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HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS:

THE RELATIONSHIP OF INTERNATIONAL, SUPRANATIONAL AND NATIONAL CATALOGUES IN THE 21st CENTURY

QUESTIONNAIRE REPLIES:

SPAIN

I. GENERAL PART: CATALOGUES OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

I. I International catalogues of human rights (ECHR, UNDHR and ICCPR)

-In your country, what is the constitutional position/characteristic/legal force of international treaties protecting human rights?

-What mechanism is used to invoke the international treaties in national court decision-making?

- Is it possible to invoke the direct effect of the international catalogues of human rights? If so, please describe the mechanism.

Spanish law is open to international treaties: once the Kingdom of Spain validly gives its consent to a Treaty and this is published in the Legal Gazzette [the *Boletín Oficial del Estado* (www.boe.es)], that treaty becomes part of the Spanish legal system. Its "provisions may only be abrogated, modified or suspended in the manner established by the treaties themselves or in accordance with the general rules of international law" (art. 95 of the Spanish Constitution, hereinafter CE[1]; Constitutional Court Judgments SSTC 140/1995, 28 September, point 3; 197/2006, 3 July, point 3). In addition, the Constitution provides that "an organic law may authorise the conclusion of treaties by which an international organisation or institution is attributed the exercise of powers deriving from the Constitution" (art. 93 CE). This rule is the basis of the participation of the Kingdom of Spain in the European Union and its EU law (Declarations of the Constitutional Court 1/1992, of 1 July, and 1/2004, of 13 December).

When treaties deal with human rights, their ordinary effectiveness -as norms of international law incorporated into domestic law- is enhanced by virtue of 10.2 EC, which states: “The rules relating to fundamental rights and freedoms recognized in the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and

[1] Its current text is available at: https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229

international treaties and agreements on the same subjects, ratified by Spain".

That influence on the interpretation and application of the Constitution itself does not imply that human rights treaties take precedence over other international treaties, neither do they obtain a special status at the system of sources of law in Spain. Nor does it mean that its content acquires constitutional rank: it cannot therefore be invoked directly in any proceedings, but only as an interpretative criteria of the constitutional precepts which recognise fundamental rights in Spain, as abundant case-law on this issue has pointed out.

According to reiterated doctrine, it is not up to the Spanish Constitutional Court "to examine the observance or non-observance *per se* of binding international texts for Spain, but to verify the respect or infringement of the constitutional precepts that recognise fundamental rights and public freedoms which are protected through the appeal for *amparo* (arts. 53.2 CE and 49.1 LOTC), notwithstanding that, by mandate of art. 10.2 CE, such precepts should be interpreted in conformity with the Universal Declaration of Human Rights and international treaties and agreements on the same matters ratified by Spain (by all, Constitutional Court Judgments SSTC 85/2003, of May 8, point 6; and 99 / 2004, of May 27, point 3), among which the European Convention on Human Rights stands out prominently" (CCJ-STC 138/2012, of June 20, point 3).

However it can be affirmed that the treaties declaring and protecting human rights, once ratified by Spain, exert a decisive influence on constitutional jurisprudence. The European Convention on Human Rights and its Protocols[2] are the legal texts that have exercised the greatest interpretative influence on the application of the Spanish Constitution. Moreover, jurisprudence has changed to a certain extent as a consequence of the implementation of European Union law on fundamental rights, even before the Treaty of Lisbon (2007) gave binding force to the Charter of Fundamental Rights of the European Union[3].

[2] European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950. It was ratified by Spain by means of the Instrument of 26 September 1979 (BOE 243, 10/10/1979).
[3] Charter of Fundamental Rights of the European Union (2000, 2007, consolidated text published in OJEU C-202, 7/06/2016).

The Kingdom of Spain has ratified numerous international conventions on human rights, especially in the field of the United Nations (UN). The *International Covenants on Civil and Political Rights* and on *Economic, Social and Cultural Rights*, adopted in 1966, are both part of Spanish Law[4]. The same can be said of many other treaties, among which the Conventions relating to *the prevention and punishment of genocide*, the *rights of women* and the *rights of the child* stand out[5].

I. II Supranational catalogues of human rights (the Charter)

Is the Charter a point of reference to review the constitutionality of legal rules and/or decisions of public authorities, be it directly (a formal point of reference in some EU member states) or indirectly by "radiating" through the national catalogues (a substantive point of reference in other states)?

-Does the human rights case law of the Court of Justice of the European Union serve as guidance for the interpretation and application of the national catalogue in your country by general courts, or as a source for judicial law-making?

-Is the national impact of the Charter conditioned, in constitutional terms, by its essentially equivalent degree of protection afforded, or as the case may be in the EU member states, is conditioned by making a request for preliminary ruling with the Court of Justice of the EU?

The Charter of Fundamental Rights of the European Union was solemnly proclaimed by the European institutions (Parliament, Council and

[4] International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights, signed in New York on 19 December 1966. Both were ratified by Spain by means of Instruments of 13 April 1977 (BOE 103, 30/04/1977).

[5] Convention for the Prevention and Punishment of the Crime of Genocide, United Nations, 9 December 1948: Spain's accession was documented by Instrument of 13 September 1968 (BOE 34, 8/02/1969); Convention on the Elimination of All Forms of Discrimination against Women, signed in New York on 18 December 1979 (among others): Spain ratified it by Instrument of 16 December 1983 (BOE 69, 21/03/1984); Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989: ratified by Spain by Instrument of 30 November 1990 (BOE 313, 31/12/1990).

Commission) after the European Council meeting held in Nice in December 2000, but without any legally binding effect[6]. It acquired binding legal force under the reform introduced by the Treaty of Lisbon (2007), which redrafted the current Article 6(1) of the Treaty on European Union[7]: «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted on 12 December 2007 in Strasbourg, which shall have the same legal value as the Treaties».

The Lisbon Treaty entered into force on December 1, 2009, after ratification by all the member states of the Union[8]. Spain expressed its consent by signing the text of the Treaty on December 13, 2007, in Lisbon, and confirmed it definitively by the Instrument of ratification of September 26, 2008[9]. Previously, the Congress had authorized the ratification of the treaty by means of Organic Law 1/2008, of July 30 (in accordance with the provisions of art. 93 CE). However, this law did not merely give substance to the parliamentary authorisation to sign the treaty; it also incorporated the full text of the Charter of Fundamental Rights in Spain, which was thus officially published in Spanish Legal Gazzette[10]. The publication of the Charter in an organic law raises doubts about its position in the Spanish legal system and, especially, about whether its application is limited to the scope governed by European Union Law or can be extended to matters subject exclusively to national legislation ().

As noted in CCJudgement 3/2018 of 22 January (point 4 *in fine*), the Charter of Fundamental Rights of the European Union of 7 December 2000, which is binding *ex* Article 6 of the Treaty on European Union, "entered into force together with the Treaty of Lisbon on 1 December 2009 (although in Spain -and for the strict purposes of Article 10.2 EC- the Charter entered into force on 1 August 2008, in accordance with Article 2 and the final provision of Organic Law 1/2008 of 30 July)". In practice, the incorporation of the Charter through The Organic Law 1/2008 has not had any repercussions until now.

The Charter of Fundamental Rights of the European Union was early ago taken into account by the Constitutional Court: CC Judgment 292/2000, of

[6] OJEU C-303, 14/12/2007.
[7] OJEU C-306, 17/12/2007.
[8] Note to the reader, OJEU C-326, 26/10/2012, page II.
[9] BOE nº 286, 27/11/2009.
[10] BOE nº 184, 31/07/2008.

November 30, defined the guarantees that, according to art. 18.4 CE, protect the personal data of citizens in conformity with art. 8 of the Charter, as well as Directive 95/46/EC of the European Parliament and of the Council, of October 24, 1995 (point 8). The text of the Charter had already been drafted by the *Herzog*'Commission (2 October 2000) and accepted by the European Council meeting held in Biarritz, on 13 and 14 October 2000. But its solemn proclamation by the Presidents of the European Parliament, the Council and the Commission did not take place until a few days later (namely on 7 December of the same year). And it would not have legally binding effects until several years later, as noted above: it was on 1 December 2009, when the Treaty of Lisbon -which gave its current wording to Article 6 of the Treaty on European Union- entered into force.

Perhaps this delay in defining the legal status of the Charter of Fundamental Rights in the European Union's legal order may explain why it has not been frequently quoted since then. However, this lack has remained constant over time. This fact is shown in CC Judgment 61/2013, of 14 March, which declared void the law that regulated, in the field of social security, the right of part-time workers to receive contributory pensions. The Spanish Constitutional Court considered that the way in which contribution periods were calculated (by computing exclusively the effective hours worked) violated the right to equality before the law, because it was disproportionate, and against the right not to be discriminated against on the basis of sex, because the majority of part-time workers in Spain are women (art. 14 EC). To reach these conclusions, the CCJ-STC 61/2013 (point 5) took into account the Charter of Rights of the European Union and its application by the Court of Luxembourg, in particular at the Case *Elbal Moreno* (of 22 November 2012).

CC Judgment 133/2010, of December 2 (point 6), draws attention to a peculiarity related to the interpretation of the Charter. This should duly take into account the explanations that indicate the sources of its legal provisions elaborated under the authority of the *Praesidium* of the Convention that drafted it (as indicated in art. 6.1.3 TEU).

The *Melloni* Case was the litmus test of the effectiveness of the Charter in Spanish law: It focused on the response that Spanish courts had to give to a European arrest warrant, issued by Italian authorities to comply with a ten-year prison sentence for a crime of fraudulent bankruptcy, which had been imposed at a criminal proceeding conducted in the absence of the accused. This *in absentia* trial is excluded by Spanish law (*in absentia* trials are only

allowed on prosecution of offences punishable with less than one year's imprisonment) and -what is relevant now- with the fair trial constitutional guarantees (art. 24 EC). In its jurisprudence, the Constitutional Court had pointed out that the presence of the accused was part of the "core content" of that fundamental right and, therefore, no person sentenced to heavy prison penalties could be extradited without conditioning the release to the possibility of retrail or, at least, of a procedural review of the conviction and penalty imposed[11].

That doctrine, elaborated in relation to extraditions, was applied to European arrest warrant[12], until several constitutional court' magistrates made clear that the utter protection of the defendant's rights at the criminal trial collided with the EU legislation, which had modified the rules on European arrest warrants precisely with the aim of reinforcing surrenders between Member States *in absentia* judgements [13]. The debate gave occassion to the first (and only) preliminary ruling that the Spanish Constitutional Court raised before the Court of Justice of the European Union. By mean of Order 86/2011 of 9 June Spanish Constitutional Court suspended the procedings of the appeal for *amparo* and referred a several questions to ECJ for a preliminary ruling, which were answered at the Melloni judgment (26 February 2013, Case C-399/11). Finally, the Constitutional Court ruled on the issue in CCJudgement STC 26/2014 of 13 February.

The Spanish Constitutional Court expressly reviewed its doctrine, concluding "that it does not violate the core content of the right to a fair trial (art. 24.2 EC) the condemnation without the defendant's appearance and without the subsequent possibility of remedying his absence at the criminal proceedings, provided that failure to appear at court was decided voluntarily and unequivocally by a defendant, duly summoned and effectively defended by an appointed lawyer" (STC 26/2014, 13 February, FJ 4, paragraph 13). The Court took that decision because "both the interpretation given by the ECHR of the right to a fair trial under Article 6 and the interpretation given by the ECJ of the rights to effective judicial

[11] As of STC 91/2000, of March 30. For example, SSTC 134/2000, of May 16; 162/2000 and 163/2000, of June 12, and 183/2004, of November 2.

[12] SSTC 177/2006 of 5 June, 37/2007 of 12 February and 120/2008 of 13 October

[13] Separate opinions to STC 199/2009 of 28 September 2009 in the light of Council Framework Decision 2009/299/JHA of 26 February 2009 to strengthen the procedural rights of individuals and to promote the application of the principle of mutual recognition of decisions rendered in the absence of the person concerned.

protection, to a fair trial and to defence under Articles 47 and 48.2 of the Charter, overlaped to a large extent", supported that interpretation (CCJ-STC 26/2014, FJ 4, point 12).

However, the way how to integrate the Charter of the European Union (EUChFR) into the Spanish constitutional order was not peaceful. This is evidenced by the production of three separate dissenting-opinions formulated in relation to CCJ-STC 26/2014, which suggests different alternatives based on the specific nature of EU Law and, hence, of its EUChFR.

I. III National human rights catalogues

-Is the catalogue of human rights part of the constitution of your country? If so, how is it incorporated (a separate constitutional charter, a part of the Constitution, a part of the constitutional order? What is its structure?

-What is the historical background of the creation of the national catalogue of human rights in your country? Is the respective legislation in your country based on other legislation (previous or foreign), or is it original?

-What has been the development of your national catalogue of human rights over time? Is it undergoing a change? Are new rights included? Is there a constitutional procedure for its modification or amendment?

The Spanish Constitution of 1978 settled a broad set of rights and freedoms in Title I, "Fundamental rights and duties" (articles 10 to 55)[14]. Its systematic does not identify the rights with their content (civil and political, economic, social and cultural rights), but with the constitutional enforcement guarantees. Therefore, Title I of the Spanish Constitution, entitled "Of fundamental rights and duties", divided the rights recognised into several different categories, which do not necessarily coincide exactly with theoretical concepts:

[14] Its current text is available at: https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229

- On the one hand, *rights and freedoms* (Chapter II of this Title I, comprising arts. 14 - 38) and on the other hand, *guiding principles of social and economic policy* (Chapter III, covering arts. 39 - 52).

- Besides that, rights and freedoms of Chapter II are classified into two different categories: first, the fundamental rights and public freedoms (section I of Chapter II, arts. 15 - 29); and second, the rights and duties of citizens (section II of Chapter I, arts. 30 - 38).

Article 53 of the Constitution regulate the *guarantees of rights and freedoms*, providing the following categories of constitutional rights:

- All the rights and freedoms recognised in Chapter II are binding for all public authorities. Their exercise shall only be regulated by law, which will, in any case, respect the essential content of the corresponding right or freedom. These constitutional provisions are protected by the Constitutional Court by mean of appeals and reference of unconstitutionality (art. 53.1 EC).

- In addition, fundamental rights and public freedoms (1st section of Chapter II), as well as the right to equality and conscience objection to military service (arts. 14 and 30.2 EC), enjoy reinforced judicial and constitutional protection: therefore "Any citizen may assert his or her claim for the protection of fundamental rights and public freedoms before ordinary courts by means of a procedure based on the principles of preferential and summary treatment, as well as through the appeal of *amparo* before the Constitutional Court (art. 53.2 CE).

- Besides that, the substantive legislation, judicial practice and the public authorities' action shall be based on the recognition, respect and protection of the principles recognised in Chapter III. These latter may only be invoked before the ordinary courts according to the legal provisions by which they are developed. (art. 53.3 CE).

Furthermore, article 81 of the Constitution outlines, within the general law reserve of article 53.1 EC, a more specific guarantee: *only by organic law, which requires the approval by a final vote of the absolute majority of the Congress, can the fundamental rights be developed*. The case-law of the Constitutional Court has clarified that this reserve exclusively concerns the rights included in section 1 (arts. 15 - 29; CCJudgement SSTC 5/1981, 13 February, point 21; 11/1981, 8 April, point 22; 86/2017, 4 July, point 7).

The drafting of the Spanish Constitution, which was carried out between June 1977' constituent elections and October 1978' Parliament approval of the final text, was influenced by several factors[15]. One consisted of the desire to approach to European democracies, reinforced by the academic prestige of Germany, Italy and France, especially in the legal field, and the close constituent experience of Portugal and Greece. Another, was the reference to the 1931' Spanish 2nd Republic Constitution, both in its positive and negative aspects, which had embedded, in fact, some features of the Spanish constitutional tradition (particularly the Democratic Sexennium of 1868-1874, with 1869'Constitution) as well as the influence of the Constitution of Mexico (1917) and The Weimar's Constitution (1919), both regarding the protection of constitutional rights and the declaration of economic and social rights.

The declaration of fundamental rights settled in Title I of the Constitution of 1978 can only be modified by an express reform of the Constitution (as in arts. 166 - 169 EC). Further, the Constitutional Court has clearly rejected the possibility of implicit reforms (or by indirect means), rejecting a forced reinterpretation of its text, to bring it in line with the Treaty on European Union signed in Maastricht (Declaration of the Constitutional Court 1/1992, 1 July). Consequently, in 1992 the first Constitutional reform amended article 13 CE to enable European citizens to vote in local elections.

No further modifications regarding constitutional rights has been made so far. However, there have been several legal reforms concerning its effectiveness. Perhaps the most relevant one is related to the set of laws that have deepened on effectiveness of equality between women and men: Organic Law 1/2004, of December 28, on comprehensive protection measures against gender violence should be highlighted (its constitutionality was confirmed by CC Judgements SSTC 59/2008, of May 14; 45/2009, of February 19, and 177/2009, of May 26, regarding the categorization of crimes of occasional domestic abuse, minor threats and light coercion, respectively) and Organic Law 3/2007, for the effective equality of women and men (examined at CC Judgement STC 12/2008, of January 29, regarding the introduction of gender-balanced candidates in ballot lists) .

[15] F. Rubio Llorente: "El proceso constituyente en España", in La forma del poder (3rd edition, 2012) I: 44 ff.

I. IV The mutual relationship between different catalogues of human rights

- Can you give examples from the case-law of your court related to the use of any of the international catalogues?

- Has your court considered the relationship/hierarchy/competition of the catalogues of human rights in light of the protection afforded?

- Is there an established procedure for choosing an specific catalogue of human rights in cases where the right is protected under more catalogues (NB: The application of the Charter is binding in EU member states subject to compliance with Article 51(1), i.e. its application is not discretionary.)

Following the guideline established in article 10.2 CE, the Spanish Constitutional Court case-law has always taken into account international human rights treaties. The 1948' Universal Declaration of Human Rights (UNHRD) is the only text expressly mentioned by the 1978' Constitution, however it occupies a modest place in the rulings of the Constitutional Court. UNHRD is approximately mentioned in a hundred judgements, but its reference is usually joined to other Covenants signed in 1966, which had given legal value to the rights proclaimed therein, especially the International Covenant on Civil and Political Rights (CC Judgment SSTC 22/1981, 22 July, points 3 and 9; 23/1983, 25 March, point 2; 41/1982, 2 July, point 2, as well as other decisions, such as CC Judgement SSTC 45/1989, 20 February, point 4; 236/2007, 7 November, points 3, 5-8, 11-13; 198/2012, 6 November, points 6 and 9; 93/2013, 23 April, point 8). At CC Judgement STC 31/2018 of 10 April (FJ 4) specified that *the obligation to interpret constitutional rules on fundamental rights in accordance with international treaties and agreements on a concrete matter, is not limited to those conventions signed or ratified by Spain after the entry into force of the Constitution*.

Besides that, the 1950' European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHRF), play a key role. The Rome Convention is constantly quoted in Spanish case-law. After the early CC Judgement STC 21/1981, of 15 June, more than 700 judgments have taken

into account different human rights set forth in the 1950 Convention or in the Protocols ratified by Spain[16].

CC Judgement STC 21/1981, which adjudicated on the constitutionality of the military discipline regime, took into account the distinction established at ECHR Case *Engel* (June 8, 1976) between *arrests involving a restriction of liberty* (the so-called simple arrests) and *those involving a deprivation of liberty* (strict arrests), in order to apply to these latter cases the procedural guarantees contained at article 6 of the ECHRF and article 24 of the Spanish Constitution (Point 9). Further, the guarantees inherent to the right to a fair trial (art. 6 ECHRF) gave rise in Spain to a large case-law, for instance, in relation to the right of a convicted person to apply for review of the judgement (CCJudgement SSTC 42/1982, 5 June, point 3; 76/1982, 14 December, point 5; 64/2001, 17 March, point 5); or on the limits that higher courts shall respect in order to overuled sentences that have acquitted the accused (CC Judgements SSTC 167/2002, 18 September & 59/2018, 4 June, point 3).

Furthermore, as stated in CC Judgement SSTC 160/2012 of 20 September (FJ 7) and 85/2019 of 19 June (FFJJ 4 and 10) The Rome Convention was key for shaping the legal content of the right to equality (art. 14 EC), since the very initial CC Judgement 22/1981 of 2 July (point 3). Moreover, CC Judgement STC 198/2012 of 6 November (point 5) on same-sex marriages, underlined that ECHRF did not confuse the right to marriage with the guarantee for the protection of family (arts. 12 and 8 ECHR). In addition, CC Judgement 99/2019, of 18 July, relied decisively on the Rome Convention and ECHR' case-law in order to declare unconstitutional the Spanish law which didn't allow minors to obtain rectification of sex and name in the Civil Register, when such minors had "sufficient maturity" and a "stable situation of transsexuality".

The Charter of Fundamental Rights of the European Union (EUChFR) was early taken into account by the Spanish Constitutional Court: CC Judgment 292/2000, of November 30, defined the guarantees that, according to art. 18.4 CE, protected citizens' personal data, in conformity with art. 8 of the Charter, as well as Directive 95/46 / EC of the European Parliament and of the Council, of October 24, 1995 (point 8). The text of the Charter had

[16] Until STC 99/2019, of July 18, the database of the Constitutional Court has referenced 719 citations in its worthwhile index of provisions cited (http://hjtc.tr Courtconstitucional.es). If all resolutions mentioning the ECHR are included, the sum reaches 879: 719 sentences, 159 orders and a declaration.

early drafted by the Herzog Commission (2 October 2000) and later accepted at the European Council meeting held in Biarritz on 13 and 14 October 2000. But its solemn proclamation by the Presidents of the European Parliament, the Council and the Commission would not take place until a few days later (namely on 7 December of that same year). Further, it did not have legally binding effects until several years later: on 1 December 2009, when the Treaty of Lisbon entered into force and gave its current wording to Article 6 of the Treaty on European Union.

Maybe this delay in defining the legal status of the EUChFR may explain why, since then, it has not been quoted as often as the Rome Convention. Even so, its quotation has remained constant over time and with an increasing frequency[17]. For example, CC Judgements SSTC 61/2013, of 14 March, and 91/2019, of 3 July, have declared void several social security laws that regulated the right of part-time workers to receive contributory pensions. The Spanish Constitutional Court considered that the calculation of contribution periods (by computing exclusively the effective worked hours) violated both the right to equality before the law (because it was disproportionate), and the right not to be discriminated on the basis of sex of art. 14 CE (because the majority of part-time workers in Spain are women). To reach these conclusions, the CC Judgement STC 61/2013 (point 5) took into account the Charter of Fundamental Rights of the European Union and its application by the Court of Luxembourg. Hence, CC Judgement STC 91/2019 (point 7) declared unconstitutional the following new regulation adopted by the Spanish legislator to adapt to the first declaration of unconstitutionality «thus it could not avoid the discriminations censored in 2013»; in fact, this judgement took into account in its reasoning the fundamental rights of the European Union (ECJ Violeta Villar Láiz, 8 May 2019, Case C- 161/2018).

More recently, CC Judgement STC 76/2019, of 22 May, declared void a provision of the Electoral Law that allowed political parties to gather information relating to the political opinions of citizens, except for the general rules on personal data protection. In its grounds, this judgement took into account articles 7 & 8 of the Charter of Fundamental Rights, as well as the reasons that led ECJ to annul the Directive on data retention in

[17] According to the HJ database, it has been cited until July 2019 in 41 judgments, 6 of them handed down in 2018 and 4 so far in 2019. It has also been cited in 7 orders and in Declaration 1/2004 of 13 December (http://hjtc.tribunalconstitucional.es).

communications (ECJ Digital Rights Ireland, 8 April 2014, Cases C-293/12 and C-594/12, point 6).

Finally, CC Judgment 133/2010, of December 2 (point 6), drew the attention to a peculiarity related to the interpretation of the Charter, which calls to take into account the explanations elaborated under the authority of the *Praesidium* of the Convention that drafted it (as indicated in art. 6.1.3 TEU) that indicate the sources of its legal provisions.

SPECIAL PART – SPECIFIC ISSUES RELATED TO SELECTED FUNDAMENTAL RIGHTS

II. I Right to life

What is the original wording of the provision protecting this right in your national catalogue?

Is it possible to restrict the right? If so, how and under what conditions?

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The Spanish 1978' Constitution protects the right to life in article 15: «Everyone has the rigt to life and to physical and moral integrity, and may under no circumstances be subjected to torture or to inhuman or degrading punishment or treatment. The death penalty is hereby abolished, except as provided by military criminal law in times of war».

According to Spanish Constitutional Court, right to life is "the essential fundamental and core right, insofar as it constitutes the ontological assumption without which the remaining rights would not have possible existence" (CC Judgement STC 48/1996, of 25 March, point 2). This fundamental right entile a double-side request to state power: on one hand, public powers should abstain from harming life; on the other hand, public powers have a positive obligation to guarantee its effectiveness through an

adequate legal system of protection. Further, in the case of life, regarding the importance of this right and the irreparable nature of its damage, this guarantee includes protection by criminal law (CC Judgement STC 53/1985, of 11 April, points 4, 7 and 12).

The CC Judgement 53/1985, of 11 April, examined the validity of the law that partially decriminalized abortion, allowing a voluntary interruption of pregnancy when any of the indications provided by law were given (*serious danger to life or health of the pregnant woman*, *pregnancy as a result of rape* or *probability of serious physical or mental defects the foetus*). The judgement held (*a*) that *the Constitution protects life as a fundamental value of the legal order*; (*b*) that *it cannot leave life unprotected at that stage, thus life is not only a condition for a independent life from the womb, but is also a moment of the development of life itself*; and (*c*) that therefore *life of the nasciturus "constitutes a legal value whose protection is founded in that constitutional precept", although the nasciturus is not the holder of the fundamental right* (points 3 to 6). That ruling took into account the wording of the International Covenant on Civil and Political Rights (art. 6) and article 2 of the Rome Convention, as well as the interpretation offered by the European Commission on Human Rights.

Moreover, this doctrine has been decisive for the examination of the laws regulating in Spain the donation and use of human embryos and foetuses or their cells (adjudicated at CC Judgement STC 212/1996, 19 December), and assisted reproduction techniques (CC Judgement STC 116/1999, 17 June).

Concerning the end of life, scarce constitutional jurisprudence (only established on terrorists' hunger-strike) has stressed that the right to life doesn not include a right to dispose of it. Suicide is simply a lawful act of the citizen, thus it's not prohibited, however it cannot be considered a subjective right, nor a fundamental right allowing to demand from public powers a positive support to obtain the oneself' death (CC Judgement STC 120/1990, of June 27). The European Convention on Human Rights was taken into consideration by the Constitutional Court from the perspective of prohibition of inhuman or degrading treatment (art. 3 ECHR).

Recently, the Constitutional Court has adjudicated on the constitutionality of the law which limited the universal jurisdiction of national criminal courts to prosecute serious crimes (CC Judgement STC 140/2018, 20 December, point 5). In its reasoning, the Constitutional Court of Spain took

into account the Strassburg jurisprudence that states that the right of access to justice would be limited by the doctrine of state immunity (ECHRJ of 21 November 2001, *Case Al-Adsani v. Spain* and 14 January 2014, Case *Jones & others v. United Kingdom*), and that the principle of universal prosecution of any international crime is not-binding, quoting, inter alia, the death of a citizen of a CoE'Member State (judgment of 7 January 2010, Case *Rantsev v. Cyprus & Russia*).

II. II Freedom of expression

What is the original wording of the provision protecting this right in your national catalogue?

Is it possible to restrict the right? If so, how and under what conditions?

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Freedom of speech is guarateed at article 20 of the Spanish Constitution:

«1. The following rights are recognised and protected:

a) the right to freely express and disseminate thoughts, ideas and opinions trough words, in writing or by any other means of communication;

b) the right to literary, artistic, scientific and technical production and creation;

c) the right to academic freedom;

d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to invoke personal conscience and professional secrecy in the exercise of these freedoms.

2. The exercise of these rights may not be restricted by any form of prior censorship.

3. The law shall regulate the organisation and parliamentary control of the social communications media under the control of the State or any public agency and shall guarantee access to such media to the main social and political groups, respecting the pluralism of society and of the various languages of Spain.

4. These freedoms are limited by respect for the rights recognised in this Title, by the legal provisions implementing it, and especially by the right to honour, to privacy, to personal reputation and to the protection of youth and childhood.

5. The confiscation of publications and recordings and other information media may only be carried out by means of a court order».

Right from the outset, the Constitutional Court case-law took into account the limits laid down in Article 20 (4) CE. Further, it always took into consideration the parameters offered by the Rome Convention (especially Article 10). For instance, at CC Judgement 62/1982, of 15 October, our Court adjudicated on the criminal conviction on public scandal of the publisher of a book (titled "A Ver"), intended for sexual education of children: its legal argumentation was very much based on the ECHRJ of 7 December 1976, Case *Handyside*, which decided on a similar case (points 5 and 6). In conclusion, the perspective offered by Article 10 ECHR has led to a strict interpretation of the limitations that may be imposed by public authorities on freedoms of expression and information, especially for the media (as said in CC Judgements STC 107/1988, 8 June, or 51/1989, 22 February, on insults to The Justice or The Army; STC 171/1990, 12 November, and 204/2001, 15 October, on protection of the right to honour of individuals). Furthermore, at Judgement 187/1999 of 25 October 1999 The Constitutional Court of Spain examined the lawfulness of a judicial-ban on the broadcasting of a TV programme, adopted in the context of a previous criminal case for slander and libel, in order to protect the fundamental rights of potential victims; this constitutional judgement took into consideration several Strasbourg' cases (points 8 - 10).

The fight against terrorism gave rise to a nuanced jurisprudence at Spanish Constitutional Court, with an evident influence of the Rome Convention. For instance, the condemnation of the editor of the newspaper "Egin" for publishing two press releases of ETA terrorist organisation (CC Judgement STC 159/1986, 16 December, point 5); the convinctions for 'collaboration with an armed terrorist group' imposed on the leaders of a political party

who had sent to the media, as electoral propaganda, videos recorded by hooded ETA terrorist members (CC Judgement STC 136/1999, 20 July); the illegalization of political parties or electoral coalitions when 'their activity seek to deteriorate or destroy the regime of freedoms or eliminate the democratic system' (CC Judgements SSTC 5/2004, of 16 January; 31/2009, of 29 January, in accordance with the doctrine settled in CC Judgement STC 48/2003, of 12 March); or the case on the new crime of exaltation of terrorism (CC Judgement STC 112/2016, of 20 June, points 3 and 4 and dissenting opinions) -this latter judgment also took into account the Framework Decision on combating terrorism (2002 and 2008) and the Convention on the Prevention of Terrorism (2005)-.

More broadly, the Constitutional Court has applied the European Convention on Human Rights when exercising constitutional control over Spanish anti-terrorist legislation, as shown by the relevant Constitutional Court Judgements SSTC 199/1987 of 16 December (points 5.3 and 6.1) and 48/2003 of 12 March (point 12).

Finally, the abuse of fundamental rights and -in particular- the interdiction of hate-speech have led to several significant Constitutional Court Judgements: (*a*) STC 214/1991, of 11 November, on a civil compensation for denying the Holocaust; (*b*) STC 176/1995, of 11 December, on a conviction for crimes of "insult and mockery of a religious confession" for the publication of the illustrated album "Hitler = SS"; and (*c*) STC 235/2007 of 7 November (Case *Librería Europa*) which declared the constitutionality of the crime of "spreading ideas or doctrines justifying the crime of genocide, such as the Holocaust" but refused that "the mere diffusion of conclusions drawn regarding the existence -or not- of certain facts" could be considered a crime. In these judgements the Constitutional Court of Spain precisely took into account, in addition to Article 10 ECHR, other sources of international law, such as the UN Convention on the Prevention and Punishment of the Crime of Genocide, as well as various resolutions of the Committee of Ministers of the Council of Europe and of the European Parliament on hate-speech and fight against racism, antisemitism & xenophobia.

II. III Right to privacy/right to respect for private life/right to private life

What is the original wording of the provision protecting this right in your national catalogue?

Is it possible to restrict the right? If so, how and under what conditions?

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The Spanish Constitution declares in its article 18: «1. The right to honour, to personal and family privacy and to the own image is guaranteed.

2. The home is inviolable. No entry or search may be made without the consent of the occupant or a legal warrant, except in cases of flagrante delicto.

3. Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary.

4. The law shall limit the use of data processing in order to guarantee the honour and personal and family privacy of citiziens and the full exercise of their rights».

Further, Article 39 of the Constitutiton, provides the following guiding principles for social and economic policy: «1. The public authorities shall ensure the social, economic and legal protection of the family.

2. The public authorities likewise shall ensure full protection of children, who are equal before the law, irrespective of their parentage and the marital status of the mothers. The law shall provide for the investigation of paternity.

3. Parents must provide their children, whether born within or outside wedlock, with assistance of every kind while they are still under age and in other circumstances in which the law is applicable.

4. Children shall enjoy the protection provided for in the international agreements which safeguard their rights».

First, Spanish constitutional jurisprudence initially developped autonomously, with no reference to international texts other than the

interdiction of "arbitrary or illegal" interferences on privacy referred to in article 17.1 of the International Covenant on Civil and Political Rights. The first references to the European Convention on Human Rights were of a general nature (as shown in CC Judgements SSTC 151/1997, of 29 September, point 5, and 201/1997, of 25 November, point 6), except in specific aspects. Hence, the ECHR case-law has been decisive in interpreting the fundamental right to secrecy of communications (set at art. 18.3 of the Spanish Constitution). Since the publication of CC Judgment 85/1994, of 14 March, the Spanish Constitutional Case-law has requested, not only judicial authorisation for any measure regarding telephone intervention -which should in all cases be authorised by law-, but also motivated order by the Court or examining judge which adopts it. The Constitutional Court acknowleged that this position coincided with the doctrine developed by the Court of Strasbourg in application of Article 8 of the European Convention on Human Rights (expressly quoting the ECHRJ of 6 September 1978, Case *Klass*, and ECHRJ 2 August 1984, Case *Malone*). Since then, the evolution of the jurisprudence established by the Court of Strasbourg has decisively influenced the case-law of the Spanish Constitutional Court, as shown in CC Judgments 49/1999 of 5 April, 184/2003 of 23 October and 70/2007 of 16 April. Likewise, the Rome Convention has exerted a great impact, for instance, in the field of the right to freedom against potential aggressions to human dignity and freedom against illegitimate use of data processing, which the Spanish Constitution calls "informática" (*TIC*) at art. 18.4 (STC 254/1993, July 20, point 6). This is awarded at the most relevant Constitutional Court Judgemnts issued in this field, such as SSTC 292/2000, of 30 November (protection of personal data), or 17/2013, of 31 January (communication of local-census data).

Second, CC Judgment 119/2001 of 24 May, rendered by the Plenary of the Spanish Constitutional Court, adapts the interpretation of the fundamental right to privacy (art. 18 EC) to that derived from European Law (art. 8 ECHR): it did so incorporating the doctrine of the ECHRJ Case *López Ostra v. Spain*, of 9 December 1994 (Claim n.16798/90). The way in which the Spanish Constitutional Court accepted that “serious noise emissions in private homes (such as noise or overhelming unpleasant odours) which are harmful to the environment, violated fundamental rights», was set aside by the Court of Strasbourg, considering that «the burden of proof required by Spanish jurisprudence was excessive» (ECHRJ Case *Moreno Gómez v. Spain*, 16 November 2004, Claim n. 4143/02).

Third, the right to family' privacy (Art. 18.1 EC) and the right to respect for family life (Art. 8.1 ECHR) represent a point of conflict between SCC and ECHR. In fact, at CC Judgement STC 236/2007, of 7 November, it was declared that «the regulation of the foreigners' right -residing in Spain- to family reunification is not subject to the legal reserve of organic law (art. 81.1 EC) neither to the legal reserve established for the "rights and freedoms recognized in chapter II" (art. 53.1 EC), therefore the references to the *regulation made by the Law* on the rights and freedoms of foreign' nationals living in Spain (and their social integration) had not infringed those constitutional provisions, as the former law does not develop the fundamental right to privacy».

In addition, CC Judgement 236/2007 at point 11 stated that the «jurisprudence of the European Court of Human Rights, in contrast to the doctrine set out by this Court, has deduced from that precept [art. 8.1 ECHR] the existence of a 'right to family life', which would incorporate the mutual enjoyment by parents and children of each other's company as one of its fundamental elements (ECHRJ Case Johansen, 27 June 1996, § 52) »; but it statted that «our Constitution does not recognize a 'right to family life' in the same terms in which the jurisprudence of the European Court of Human Rights has interpreted art. 8.1 ECHR, and even less a fundamental right to family reunification, since none of these rights is included in the content of the right to family privacy guaranteed by Art. 18.1 CE. In the same line, CC Judgement SSTC 60/2010, October 7, points 8.b and 9; 186/2013, November 4, point 6). According to reiterated Spanish case-law, this divergence does not mean that "the vital space protected by the 'right to family life' derived from arts. 8.1 ECHR and 7 of the Charter of Fundamental Rights of the European Union (EUChFR), and, what matters most here, the autonomous configuration of affective relationships and family & coexistence relationships, lack of protection within our constitutional order. The "'right to family life" derived from arts. 8.1 ECHR and 7 EUChFR is not one of the dimensions included in the right to family privacy of art. 18.1 EC»; hence, its protection, within our constitutional system is found in the principles of our Constitution that guarantee the free development of personality (art. 10.1 CE) and that ensure the social, economic and legal protection of family (art. 10.1 CE). 39.1 CE) and children (art. 39.4 CE), whose effectiveness, as may be deduced from article 53.2 CE, cannot be demanded through the appeal on amparo (individual appeal for protection of a fundamental right), without prejudice to the fact that judicial practice should be based on their recognition,

respect and protection (art. 53.3 EC), which means that ordinary judges should take these principles specially into account when exercising their power to interpret and apply" laws (STC 186/2013, FJ 7)».

Further, as for EUChFR, it was early taken into account by the Spanish Constitutional Court: Judgement STC 292/2000, of 30 November (mentioned above in relation to the Rome Convention), defined the guarantees which, according to Article 18.4 CE, protect citizens' personal data, in conformity with Article 8 of the Charter, as well as Directive 95/46/EC of the European Parliament and of the Council, of 24 October 1995 (point 8). The EUChFR was taken into consideration in more recent resolutions, once it entered into force in 2009. For instance CC Judgement 58/2018 of 4 June (points 5-7) confirms the existence of a right to be forgotten in the digital public sphere, following the doctrine of the ECJ *Google Spain* of 13 May 2014 (C-131/12) and also applies it to the browser that offers a communication method on the Internet.

Finally, CC Judgement STC 64/2019, of 9 May (point 4), declares that «the right of minors to be heard in proceedings affecting their rights (art. 24.1 CE) is enshrined in the Charter, although in a more general way than in international conventions on the rights of the child».

II. IV Freedom of religion

What is the original wording of the provision protecting this right in your national catalogue?

Is it possible to restrict the right? If so, how and under what conditions?

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

In this matter, the decisive constitutional declaration is to be found in article 16 of the Spanish Constitution: «1. Freedom of ideology, religion and worship of individuals and communities is guaranteed, with no other

restriction on their expression than may be necessary to maintain public order as protected by law.

2. No one may be compelled to make statements regarding his religion, beliefs or ideologies.

3. There shall be no State religion. The public authorities shall take the religious beliefs of Spanish society into account and shall consequently maintain appropriate cooperation with the Catholic Church and the other confessions».

First and foremost, constitutional jurisprudence in this area has not been influenced by the EUChFR and only slightly by the ECHR. CC Judgment STC 46/2001, of 15 February, adjudicating on the refusal of the Spanish authorities to register the *Unification Church* as a religious entity, underlined that *Spanish legislation is in line with Article 9 ECHR*. The only limit to the exercise of freedom of religion and worship is «the protection of the right of others to exercise their public freedoms and fundamental rights, as well as the safeguarding of security, health and public morality, that constitute elements of public order protected by law in the context of a democratic society». This judgement stressed that, as the "only limit" to the exercise of the fundamental right, «*public order* cannot be interpreted as a sort of preventive clause against eventual risks, because in such a case it becomes the greatest danger for the exercise of that right of freedom. An understanding of the *public order* clause consistent with the general *principle of freedom* -that informs the constitutional recognition of fundamental rights-, leads us to consider that, as a general rule, it is only when a certain danger to 'public safety, health and public morality' -as they should be understood in a democratic society-, has been accredited in a court of law that it is appropriate to invoke *public order* as a limit to the exercise of the right to freedom of religion and worship» (point 11). Furthermore,the threat of specific actions by certain sects or groups using recruitment methods, which may undermine the free development of the personality of their followers, cannot be ignored: «In this very singular context, the exceptional preventive use of the aforementioned *public order* clause cannot be considered contrary to the Constitution, provided that it is directly aimed to safeguarding *public safety, health and public morality inherent in a democratic society*, that the elements of risk are duly accredited and that, in addition, the measure adopted is proportionate and appropriate to the aims pursued», quoting the judgements handed down by

the Court of Strasbourg in the cases *Kokkinakis, Hoffman and C.R. v. Switzerland* (FJ 11).

Besides that, CC Judgement 11/2016 declared unconstitutional that a pregnant woman who had an abortion, after 22 weeks of gestation, was denied permission to incinerate her unborn child in a civil and family ceremony and to bury her with dignity. In this appeal of amparo (individual appeal for protection of a fundamental right) the plaintiff alleged a violation of her religious freedom. However, CC Judgement 11/2016 of 1 February (point 2) considered that the issue should be sorted out from the prism of family privacy, following the approach of the ECHR Case-law established in analogous or similar cases.

Secondly, the relationship between religious freedom and the right to education has produced important judgments, starting with CC Judgement STC 5/1981, of 13 February (point 7), on the status of schools. Some CC decisions have made references to Art. 9 ECHR, as well as to the right of parents to ensure that their children receive religious and moral instruction in accordance with their own convictions (Art. 2 of the Additional Protocol to the Convention, 1952; Art. 27.3 CE). Further, CC Judgement 74/2018 of 5 July (point 4) took these rules into account when adjudicated on the public funding of private educational establishments, through the regimen of 'educational agreements'; these agreements could offer a *differentiated education* by promoting schools for boys and schools for girls. This judgement was based on the asumption that this type of education is not discriminatory *per se*, but rather a pedagogical option chosen by parents in the exercise of their educational freedom (CC Judgement STC 31/2018, 10 April). Therefore, the denial of the system of agreements lacked a legal basis and –consequently- violated the fundamental right.

Thirdly, ideological freedom, devoid of any religious significance, has been alleged by various parties and electoral groups close to basque-abertzale left ideology: they argue that Basque Country is a nation and it should declare its independence from Spain. Constitutional case-law has reiterated that this sort of speech is protected by ideological freedom and freedom of expression (arts. 16.1 and 20 CE). Nevertheless, some basque-abertzale political parties (such as Herri Batasuna, in particular in CC Judgements SSTC 5/2004 and 6/2004, of 16 January) were declared illegal and dissolved; but not because of their ideas or their electoral programme, but for having collaborated with the ETA terrorist activities (duly accredited in a judicial process). The dissolution of those political entities was based on

the Political Parties Law still in force (Organic Law 6/2002, of 27 June), whose validity was examined in CC Judgement STC 48/2003 of 12 March, which took full account of the criteria laid down in the jurisprudence of the ECHR on the dissolution of political parties (point 12).

Further, Spanish case-law has emphasized that the effects of the dissolution of a party, which can only take place by virtue of a judicial sentence dictated prior to a due trial, are limited to the immediate cessation of its activity and to the liquidation process of its patrimony. However, the dissolution of a political party should not prejudice the individual rights of its leaders and members, whose behaviour has only been judged *prima facie* during the dissolution process, for the purpose of assessing the party's trajectory. In particular, the dissolution of a political party does not entail the deprivation of the right to vote, active or passive, of its promoters, leaders or members (CC Judgements SSTC 85/2003, 8 May, FJ 23; 99/2004, 27 May, FJ 19; 68/2005, 31 March, FJ 10).

Fourthly, the refusal of blood transfusions, founded by Jehovah's Witnesses on their religious beliefs, is covered by the right to religious freedom, interpreted in accordance with the Rome Convention. However, this free decision of the citizen does not imply that the refusal of NHS' doctors to perform a surgical intervention under these conditions, on the basis of *lex artis*, is unreasonable; nor does it oblige public administration to subsidize surgery performed in a private hospital (CC Judgement STC 166/1996, 28 October). Besides that, religious freedom prevents parents from being convicted of 'homicide committed by omission' when they refuse to convince their minor child to accept blood transfusions against their religious convictions, a rejection that led their child to death (CC Judgement STC 154/2002, 18 July). Both cited judgments took into account the scope protected by the freedom in article 9 of the ECHR (points 2 and 7, respectively).

Fifthly, the relationship between freedom of belief and conscience' objection was settled by CC Judgement STC 15/1982 of 23 April (point 6), relying on art. 9 ECHR and on the interpretation supported by the Council of Europe on this issue. In that judgment, the Court held that the constitutional rights of legal configuration have a mínimum core content, protected directly by the Constitution (interpreted in accordance with European and international human rights law); this latter content does not depend on whether the legislator has developed its provisions through the corresponding legal dispositions or not. In that specific case, as Parliament

had not legislated on conscience objection to military service (art. 30.2 EC), the judgment concluded that the objector was entitled to postpone his enlistment in the army until the legislation regulating the procedure and social service alternatives was issued (see also CC Judgements SSTC 160/1987 of 27 October and 55/1996 of 28 March).

Nevertheless, the scope of objection of conscience is far from being peaceful, even when its interpretation is guided by the European Convention on Human Rights. This controversy is highlighted by CC Judgement 145/2015 of 25 June, which granted partial protection to a chemist who had refused to dispense a medicament which active ingredient was *levonorgestrel* (the so-called *morning-after* pill) and condoms. The first of the three dissenting opinions attached to this judgment revealed that the references to Article 9 ECHR european case law need not lead to the end of constitutional discussions (CC Judgement STC 145/2015 of 25 June, Dissenting Opinion, paragraph 3).

By the way, this Dissenting Opinion contains the only reference made -so far- to the Charter of Fundamental Rights of the European Union in the field of ideological and religious freedom. The judge who signed this dissenting opinion underlined that Article 10.2 of the Charter recognizes the right to conscience objection "in accordance with the national laws regulating its exercise". Further, according with the explanations drawn up for the interpretation of the Charter, this right it is the only that lacks of an additional source of recognition, a fact that -in the judge's opinion- evidences that the reference to *national legislations* lead to the conclusions, firstly, of the absence of a "common constitutional tradition" to which the institutions of the Union could simply turn and, secondly, the need for recognition by the corresponding national legislator of the possibility of rejoin on the grounds of conscience in the different fields of activity that affect citizens' rights. "In other words, outside the Constitution and the Law, no citizen may raise his conscientiousness to a supreme standard and object whenever and however he pleases" (CC Judgement STC 145/2015, 25 June, Dissenting Opinion I, paragraph 3).

II. V Prohibition of discrimination

What is the original wording of the provision protecting this right in your national catalogue?

Is it possible to restrict the right? If so, how and under what conditions?

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

Article 14 of the Spanish Constitution protects the right to equality and non-discrimination:«Spaniards are equal before the law and may not -in any way- be discriminated against or on account of birth, race, sex, religion, opinion or any other personal or social condition or circumstance».

This article has been read in the light of the provisions of other precepts of the Constitution, in particular article 9, paragraph 2: «It is incumbent upon the public authorities to promote conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective, to remove the obstacles which prevent or hinder their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life».

First, the right to equality before the law (art. 14 EC) has been interpreted by the Spanish Constitutional Court, since the beginning, following the guidelines offered by the jurisprudence of the European Court of Human Rights. This can already be deduced from the Judgement of Plenary 22/1981, of 2 July: "The European Court of Human Rights has pointed out, in relation to Article 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms, that inequality does not necessarily constitute discrimination in all cases.

Article 14 of the European Convention on Human Rights- declared the aforementioned Court in several of its Judgments - does not prohibit any difference of treatment in the exercise of rights and freedoms; equality is only violated if the inequality is devoid of an objective and reasonable justification, and the existence of such justification must be assessed in relation to the purpose and effects of the measure under consideration, with special emphasis on a reasonable relationship of proportionality between the means employed and the aim pursued" (STC 22/1981, FJ 3).

This doctrine has been maintained since then, as evidenced by CC Judgments 19/2011 of 3 March (point 10); 118/2012 of 4 June (point 4); or 91/2019 of 3 July (point 5), among many others. The decisive influence of the Strasbourg doctrine has been plainly acknowledged in numerous cases (as shown, for example, by CC Judgements SSTC STC 122/2008 of 20 October, point 6, or 160/2012 of 20 September, point 7).

Second, the influence that EU Law has -so far- had is more limited, but not negligible. The doctrine of the European Court of Justice has exerted a considerable influence on the right to equality. It is true that, on the general level of the right to equality, the influence of the Rome Convention and Strasbourg case-law has been relevant, as we have just mentioned. But where EU Law and Luxembourg case-law has been decisive in the field of discrimination.

A) Equality of rights affect firstly between women and men. As an example, it would be enough to point out that the constitutionality of the effective equality' measures adopted by the Spanish legislator has been examined by the Spanish Constitutional Court on the basis of EU Law and case-law. For instance, on electoral matters, Organic Law 3/2007, of 22 March, established that in elections to public posts, only gender balanced lists may be drawn up. CC Judgement 12/2008, of 29 January, declared constitutional this legislative mandate in the light, among other norms, of those of the EU, and it stressed the fact that the reform introduced by the Treaty of Lisbon of 2007 reinforced the mandate on gender equality (point 2).

B) Other no less significant examples may be mentioned. The fact that the Spanish Constitution forbids direct as well as indirect discrimination on the grounds of sex, is inspired by EU Law and jurisprudence. This was expressly stated at CC Judgments 253/2004, of 22 December (point 7), 61/2013, of 14 March (point 5) or 91/2019, of 3 July (points 4.c and 7), which declared unconstitutional different paragraphs of social security legislation that harmed part-time workers, which are largely women. Similarly, the dismissal of a pregnant woman constitutes discrimination on grounds of sex expressly founded on European Union Law; CC Judgment 41/2002 of 25 February (point 3) expressly mentioned Directives 76/207/EEC and 92/85/EEC, as well as various judgments of the Court of Luxembourg.

C) Another reason for discrimination has been declared contrary to the Spanish Constitution following the criterion offered by EU Law: discrimination on the basis of sexual orientation. The conclusion that the interdiction of discriminations of art. 14 CE englobe measures that damage a person because of their sexual orientation, was reached by CC Judgement 41/2006, of 13 February, pursuant article 13 of the ECT (now art. 19 of TFEU), art. 21.1 of EUChFR (not without standing that it was not in force at that time) and several Directives, although it did not go so far as to quote specific sentences. On the contrary, it did so in CC Judgement 41/2013 of 14 February, when it declared unconstitutional a social security legislation that conditioned the grant of a specific survivor's pension to the requirement that the deceased and the beneficiary had had joint children -but it did so to warn that the issue was not resolved by EU Law- (ECJJ, C-267/2006 *Maruko* of 1 April 2008,).

D) Finally, the Spanish Constitution prohibition of discrimination on the grounds of disability has also been based on EU Law. CC Judgment 3/2018 of 22 January states that "Article 21 of EUChFR includes explicitly disability as one of the factors of protection against discrimination, while Article 26 'recognises and respects the right of disabled persons' to benefit from measures for their integration. Council Decision 2010/48/EC of 26 November 2009 concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities has incorporated the latter into the Union's legal order. As a result, the Court of Justice of the European Union itself, with regard to the references by national courts of questions for a preliminary ruling on the aforementioned Directive 2000/78/EC, has been using the United Nations (UN) Convention of 2006 as a source of interpretation, regarding the right to non-discrimination on the basis of disability at work, making its own the concept of disability that the UN convention brings" (point 5.e, with background in CC Judgement SSTC 269/1994, of 3 October, point 4, and 10/2014, of 27 January, point 4).

Third, the Spanish Constitutional Court has defined the right to equality (art. 14 CE) inspired by art. 14 ECHR and, now, Protocol No. 12 of 4 November 2000, as interpreted by the doctrine of the Court of Strasbourg. However, it has not accepted its criterion on one point: as summarized in

CC Judgement 181/2000 of 29 June (point 11), "according to reiterated and constant doctrine of this Court, the right to equality of art. 14 of the Constitution does not enshrine a right to unequal treatment (CC Judgement STC 114/1995, 6 July, point 4), nor does it protect the lack of distinction between different assumptions, so there is 'no subjective right to unequal normative treatment' (CC Judgement STC 16/1994, 20 January, point 5), falling the so-called 'discrimination through indifferentiation' (CC Judgement STC 308/1994, 21 November, point 5) outside the scope of this constitutional precept. In brief, 'the principle of equality cannot form the basis of a reproach of discrimination for indifferentiation' (CC Judgement STC 164/1995, 13 November, point 7)". This led the Spanish Constitutional Court to declare unconstitutional the motor-vehicle insurance law, which had introduced a system for assessing personal injuries by means of a scale, which could violate the right to equality by establishing equal treatment for different cases.

II. VI Right to liberty

What is the original wording of the provision protecting this right in your national catalogue?

Is it possible to restrict the right? If so, how and under what conditions?

Has your court considered this right/its interpretation or enshrinement in more detail? If so, please provide practical details and list the catalogues of human rights applied.

Is there a difference between the case law of your court and the case law of international courts with respect to the protection of this right?

The Spanish Constitution protects the right to personal freedom under article 17:«1 “Every person has a right to freedom and security. No one may be deprived of his or her freedom except in accordance with the provisions of this article and in the cases and in the manner provided by the law”.

2. “Preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the

facts; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours".

3. "Any person arrested must be informed immediately, and in a manner understandable to him or her, of his or her rights and of the grounds for his or her arrest, and may not be compelled to make a statement. The arrested person shall be guaranteed the assistance of a lawyer during police and judicial proceedings, under the terms established by the law".

4. "A habeas corpus procedure shall be regulated by law in order to ensure the immediate handing over to the judicial authorities of any person arrested illegally. Likewise, the maximum period of provisional imprisonment shall be stipulated by law».

Starting from the outset, Spanish case-law has always taken into account the human rights involved (as evidenced by CC Judgements SSTC 16/1981, 18 May, point 5; 41/1982, 2 July, point 5, or 44/1983, 24 May, point 1). The progressive incorporation of the parameters of judgement established by the Court of Strasbourg into the fundamental rights protected by the Spanish Constitution has marked the evolution of constitutional doctrine. Several significant exemples can be mentioned:

Firstly, the assertion that the maximum duration of pre-trial detention (art. 17.4, second paragraph of the Spanish Constitution) is not freely fixed by law, although "a superficial reading of the text could lead to the conclusion that this constitutional norm serves as a blank-cheque and therefore, that the ordinary legislator is free to set the maximum duration of pre-trial detention" (CC Judgement STC 8/1990, 18 January, point 3). Due to the fact that "freedom is a superior value of our legal system (art. 1.1 CE), the constituent did not only call for the increase of the speed of the criminal process (art. 24.2 CE), but also demanded and requested through art. 17.4 CE that *no citizen may remain in pre-trial detention beyond a reasonable period*, which the ordinary legislator has established in two years as a maximum limit for serious crimes, but that in no way excludes that this period, due to the application of the aforementioned constitutional precepts, could be significantly shorter, given the nature of the case" (CC Judgement STC 8/1990, 18 January, FJ 4). Further, because "it is not the mission of the Constitution to protect illusory rights, but real, effective and immediately applicable by all public powers" -which is one of the vectors of European case-law.

Secondly, in relation to the conditions justifying its adoption as a provisional measure of deprivation of liberty while the criminal case is pending, the figure of pre-trial detention was also subject to the standards of the 1950 European Convention. CC Judgment 128/1995 of 26 July 1995 outlined that this measure should be understood as "strictly necessary, of subsidiary application, provisional and proportionate to the purposes which constitutionally justify and delimit it… in essence by the need to ensure the process develops properly" (point 3). Therefore, it stated that criminal courts could not limit themselves to assessing the criteria established by the law in force at the time for ordering the provisional detention of the accused (the seriousness of the crime object of the accusation and rational evidence of criminality) Further, they had to take into consideration the factors deduced from article 5 ECHR by the European Court of Human Rights, which only admits as legitimate purposes of the preventive deprivation of liberty "the need to avoid certains risks stemming from the behaviour of the accused, that might be relevant to the process and, in some cases, to the execution of the judgement, namely: his subtraction from the action of justice, obstruction of criminal investigation and, on a different but closely related plane, criminal recidivism" (CC Judgement STC 128/1995, point 3).

This doctrine gave rise to grant a large number of appeals of *amparo* (individual appeal for protection of a fundamental right) until, finally, the Spanish Parlament modified the criminal proceedings legislation governing provisional detention in the sense pointed out by constitutional case-law: this was expressly stated in the preamble to Organic Law 13/2003, of 24 October, which gave its current wording to articles 503 and 504 of the Criminal Procedure Law. It should be noted that, at that time, a question of unconstitutionality was pending over these legal precepts, which was finally declared inadmissible (CC Judgement STC 47/2000, of 17 February, and CC Order ATC 154/2004, of 28 April) by virtue of the legislative reform. Therefore, the constitutional criteria deduced from Articles 17 CE and 5 ECHR remain fully valid, as evidenced by CC Judgements SSTC 84/2018 of 16 July and 62/2019 of 7 May.

Thirdly, the Rome Convention has exerted great influence on the constitutional criteria on police detentions (Art. 17.2 CE). For instance, the requirement for a person to accompany the police to police station in order to verify his or her identification was declared as "deprivation of liberty" in the constitutional sense (art. 17 EC), according to the criteria taken into

account in the interpretation of art. 5 ECHR (CC Judgement STC 341/1993, of 18 November, points 3 and 4). Further, constitutional guarantees also apply outside the national territory, as long as the Spanish lawenforcers perform outside Spain, as in the case of the interception at sea of a drug-smuggling vessel, in CC Judgement 21/1997, of 10 February, which took into account art. 1 ECHR and its jurisprudence (point 2). However, this latter was taken into consideration in the aim to modulate the application of constitutional requirements (especially at points 4 and 5).

Of course, the EUChFR (2000 - 2007) has had more recent interpretative effects -but no less relevant for that reason. For instance, CC Judgment 53/2002, of 27 February, examined the validity of the law which provided that asylum-seekers should remain at the border while their application was being treated for admission. In its reasoning, it took into account that the Charter has included among the "Freedoms" of Chapter II both the right of asylum and the right not to be expelled, extradited or returned to a state where there is a serious risk of being subjected to the death penalty, torture or other inhuman or degrading treatment or punishment (arts. 18 and 19 EUChFR): in this way, the close connection between asylum, immigration control and european security "does not operate at the expense of the right of asylum but, rather, starting from its necessary validity within the Union" (point 3).

Another example is CC Judgement 21/2018, of 5 March, which has protected the right of a detained person to have access to the relevant elements of the police file, as an integral part of the right to know the reasons for any deprivation of liberty (Myranda clause). In order to reach this conclusion, the wording of Article 17.3 CE has been decisively reinforced by the provisions of the European Charter of Fundamental Rights (Articles 6 and 47) and, in its development, by Directive 2012/13/EU of 22 May on the Right to information in criminal proceedings, duly incorporated into Spanish law (point 5). In a complementary, instrumental an esential way to the right to receive information on the reasons for detention and to challenge the lawfulness of detention, the new legal regulation recognises the right of every detained person to "have access to the elements of the actions that are essential to challenge the legality of the detention or deprivation of liberty"; " in order to be sufficient, the reasons for detention must be supported by objective data and the claimant should be able to contrast and verify them by accessing the elements of the proceedings that support it. Evidently, only if

the detainee, duly advised, receives sufficient information on the reasons for which he has been deprived of liberty will he be able to verify its veracity and sufficiency" (CC Judgement STC 21/2018, point 7).

Madrid, 20th November 2019.