regarding up to what point fundamental rights of investigated persons may be restricted. Likewise, even if Article 11(1) of the Organic Law 2/1986, of Police and Security Forces, establishes the functions of such bodies (investigate crimes, safekeeping of instruments, objects and evidence related to crimes...) it does not tell us nothing about whether they may enter the home of suspects, open the correspondence, monitor calls, place eavesdropping devices, use the polygraph, etc. The Judgment delivered by the majority is out of focus when it invokes organizational rules granting certain functions to the police and security forces in order to legitimate the absence of a judicial authorization. Such rules can never be the source the constitutional authorization to invade or intrude fundamental rights. In any case, the police and security forces, according to such organizational and functional regulations, are obliged to submit any objects, instruments, fingerprints or elements found in the scene of the crime, whereby the initiative of conducting further sensitive analysis that poses a threat to fundamental rights is not warranted.

This leads us to conclude that the sole legal cover at the moment of the facts was afforded by Article 363 of Criminal Procedure Law (in its prior wording, before the amendment made by Organic Law 15/2003, November 25), which demanded judicial authorization for chemical analyses. A rule, which if more specific legal regulations are not available, could be applied analogically to the analysis of the DNA profiles and in view of which, without judicial authorization there was no legitimate cover to obtain the evidence that led eventually to the conviction of the plaintiff. However, the Judgment delivered by the majority considers the “civil death” of a provision that categorically requires the jurisdictional reserve and such dismissal is based on a rather surprising argument that considers that a statute may not include a requirement that has not been foreseen in the Constitution expressly, as if the legislator were precluded from adopting the appropriate decision commensurate with the degree of protection imposed on him by the Constitution. Again, it is surprising that such provision is deemed obsolete — indeed aged as the entire Criminal Procedure Law which was enacted in the 19th century but not inappropriate in spite of its age—, because it is required the judicial authorization in order to conduct chemical analyses, the reason for such being considered a hypothetical goal of monitoring public expenditure and not, as it seems more plausible, the finality of guaranteeing the less interference possible with the freedoms of citizens or, to use the legal jargon of our times, the protection of fundamental rights. Therefore, to empty a legal provision of its contents is clearly a total breach of the construction rule foreseen in Article 3(1) of the Civil Code, which mandates that legal provisions should be interpreted according to the social context of

the time in which they are to be applied, in particular in view of the context provided by the citizenship values arising from the Spanish Constitution, and not in view of social requirements or issues applicable two centuries back. Consequently, the Judgment should have concluded that in view that no specific legal statute exists, the provision contained in the Criminal Procedure Law regarding the need for a judicial authorization should have been observed and applied analogically to the discovery of evidence carried out, which implies, in summary, a prior judicial mandate for such action.

7. In light of the above, I consider that to carry out analyses on saliva samples as ordered by the police authorities without a legal provision authorising it, entails an invasion of the right to privacy of the appellant which was carried out without his consent or knowledge, without judicial authorization and without having effectively established that the urgent need for the police to intervene existed, and as in the judgments challenged there is no assessment whatsoever as to the proportionality of the measure adopted, the Court should have concluded that a breach of Article 18(1) of the Spanish Constitution had ensued regarding the appellant's right to privacy and to a fair trial with all guarantees [Article 24(2) of the Spanish Constitution], considering that the DNA analysis had been used in the trial as incriminating evidence.

Going beyond the decision reached in this particular Amparo appeal, I have to express my major concerns regarding the future development of our jurisprudence on fundamental rights, because a reasoning that merely pays lip service to legality and even diminishes it, may trivialize the contents of the Constitution regarding such an important matter.

Madrid, on December 5th 2013

Dissenting Opinion of Judge Mr. Andrés Ollero Tassara regarding the Judgment deferred to the full bench of this Court on December 5, 2013 in the Amparo appeal no. 9530-2005.

Within the scope granted by Article 90(2) of the Organic Law on the Constitutional Court and with the utmost respect for the opinion of the majority of my colleagues, I hereby include my dissenting opinion which I have expressed during our discussions prior to delivering the aforementioned judgment, and which also refers to the Grounds of such Judgment.

1. The requirements arising from Article 18(1) of the Spanish Constitution have become progressively clear. The starting point had been the protection of the right to privacy contemplated in its first paragraph, in the understanding that the fourth paragraph of this article was a warning on the potential impact that the use of “data processing systems” may have on such right. Over time, however, Article 18(4) of the Spanish Constitution developed into a personal data protection right with its specific requirements which has been termed the right to non-disclosure of personal information. Article 18(1) of the Spanish Constitution protected the possibility of maintaining a “specific and reserved area of privacy sheltered from the intrusion and awareness by other persons, required, in fact, according to our own cultural standards, to guarantee a minimum degree of quality of life,” and highlighting particularly sensitive personal aspects; Article 18(4) of the Spanish Constitution in its turn, guaranteed a “power of

control” by any citizen over his own personal data, regardless of their nature, whereby such data may not be used without his consent except if a statutory provision establishes otherwise.

The main grounds for my dissent lies in the fact that the Judgment delivered focuses almost exclusively on a potential breach of Article 18(1) of the Spanish Constitution, in spite of the fact that the relief appellant invoked such article constantly coupled with Article18(4) of the Spanish Constitution . In fact, while Grounds 3 to 10 refer to an alleged breach of the first paragraph of such provision, only Ground 11 refers to Article 18(4) of the Spanish Constitution, and in my understanding, in a not very satisfactory manner.

2. We are shown in Ground 11 that, in fact, the starting point in order to delimit what may be considered the subject matter of the data protection right, is STC 292/2000, November 30, as if only that ruling was “an attempt that had been made in order to determine the scope of faculties and limitations enshrined in the data protection right.” In fact, six years before, STC 143/1994, May 9, although it does not establish a very clear distinction between such right and the right to privacy, invoking a rather unsatisfactory Italian expression “data processing freedom” already demanded in its Ground 7, certain relevant requirements such as this one: “a legal framework authorising that data may be gathered even for legitimate purposes, and apparently of neutral content, that does not include guarantees for a potentially invasive use of such data in connection with the private life of citizens, would entail a breach of such right exactly the same as any other breach to the right of privacy.” This line of thought is also present in Ground 4 of STC 94/1998, May 4, while Ground 2 of STC 202/1999, November 8, added: "the privacy guarantee is nowadays considered also to be the right that any individual has to control his own personal data"; characterized as *habeas data* in an obvious parallelism with *habeas corpus*.

It was therefore clear at that stage, that a supervision power over personal data against the interference of third parties already existed, motivated by legitimate purposes, regardless of whether such data are more or less sensitive. Only personal consent or a statutory provision authorising the treatment and use of such data for a specific purpose could be considered as adequate compliance with the Spanish Constitution mandate in this field.

3. My dissenting opinion regarding the Judgment mentioned takes into account that it discusses in great detail the impact of Article 18(1) of the Spanish Constitution on the gathering of the DNA from spit cast by the individual who had been arrested in a cell of the police headquarters. However, it does not seem to attach great relevance to the fact that such sample was subsequently matched with another one obtained from a T-shirt which had been abandoned by one of the unknown persons involved in an offence of rioting, whose DNA had then been included in a data base without any legal authorisation. The situation is peculiar because the abovementioned Ground 11 mentions with full detail the scope of the data protection right, which is wider than the right to privacy protected by Article 18(1) of the Spanish Constitution. It must be noted that "the power of disposal and control over personal data entitles a person to decide what part of such data he wishes to provide to a third party, either the State or a private individual, or what data may such third party obtain, and it also grants the right to that person to know who is holding his personal data and why, being entitled to notify his

opposition to the possession or use of such data. These disposal and control powers over personal data, which are part of the content of the fundamental right regarding data protection, entail from a legal point of view the right of consenting to their collection and likewise to obtaining and granting access to personal data, to their subsequent treatment and storage, and to its potential use or uses either by the State or a private individual". However, it seems that in breach of what has been described above its reference to a legitimate purpose such as “the prosecution and punishment of an offence” —seems to act as a blanket authorization for handling data without any further requirements—. Likewise, its reference as to whether such data could or not “contribute to generating a profile or characterize a person” ignores the requirements of Article 18(1) of the Spanish Constitution with the ones foreseen in paragraph four thereunder [Article 18(4) of the Spanish Constitution]. Finally, it is hardly believable that the comparison between the DNA obtained from spit and the one obtained from T-shirt which had been abandoned months before, could have been made without resorting to any data base, with the sole argument that “there is no record of such file in the judicial resolutions.”

The requirement of such legal authorization was finally confirmed by paragraph four of the First Final Provision of Organic Law 15/2003, November 25. Its relevance has been eloquently stressed in the Preamble of a subsequent Organic Law 10/2007, October 8, which reminds us that in the year 2003, “the Criminal Procedure Law was amended in order to provide legal cover to certain investigation procedures which had not been previously foreseen by the law,” leading to “a regulation on the possibility of obtaining DNA from biological samples arising from evidence gathered in the scene of the crime or obtained from potential suspects in order to incorporate these DNA profiles to a data base for their use in that specific investigation.” This reveals that a "legal vacuum" with regard to constitutional requirements, acknowledged years before, already existed, notwithstanding the fact that at a later stage other shortfalls were evidenced arising from the “insufficient legal regulations to satisfy technical requirements and citizenship demands, as well as international obligations gradually acquired by the Kingdom of Spain in connection with the exchange of DNA profiles for the investigation of certain offences.”

Unfortunately a major opportunity has been lost because this Judgment could have been contributed to establish a legal doctrine on the potential impact on the protection afforded by Article 18(4) of the Spanish Constitution with regard to the storage of personal data from unidentified individuals when such data has been chosen precisely to make it possible to identify them, without legal authorization. The reference to “we are not aware that the profile has been used for a different purpose than the one for which such data were obtained” is not very intelligible, because there is no previous legal statute that indicates which should have been that purpose.

4. All the foregoing would lead to consider that information obtained from a data base which does not comply with the requirements of art 18(4) of the Spanish Constitution had been used as evidence, and therefore the Amparo protection should have been granted. This is the reason why I have issued a dissenting opinion.

Madrid, on December 5th 2013