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Spanish Judicial Decisions in Public International Law, 2008

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I. INTERNATIONAL LAW IN GENERAL

II. SOURCES OF INTERNATIONAL LAW

III. RELATIONSHIP BETWEEN INTERNATIONAL LAW AND MUNICIPAL

1. Constitutional Court (CC) Ruling no. 129/2008 of 26 May
Enforcement of Judgements of the European Court of Human Rights (ECHR)

"II. Legal Grounds

1

The Court is asked to declare Constitutional Court Appeal 220/2001, of 18 July (RTC 2001, 220 AUTO) null and void and not to admit the appeal for legal protection entered against the Decision by the Third Chamber of the Supreme Court of 28 September 1999 (RJ 1999, 7931) that dismissed the appeal to the Supreme Court of the National Court Decision of 14 February 1995 that, in turn, dismissed the administrative contentious appeal of the denial of damages by the Ministry of Justice as compensation for time spent in prison on criminal charges for which the subject was ultimately acquitted on the grounds of violation of the right to be presumed innocent. In support of said position it is stated that no internal reparation has been made for the fundamental right to be presumed innocent that the European Court of Human Rights (ECHR) found to have been violated. Such reparation would require nullification of Ruling 220/2001, of 18 July (RTC 2001, 220 AUTO), and continuation of the appeal for legal protection which was halted until the such time as the pertinent Ruling was made.

2

In accordance with the doctrine of this Court (most recently included in Constitutional Court Decision 197/2006, of 3 July [RTC 2006, 197], which highlights the specificity of CC Decision 245/1991 [RTC 1991, 245], as cited by the plaintiff in support of his application), «from the regulation of the Convention itself and its interpretation by the European Court, it is derived that Court rulings are declaratory in nature and do not, in and of themselves, nullify or amend the acts, in this case the Decisions, found to be contrary to the Convention. [...] From a perspective of International Law and its binding force (Art. 96 Spanish Constitution [RCL 1978, 2836]), the Convention does not introduce a higher, supranational jurisdiction, in the technical sense of the term, into the internal legal order to review or directly control domestic judicial or administrative decisions, nor does it impose on Member States any specific procedural nullification or rescission measures to ensure reparation in the event the Convention is violated, as found by the Court». «The European Convention on Human Rights does not mandate that European Court of Human Rights Decisions be enforced domestically by nullifying the authority of *res judicata* and the enforcement of the national court decision that such Court found in violation of the Convention, nor does it confer on the subject the right to broaden the grounds as set forth under domestic Law in order to re-open the judicial proceedings which gave rise to a firm, enforceable Decision.»

Furthermore, the infringement of law set forth in the ECHR Decision is no longer current, as the European Court of Human Rights itself included in its Decision a compensatory statement that equitably repairs the harm set forth. As the Prosecutor states in his report, in Constitutional Court Appeal 96/2001, of 24 April (RTC 2001, 96 AUTO), the full Court accepted that when the European Court of Human Rights establishes equitable compensation at the expense of the Spanish State as a form of reparation, the Court's Decision must be considered as being executed by such compensation. Thus, having judged the applicability of compensating the plaintiff for the prison time served on charges of which he was ultimately acquitted, it is all the more necessary to consider that the injury has been repaired and that, therefore, the alleged injury is not current but rather past.

Therefore the Section

RULES

To dismiss the application for nullification of Constitutional Court Appeal 220/2001, of 18 July, as set forth in this appeal for legal protection."

IV. SUBJECTS OF INTERNATIONAL LAW

1. Dec. by the High Court of Justice of the Basque Country of 8 April 2008
   Appeal for Reversal no. 3029/2007
   Drafted by: H.H. Manuel Díaz de Rábago Villar
   Immunity from attachment of property of a foreign State

"FIRST

The United States of America entered before this Court an appeal for reversal of the Decision by Labour Court No. 3 of Bilbao of 4 October 2007 that confirmed its rulings of 27 March and 29 May of the same year which, in the enforcement proceedings underway against said State to settle a pending payment of 91,421 euros of principal and 20,112.67 euros of interest and costs, ordered the seizure of the amounts to be reimbursed for VAT by the Tax Agency, as well as disbursement of the money obtained in partial compliance (34,894.97 euros) and service of the payment orders to the executants.

The appeal for reversal, based on whether the protection rule was paragraph a) or c) of Art. 191 of the reconsolidated text of the Law on Labour Procedure (RCL 1995, 1144, 1563) (Law on Labour Procedure), set forth two grounds on which it claimed, in essence, that the decision was illegal because the property was not subject to embargo since it was covered by immunity as property linked to the exercise of sovereignty in our country, and wherefore the appellant considers its right to effective judicial protection, as set forth in Art. 24.1 of our Constitution (RCL 1978, 2836) and Arts. 605, 606 and 609 of the Law on Civil Procedure (RCL 2000, 34, 962 and RCL 2001, 1892), in relation to Art. 22-3 of the 1961 Vienna Convention on Diplomatic Relations (RCL 1968, 155, 641), Art. 31 of the 1963 Vienna Convention on Consular Relations (RCL 1970, 395), Art. 3 of Royal Decree 3485/2000, of 29 December (RCL 2000, 3040), on Diplomatic, Consular and International Organization allowances and exemptions, and Constitutional doctrine based on Decisions 107/1992, of 1 July (RTC 1992, 107), 292/1994, of 27 October (RTC 1994, 292), and 176/2001, of 17 September (RTC 2001, 176), was violated. It its arguments it sets forth that reimbursement of VAT amounts affects transactions or property linked precisely to a sovereign right and that it would be entitled to immunity even if they arose from another type of transactions or property, pursuant to criteria applied by the Constitutional Court in the first of such decisions regarding the embargo of current accounts.

The complainants have opposed the appeal by invoking the same Constitutional Court Decisions and its Ruling 112/2002, of 1 July (RTC 002, 112 AUTO).

Before examining the matter and because it is not a minor issue, we set forth that the enforcement action was constituted in April 1996, enforcement was dispatched on 10 February 1997, and the enforcement proceeding was totally sterile until the embargo in question. A ruling of insolvency was issued for the United States of America on 8 March 2005, wherein enforcement measures included documentation evidencing the diplomatic treatment followed in compliance with said decision, showing, *inter alia*: 1) that the reason why the United States of America refused to voluntarily comply with the decision was that it considered that its decision to close its Consulate in Bilbao pertained to its sovereignty and it therefore did not have to pay any compensation over what corresponded to a lawful dismissal owing to cancellation of employment; 2) that the Tax Agency, in complying with the VAT embargo order, had set forth its criteria that it considered the property not subject to embargo because

the reimbursement was a result of the exemption from tax that foreign States enjoy in the *imperi* activity pertaining to their diplomatic and consular activities; 3) that the State Attorney also expressed to the Court that he considered this property not subject to embargo under Art. 22.3 of the Vienna Convention on Diplomatic Relations.

(…)

FOURTH

A) Not all a debtor's assets are subject to embargo, even if it means that a decision goes unenforced. The right to effective judicial protection of those who have obtained a firm court decision to be paid an amount is not necessarily violated therefore, since in the assessment of the interests at stake, other values can be considered to take precedence. Arts. 605, 606 and 607 of the Law on Civil Procedure (RCL 2000, 34, 962 and RCL 2001, 1892) contain premises involving property not subject to embargo, including property declared as such by some other legal provision or by Treaties ratified by Spain, nullifying any embargo of property not subject to embargo (Art. 609 Law on Civil Procedure).

In its Decision 107/1992 (RTC 1992, 107), our Constitutional Court set forth important guidelines in this matter relating to the property of foreign debtor States, and reiterated them in its Decisions 292/1994 (RTC 1994, 292) and 176/2001 (RTC 2001, 176) (cited above) and 18/1997, of 10 of February (RTC 1997, 18) as follows: 1) the immunity from enforcement of certain property of States is compatible with this fundamental right, but an undue extension or broadening of such provisions is not; 2) the property of diplomatic and consular missions of States is totally immune from enforcement, since it is protected by the Vienna Treaties referred to in the appeal. This guarantee affects mission and consular office premises, furnishings and other effects located therein, and means of transport. The current bank accounts used for their operation are considered to be included among such property under International Law, even when they serve activities not directly linked to acts of sovereignty (owing to the impossibility of differentiating balances and investigating movements); 3) with regard to the rest of a State's property, the property involved in the State's right of sovereignty is not subject to embargo, but the property related to its acts of management is; 4) the enforcement activity aimed at achieving compliance with the decision should involve, if necessary, collaboration by the Ministries of Finance and Foreign Affairs, and the latter may even be called upon to take appropriate steps through diplomatic channels.

This is doctrine that is not challenged by either the appellant or the plaintiffs. The discrepancy is in the determination of whether the embargoed VAT falls under such immunity.

B) The Chamber shares the opinion of the Court that has found the property to be subject to embargo for several reasons.

As a preliminary matter, we point out that neither the appealed decision nor those on which it is based accredit that the VAT to be reimbursed derives exclusively from the exemptions contemplated under Art. 3 of Royal Decree 3485/2000 (RCL 2000, 3040), nor does the appeal seek to present any such position, which is unequivocally factual in nature, through proper channels. It is true, nonetheless, that the appeal makes reference to a 4 June 2007 letter sent by the Tax Agency to the Court in the proceedings (pages 551 to 553 of the case file), in which the Executive Delegate of the Agency does so state, and therefore an interpretation of the scope of the complaint appropriately informed by criteria favouring the provision of judicial protection could allow us to take it into consideration. In that case, in the view of this Chamber, there arises an overriding to deny the non-embargo ability of this property, since it is a right of credit that arises solely, as the Court correctly reasons, from a tax privilege, which cannot be equated with property protected by absolute immunity from enforcement by the Vienna Conventions, as property of the Diplomatic or Consular Missions of a Foreign State that is involved in their operation. This lack of comparability is shown not only by the difference in type of property from one to the other (in one case, right over the property that the State itself has linked to its exercise of its sovereignty; on the other, the right of credit recognised by the State where the sovereignty is being exercised and which said State limits, additionally to criteria of reciprocity, as set forth in Art. 3 of the above mentioned Royal Decree). The constitutional criteria set forth previously comes into play here in regard to non-extension of immunity from enforcement when interpreting or applying its rules, precisely so as not to affect the right to effective judicial protection of those who have obtained a decision in their favour and do not achieve its compliance by the party ordered to so do.

This conclusion is further reinforced when the real reason the appellant refuses to comply voluntarily with the payment to which it was sentenced by firm decision is found, which is the questioning of the same enforcement order, refusing to comply with it for reasons that reveal its refusal to subject itself to our sovereignty to interpret compliance with Spanish labour law, as revealed by the response received through diplomatic channels by the Ministry of Foreign Affaire, when the Court resorted thereto in order, through such channels to achieve compliance with its Decision. In the face of such an attitude, revealing an obstructionist attitude in regard to complying with the Decision, after ten years of unfruitful enforcement efforts against a State regarding which maintaining that it is insolvent is an exercise of sarcasm, the right of effective judicial protection of the plaintiffs should be protected in an effective way, as done by the appealed order, in what constitutes a second reason to ratify the embargo ordered, following the line of defence of said fundamental right as under Constitutional Court Decision 18/1997 (RTC 1997, 18) in a case which was also involved a protracted, unproductive enforcement against a foreign State (Equatorial Guinea) and in which the enforcement was ultimately shelved (although only provisionally as is proper to labour cases) without exhausting the means still available, such as proceeding through diplomatic channels or the embargo

of amounts Spain recognises as being owed to such State as credit, aid, or subsidy not resulting from international treaty.

For the reasons stated above, the appeal should be dismissed.

(…)

WE HEREBY RULE

1º

To dismiss the appeal for reversal entered by the legal representatives of the United States of America against the Order by Labour Court No. 3 of Bilbao, of 4 October 2007, which is the enforcement of the Decision set forth in case 151/1996, brought by Mr. Jesus Luis y Ms. Mari Trini, against the appellant, and confirm the appealed Decision.

(…)".

V. THE INDIVIDUAL IN INTERNATIONAL LAW

1. CC Dec. No. 52/2008 of 14 April
   Fundamental right not to be subjected to torture

"II. Legal Grounds

1

The object of this appeal is to determine whether the resolutions appealed have violated the right of the appellant to physical and moral integrity (Art. 15 Spanish Constitution), to effective judicial protection (Art. 24.1 Spanish Constitution) and to due process of law (Art. 24.2 Spanish Constitution), in the stay and provisional shelving of criminal proceedings brought on a charge of torture, without having carried out all procedures relevant to reaching such a decision.

2

This Court has had the opportunity to rule on the requirements arising from the right to effective judicial protection (Art. 24.1 Spanish Constitution [RCL 1978, 2836]) in relation to judicial decisions to stay the criminal complaints brought regarding charges of torture or inhumane or degrading treatment in recent Constitutional Court Decisions 224/2007, of 22 October (RTC 2007, 224), and 34/2008, of 25 February (RTC 2008, 34).

This Court has underlined in said CC Dec. 34/2008, in line with ECHR jurisprudence of on this matter (for all, ECHR Decs. of 16 December 2003 [ECHR 2003, 82], Kmetty vs. Hungary, §37 and of 2 November 2004 [ECHR 2004, 65], Martinez Sala and others vs. Spain, §156), that the right to effective judicial protection of a person who complains of having been the victim of torture or inhumane or degrading treatment, according to the reinforced rule of motivation, requires a grounded and legally-based decision in accordance

with the absolute prohibition of such conduct, which «must take into account the gravity of the violation of this prohibition and the type of judicial action necessary to preserve it in the light of the difficulty of establishing proof and the special reliance on such judicial safeguarding of personal dignity, the central protective purpose of prohibition. It is noteworthy in this regard this judicial protection is doubly reinforced and has no equal in other complaints for judicial protection, since here judicial protection is sought against the violation of an absolute, fundamental right, the protection of which essentially relies on such judicial protection» (F. 6). Similarly, and in relation to the above, the same Decision also states that in these cases «the right to effective judicial protection is only met if an inquiry of the matter is held that is both sufficient and effective, since the protection requested consists initially in what is found out regarding what happened. Such compliance and effectiveness can only be evaluated in view of the specific circumstances of the complaint and what is charged, and based on the seriousness what is charged and its prior opacity, both features affecting the degree of judicial effort required under Art. 24.1 Spanish Constitution» (F. 6).

Furthermore, special emphasis as been placed on the fact that while this requirement does not involve opening an enquiry in any case nor does it require that all possible investigation procedures be carried out, «on the contrary, it violates the right to effective judicial protection in this area not to open or to close the enquiry when there is reasonable cause to think that the offence of torture or inhumane or degrading treatment may have been committed as alleged, and when such suspicions are shown to be able to clarified» (CC Dec. 34/2008 [RTC 2008, 34], F. 6), since «in regard to the investigation of signs of torture or cruel and inhumane or degrading treatment suffered in the custody of police authorities, the international Agreements signed by Spain and the tenor of Art. 15 of the Spanish Constitution establish a special mandate to exhaust all reasonable possibilities of enquiry as may be useful to clarify the facts. In such cases, in which the higher value of human dignity may be seen to be compromised by a special situation in which an individual finds him/herself when provisionally in the physical custody of the State, it is necessary to enhance the guarantees, so that the constitutional order can protect the individual who is *de facto* unprotected regarding any suspicion of excess against his/her physical or moral integrity» (CC Dec. 224/2007 [RTC 2007, 224], F. 3).

Lastly, the Court has set forth that to evaluate whether a reasonable suspicion of torture exists and if such suspicion can be dispelled, which would make closure of the investigation unconstitutional under Art. 24.1 of the Spanish Constitution, the specific circumstances of each case must be taken into consideration, and it is necessary to deal with, among others, the circumstance of the probable lack of evidence that exists in these types of crimes, which should, on the one hand, encourage the investigator to be diligent in effectively pursuing possible means of investigation and, on the other, in view of the difficulty of the victim's being able to provide means of evidence of their commission, make the principle of proof applicable as sufficient reason to initiate a judicial investigation. Likewise,

it is also pointed out that the official status of the defendants must be offset by judicial firmness in the face of strong resistance or delay in the provision of means of proof, with special attention given to the evidence proceedings whose origin is outside the institutions affected by the complaint, and with the presumption for investigative purposes that the injuries the detainee may potentially show after arrest which were inexistent prior to same can be attributed to the persons charged with his/her custody. Furthermore, it is emphasized as a requirement of rationality that the assessment of the judicial testimony of the complainant, a particularly appropriate means of investigation in complaints of torture or inhumane or degrading treatment, and that his/her prior declarations to physicians, the Police or court bodies, take notice that the effects of the violence exercised against an individual's freedom and self-determination do not stop when such circumstance physically ceases and the individual is placed at the disposal of the court, but that coercion can and normally does continue beyond the actual practice of same. (CC Dec. 34/2008 [RTC 2008, 34], F. 7).

3

From the above it should be concluded that in this case the decision to shelve the criminal proceedings initiated as a result of the complaint of torture by the appellant does not meet to the requirements of Art. 24.1 of the Spanish Constitution (RCL 1978, 2836), because when the investigation was closed reasonable suspicion existed of the possible commission of the facts charged, and furthermore, as also indicated by the Public Prosecutor, there were also means of investigation available to try to clarify such suspicions.

In fact, in this case the suspicion of truth regarding the facts denounced may not have been solid; however, from the perspective and in the judgment of this Court of Appeals, they were sufficient for the barely begun judicial investigation to be pursued, since there were means of investigation available to do so. Thus, as accredited in the proceedings and set forth in greater detail in the background, it is important to underline, first, that the detainee had to be transferred to a hospital at the beginning of his detention because he suffered «general discomfort and queasiness», whereby examination showed «slight redness in the upper right area of the shoulder» and a «heart rate of 96 beats per minute», compatible with the clinical finding of «queasiness in situation of anxiety.» Second, in the narrative in his complaint the appellant referred to specific physical signs as resulting from aggression by to police officers that caused the redness on his neck and back. Third, after a medical examination on 3 March 2002 it is reported in the appropriate police records that the physician prescribed a specific medication (Rovamycine 500) to be administered to the detainee every six hours, and there is no further information in the record regarding the reason for such prescription or the type of condition warranting prescription of said medication. Lastly, it is also pointed out that, as stated by the appellant, «when he was brought before the judge he told the Magistrate-Judge in charge of Central Examining Court No. 2 that he had been mistreated during his period of detention.»

4

In view of the situation set forth, sufficiently indicative of the facts denounced to proceed to investigate what happened, the reasons given by the judicial bodies are not in line with the strengthened requirements of law regarding effective protection to find that there is no reasonable suspicion that such facts took place and take the decision to close the investigation of same.

(…)

In conclusion, in view of the fact that regarding the charge of torture no effective judicial investigation was carried out, since, although judicial investigation was promptly carried out and showed certain content, it was closed when there still existed reasonable suspicion that the offence had been committed and there were still means available to clarify whether this was so, it is appropriate to grant the appeal on the basis of violation of the right to effective judicial protection (Art. 24.1 Spanish Constitution [RCL 1978, 2836]), in regard to the right not to be subject to torture or inhumane or degrading treatment (Art. 15 Spanish Constitution).

Reestablishment for the appellant of the integrity of law requires, as argued in CC Dec. 34/2008, of 25 February (RTC 2008, 34), F. 9, nullification of the proceedings challenged and retroactive return to the proceedings to dispense to the appellant the judicial protection called for."

2. CC Dec. no. 176/2008 of 22 December
The right not to be discriminated against on the grounds of sexual orientation

"b) On 24 May 2004 Ms. P.Q.F's attorney submitted a suit to this Court for amendment of definitive measures, seeking denial of custody to the father and total suspension of visitation and communication rights of the father regarding the child in common, alleging as grounds first, a certain lack of interest on the part of the father vis-à-vis the child, in addition to non-payment of child support except for a few times; and second, the fact that several months prior the father had commenced submitting to treatment to bring about a sex-change and had started using make-up and dressing as a woman.

(…)

2

As set forth in the background, since the date on which the Separation Decision was established, 2 April 2002, the appellant had been authorised visitation with his child in accordance with a court-approved regulatory agreement under which the child was turned over to his father on alternate weekends, from 10:00 a.m. on Saturday to 8:00 p.m. on Sunday, and also establishing the rules for custody of the child during the Christmas, Easter and summer vacation periods, dividing each period in two and assigning each parent one half on a rotating basis for even and odd years. As from the Decision of the Court of the First Instance No. 4 of Lugo of 18 October 2004, confirmed in its entirety in appeal

by the Decision issued on 19 May 2005 by the Provincial Court of Lugo, the visitation and custody arrangement was replaced by communication between the father and child (then 6 years old) lasting three hours – from 5:00 p.m. to 8:00 p.m. – every two weeks (alternate Saturdays), at a meeting point in Lugo and in the continued presence of a professional and the child's mother, leaving open the possibility of extending this arrangement in the future, depending on the bi-monthly reports prepared for the Court by meeting-point psychologists. None of the Decisions appealed provided for a return to the original child custody arrangement, at least until the appellant had completed the sex-change process involving pertinent surgery. The Court has no evidence of completion of this process to date.

(…)

3

The appellant, as already indicated, considers that the arguments on which the Court's Decision is based and which partly accedes to the mother's desires, disguise discrimination by reason of sexual orientation, outlawed by Art. 14 of the Spanish Constitution (RCL 1978, 2836), owing to the fact that the child visitation arrangement was restricted based on the reservations of judicial bodies over his transsexual status, without which prejudice said restriction would not have been ordered, as stated. The Public Prosecutor agreed with the appellant regarding this view.

(…)

4

The doctrine of this Court distinguishes between the general equality clause in the first paragraph of Art. 14 of the Spanish Constitution (RCL 1978, 2836), granting to all citizens the subjective right to equal treatment by the public powers, provided identical circumstances are present and there is no objective reason to warrant any differentiation, and the second aspect of the same fundamental right, that we are concerned with here, contained in the second paragraph of Art. 14 of the Spanish Constitution, which prohibits discriminatory behaviour based on any of the factors set forth therein on a non-exhaustive list (CCD 75/1983, of 3 August [RTC 1983, 75], F. 6).

With this list, the Constitution aims to expressly ban the maintenance of certain historical or traditional discriminations, that through both public action and social practice placed sectors of the public in situations that were not only disadvantageous but also overtly counter to personal dignity, as set forth in Art. 10.1 of the Spanish Constitution (CC Decs. 128/1987, of 16 July [RTC 1987, 128], F. 5; 19/1989, of 31 January [RTC 1989, 19], F. 4; 145/1991, of 1 July [RTC 1991, 145], F. 2; 39/2002, of 14 February [RTC 2002, 39], F. 4; 161/2004, of 4 October [RTC 2004, 161], F. 3; 175/2005, of 4 July [RTC 2005, 175], F. 3; 214/2006, of 3 July [RTC 2006, 214], F. 2; 342/2006, of 11 December [RTC 2006, 342], F. 3; 3/2007, of 15 January [RTC 2007, 3], F. 2;

233/2007, of 5 November [RTC 2007, 233], F. 5; y 62/2008, of 26 May [RTC 2008, 62], F. 5, all inclusive).

From this perspective, there is no reason that would preclude coverage by the principle of non-discrimination contained in the second paragraph of Art. 14 of the Spanish Constitution of a complaint over the denial or restriction of rights, in this case family rights, to anyone who defines him/herself as a transsexual and alleges having been discriminated against precisely owing to such condition and the rejection and lack of understanding produced in third parties by his gender dysphoria. In relation to the above, transsexual status, while not expressly referred to in Art. 14 of the Spanish Constitution as one of the specific cases in which discriminatory treatment is banned, is certainly a circumstance covered under the clause «any other personal or social condition» to which the prohibition of discrimination refers. This conclusion is reached, on the one hand, by considering that transsexuality, together with the other cases set forth in Art. 14 of the Spanish Constitution, is an historically-rooted difference and has placed transsexuals, by both the actions of the public powers and by social practices, in positions of disadvantage contrary to personal dignity as acknowledged in Art. 10.1 of the Spanish Constitution, owing to a deeply-rooted legal and social prejudice against such persons; and, on the other, through consideration that the requirements set forth under Art. 10.2 of the Spanish Constitution, should serve as an source of interpretation of Art. 14 of same.

In fact, regarding the former, it is well-known that transsexuals have historically been socially disadvantaged and subject to an essential lack of equality and to marginalization. In regard to the later, the European Court of Human Rights can be cited as an example. After analysing the scope of Art. 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (RCL 1999, 1190, 1572) (ECHR), it confirmed that sexual orientation is a concept that is unquestionably contemplated in said Article, stating that the list is indicative and not exhaustive in nature (ECHR Dec. of 21 December 1999 [ECHR 1999, 72], in the case Salgueiro Da Silva Mouta vs. Portugal, §28); expressly stating that since discrimination based on sexual orientation is dealt with under Art. 14 of the ECHR, as discrimination based on on grounds of sex, it is especially important that differences in treatment based on sexual orientation be justified (*inter alia*, ECHR Decs. of 9 January 2003, cases L. and V. vs. Austria [ECHR 2003, 2], §48, and, SL vs. Austria [JUR 2003, 14875], §37, 24 July 2003 [ECHR 2003, 50], case Karner vs. Austria, §37, to which numerous subsequent decisions refer such as the ECHR Decs. of 10 February 2004 [ECHR 2004, 9], case B.B. vs. United Kingdom; 21 October 2004, case Woditschka and Wilfing vs. Austria; 3 February 2005 [ECHR 2005, 12], case Ladner vs. Austria; 26 May 2005 [ECHR 2005, 57], case Wolfmeyer vs. Austria; 2 June 2005 [JUR 2005, 137339], case H.G. and G.B. vs. Austria; and 22 January 2008 [ECHR 2008, 4], case E.B. vs. France, §91).

Likewise, Art. 26 of the International Covenant on Civil and Political Rights (RCL 1977, 893), establishes equality before the law and prohibits discrimination on the grounds of race, colour, sex, language, religion, political or other

opinion, national or social origin, property, birth or other status. The United Nations Human Rights Commission has confirmed that the prohibition of discrimination on the grounds of sex (Art. 26) includes discrimination based on sexual orientation (Opinion of 4 April 1994, Statement no. 488-1992, Toonen vs. Australia, §8.7, and Opinion of 18 September 2003, Statement no. 941-2000, Young vs. Australia, §10.4).

Also pertinent is Art. 13 of the Treaty Establishing the European Community (RCL 1999, 1205 ter) (future Art. 19 of the new Treaty on the Functioning of the European Union, as per the Lisbon Treaty of 13 December 2007, Spain's ratification of which is enacted by Organic Law 1/2008, of 30 July [RCL 2008, 1437]), that refers to sexual orientation as one of the causes of discrimination, stating «Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.»

Lastly, Art. 21.1 of the Charter of Fundamental Rights of the European Union, approved in Nice on 7 December 2000 and amended in Strasbourg on 12 December 2007 (LCEur 2007, 2329), expressly contemplates «sexual orientation» as one of the grounds on which discrimination is expressly prohibited.

(…)

5

(…)

It must be kept in mind that communication and visitation by the parent who does not have permanent custody of the child is set forth in Art. 94 of the Civil Code (LEG 1889, 27) as a right to which such parent is entitled in terms as set forth by the Court, but which cannot be limited or suspended except where «serious circumstances warrant or there is serious or repeated non-compliance with the duties imposed by court order.» In reality, it is a right of both parent and child, a manifestation of the parent-child bond, and contributes to the development of each one's affectivity.

In this regard, the international legal instruments protecting children that have been incorporated into our legal system under Art. 10.2 of the Spanish Constitution (RCL 1978, 2836) by express reference to Organic Law 1/1996, of 15 January (RCL 1996, 145), on the legal protection of children (Art. 3), contemplate recognition of the right of parental visitation with the child as a basic right of the child, except where otherwise resolved in the child's interest: thus, Art. 9.3 of the Convention on the Rights of the Child (RCL 1990, 2712), adopted by the UN General Assembly on 20 November 1989 and in force since 2 September 1990 («States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary

to the child's best interests.»); also, Art. 14 of the European Charter on the Rights of the Child, approved by the European Parliament in its Resolution of 18 July 1992 («In the event of *de facto* separation, legal separation, divorce or annulment of the marriage of the parents, the child has the right to maintain direct permanent contact with his/her two parents, both of whom have the same obligations, even if one of them lives in another country, unless the competent body of each Member State declares it to be incompatible with safeguarding the child's best interest.»); it is also relevant to cite Art. 24.3 of the EU Charter of Fundamental Rights (LCEur 2000, 3480) («Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests»).

6

Consistent with the above, it is the consolidated doctrine of this Court, based on the above mentioned domestic and international provisions of law established to protect children, that in regard to the parent-child relationship (including the regulation of guardianship and custody of children by their parents, such as in the case at hand) the criteria that must prevail in the decision adopted in each case by the Judge, in consideration of specific circumstances, must necessarily be the prevailing interests of the child, over those of the parents, which must also be taken into account.

(. . .)

a risk of effective alteration of the personality of the child, due to the parent's undue social behaviour, either owing to the negativity of the social or affective values he/she transmits during the time they are in contact, or because the child directly suffers the effects of violent, inhumane or degrading treatment by the father or mother, or which persistently alters or disturbs his/her mind. Whatever the reasons for such disturbance, even if they are circumstances over which the parent has no control (depression or other mental problems), the child unequivocally and absolutely is by no means obligated to suffer them, and it is up to the competent authority to determine the appropriate measures to avoid them, even restricting or suspending the right to parent-child contact, in accordance with the gravity of the facts.

7

It is however clear that it is not constitutionally acceptable to assume that there is a risk of harm to the affective personality of the child owing to the mere fact of one parent's or the other's sexual orientation. This means that the court decision to deny, suspend or limit contact between parent and child based principally or exclusively on the transsexuality of the father or the mother must be considered a discriminatory measure that is prohibited under Art. 14 of the Spanish Constitution (RCL 1978, 2836).

This has been established by the European Court for Human Rights when analysing the scope of Art. 14 of the ECHR (RCL 1999, 1190,1572), that

sanctions the principle of non-discrimination «on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status,» an open clause that includes, as stated previously, sexual orientation, as well as Art. 8 ECHR, that acknowledges the right to respect for private and family life (guaranteed by Art. 18.1 of the Spanish Constitution).

In this regard it is worth recalling that in the ECHR Decision of 25 March 1992 (ECHR 1992, 43), case B. vs. France, §48, the European Court had already confirmed in relation to transsexuality that it «considers it undeniable that mentalities have evolved, that science has progressed and that growing importance it being given same,» further pointing out the complexity of legal issues linked thereto: «issues of an anatomical, biological, psychological and moral nature», in addition to the areas it affects, including the parent-child relationship. In that specific case, the Court found infringement of ECHR Art. 8, in that the refusal of the authorities to grant the complainant the right to change his/her name after submitting to treatment – including sex change surgery – was not justifiable and caused the complainant a number of serious personal problems (§§55 to 63).

In conclusion, the decision of a court or other public authority that eliminates, suspends or restricts the rights of a parent in relation to his/her minor children, whose *ratio decidendi* rests decisively, whether explicit or implicit, on the sexual orientation of said parent amounts to a discriminatory differentiation outlawed by Art. 14 of the Spanish Constitution, since in no case can the mere fact of sexual orientation, or more specifically, gender dysphoria be used as objective or reasonable justification for discriminatory treatment of such parent in the framework of parent-child relations. This implies that the court (or administrative, where applicable) decision that orders the denial or limitation of the rights of a transsexual parent in regard to his/her minor children can, in formulating its judgment, and keeping in mind the prevailing interest of the child, be required to justify the need for and proportionality of any restrictive measures imposed, so that when examining the resolution it is possible to rule out without any shadow of doubt, the parent's sexual orientation or gender dysphoria as being the true reason for the decision adopted.

(…)

Ultimately the appellant's transsexuality is not the cause of the restriction of visitation ordered in the appealed Decision, but rather the parent's emotional instability, according to the expert psychological report admitted by the Court and which found the existence of a relevant risk of effective disturbance of the emotional health and development of the child's personality, given his/her age (six at the time of the court examination) and his/her stage of development.

It is certainly not sufficient to confirm a parent's emotional problems in order to adopt a measure that restricts the parent-child rights to the extent considered here. The determining factor, in any case, must be the effect of such problems on the child. Of course, a child has no moral or legal obligation to bear inappropriate or disturbing treatment from his/her parents owing to whatever personal

problems they may have, including any problems deriving from any decision freely taken by one of his/her parents to submit to sex-change procedures. If it is verified that this impacts negatively on the personal development of the child, effective measures must be taken to prevent it but only in such case.

In this case, then, the negative impact was qualified in the appealed Decisions as «relevant risk» (CC Decs, F. 4; and 71/2004, of 19 April [RTC 2004, 71], F. 8) for the child, thereby making it possible, as stated, to rule out that the appellant's gender dysphoria was the actual reason for the decision to restrict the appellant's visitation. In fact, the grounds set forth in the Decision showed that, based on an informed, rational assessment of the evidence admitted in the process, particularly the psychological report (a report which is not up to this Court to review), in conformity with consolidated doctrine: CC Decs. 81/1998, of 2 April [RTC 1998, 81], F. 3; 220/2001, of 5 November [RTC 2001, 220], F. 3; 57/2002, of 11 March [RTC 2002, 57], F. 2; 119/2003, of 16 June [RTC 2003, 119], F. 2; and the decision to restrict the appellant's visitation schedule, upon finding the existence of certain risk (and during such time as it continues to exist) that, given the emotional problems suffered by the appellant in this case, in accordance with the psychological evaluation carried out at the behest of the Court, harm could be caused to the mental integrity or personality development of the child if the original visitation schedule were maintained.

In conclusion, the reasoning of the appealed Decisions led to the conclusion that the decision to restrict the appellant's originally agreed visitation schedule was adopted by the court in view of the genuine and prevailing best interests of the child, weighed against those of the parents, and there is no finding that such decision was influenced, as alleged by the appellant and the Public Prosecutor, by the father's transsexuality. This determines that we must rule out that the appealed Decisions gave the appellant unfavourable legal treatment in the framework of his parent-child relations in violation of Art. 14 of the Spanish Constitution.

(…)

DECISION

In view of all the above, the Constitutional Court, by the authority vested in it by the Spanish Constitution,

Has decided

To deny the appeal entered by Mr. A. P. V.".

3. CC Dec no. 12/2008 of 29 January
   Right not to be discriminated against by reason of gender in the area of political representation

"On unconstitutionality matter no. 4069–2007, Administrative-Contentious Court no. 1 of Santa Cruz de Tenerife has discussed the questions posed regarding the constitutionality of Art.. 44 bis of Organic Law 5/1985, of 19 June (RCL 1985, 1463 and RCL 1986, 192), on the General Electoral System, introduced by the Second Additional Provision of Organic Law 3/2007, of 22 March (RCL 2007,

586), on effective equality of women and men (hereinafter LOIMH). For its part, Appeal for unconstitutionality no. 5653-2007 entered by over fifty Deputies pertaining to the Popular Parliamentary Group of the Congress of Deputies challenges the different amendments of the Organic Law on the General electoral system (hereinafter LOREG [RCL 1985, 1463 and RCL 1986, 192]) contained in said Additional Provisions; which, in addition to introducing a new Art. 44 *bis* LOREG, amends other provisions of the electoral Law, specifically Arts. 187.2 and 201.3 and the First Additional Provision, adding a new Transitory Provision, the Seventh.

(…)

Both the Court promoting the unconstitutionality issue and all of the parties to the appeal for unconstitutionality use arguments from International Law and Comparative Law in favour of and against the constitutionality of the appealed measures. Despite the relevance such arguments may have in the reasoning of the different parties, it must be remembered that according to our doctrine, «International Treaties are not the rule for judging the constitutionality of regulations having the status of law (CC Decs. 49/1988, of 22 March [RTC 1988, 49], F. 14; 28/1991, of 14 February [RTC 1991, 28], F. 5; 254/1993, of 20 July [RTC 1993, 254], F. 5)» (CC Dec. 235/2000, of 5 October [RTC 2000, 235], F. 11). This, however, must not deter from underlining the importance of constitutional remission (Art. 10.2 Spanish Constitution [RCL 1978, 2836]) in certain instruments of International Law as an interpretational criteria of fundamental rights. As we have reiterated in CC Dec. 236/2007, of 7 November (RTC 2007, 236), «this decision acknowledges our agreement with the values and interests protected by such instruments, as well as our desire as a nation to belong to an international legal order that stands for the defence and protection of human rights as the fundamental base of State organisation.» (F. 3).

Therefore, both the texts of general International Law – relevant among which is the Convention on the Elimination of all Forms of Discrimination against Women, of 18 December 1979 (RCL 1984, 790) (ratified by Spain by instrument of 5 January 1984), in which the States parties commit to ensuring women «on equal terms with men, the right to participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government.» [Art. 7 b)] –, such as those developed by the Council of Europe based on the European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950 (RCL 1979, 2421) (ratified by Spain on 26 September 1979), highlight the quest for formal and material equality between men and women as a keystone of International Human Rights Law.

This conclusion is also supported in the sphere of Community Law – the insertion of which into our legal system has already been dealt with by this Court in its Declaration 1/2004, of 13 December –, in which the recent amendment of the Treaty of the European Community by the Lisbon Treaty of 13 December 2007, that has not yet entered into force, has given greater visibility to promoting equality between men and women. Specifically, added to the

definition of a transversal objective for all community activities, consisting of «eliminating inequalities between men and women and promoting their equality,» as already contained in Art. 3.2, is a new Art. 1 *bis*, according to which «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the right of persons belonging to minorities. These values are common to the Member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.» The inclusion of equality in this set of fundamental values is in correlation to the assumption of a commitment to foster such values, set forth in the second paragraph of the new Art. 2.3 of the Treaty of the European Community.

Therefore, beyond the generic mandates to foster equality among men and women, international conventions (in contrast to other international texts to which the parties refer but which, despite their unquestionable political value, do not fall under the mandate of Art. 10.2 of the Spanish Constitution), do not in principle discuss the specific instruments that States may use to enforce them. It is in this sphere in which the considerations of Comparative Law contained in the documents presented in both processes are found. Without entering into evaluations it is not up to us to make, it must be pointed out that the vicissitudes of Italian and French jurisprudence to which the parties refer are explained precisely owing to a fundamental difference between their legal systems and ours, owing to the special feature of the extensiveness of Art. 9.2 of the Spanish Constitution, which expressly deals with political participation and adds promotion and facilitation to the idea of removal (of barriers). So, the introduction in our neighbouring countries of measures similar to the ones subject to controversy here was preceded by constitutional reforms that have included the idea of promoting equality between men and women in the area of political representation –thereby going leaving behind a narrowly formal view and going beyond the mandates to merely remove obstacles to achieve effectiveness– in terms similar to the ones that have existed from the beginning in the Spanish Constitution which constitutes, obviously, our only yardstick of constitutionality.

(…)

On the basis of the above, the Constitutional Court, by the authority vested in it by the Constitution of the Spanish nation,

Has decided

To dismiss Constitutionality Issue no. 4069-2007, brought by Administrative-Contentious Court no. 1 of Santa Cruz de Tenerife, and the Appeal for a declaration of unconstitutionality no. 5653-2007, entered by over fifty Deputies of the Popular Parliamentary Group of the Congress of Deputies."

4. CC Dec. no. 60/2008 of 26 May
   Right to double review in the criminal sphere

"the appellant has developed a challenge to the current system of Spanish judicial cassation and the specific legitimacy for bringing such appeal (Art. 854 Law

on Criminal Procedure [LEG 1882, 16]), concluding that he/she lacked the possibility of appealing the Decision against him, issued by the Criminal Section of the Supreme Court against an original acquittal Decision. He/she considers that such circumstance has violated his/her right to all due guarantees of law, including, because of its effect on the interpretation of Art. 24.2 of the Spanish Constitution (RCL 1978, 2836) of Art.14.5 of the International Covenant on Civil and Political Rights (ICCPR) (RCL 1977, 893), the right of any person found guilty of an offence to a review of the conviction and the sentence imposed.

Under this perspective it is important to state that, in fact the mandate of said Art. 14.5 ICCPR, even though there is no express constitutional recognition, makes it mandatory to consider that the guarantees of the criminal process referred to by the Constitution in its Art. 24.2 include appeal to a higher Court and that, consequently, all the rules of criminal procedural law under our legal system (CC Decs. 76/1982, of 14 December [RTC 1982, 76], F. 5; 70/2002, of 3 April [RTC 2002, 70], F. 7, among others) must be interpreted in a more favourable sense regarding the existence of an appeal of this type. Nonetheless, while such a mandate has been included in our domestic Law through Art. 10.2 of the Spanish Constitution under which the rules regarding fundamental rights and public freedoms recognised by the Constitution are to be interpreted in consonance with such text (CC Decs. 80/2003, of 28 April [RTC 2003, 80], F. 2; 105/2003, of 2 June [RTC 2003, 105], F. 2), it is not in an of itself sufficient for non-existing appeals to be created (CC Decs. 51/1985, of 10 April [RTC 1985, 51], F. 3; 30/1986, of 20 February [RTC 1986, 30], F. 2). By virtue thereof, acknowledging the free ability of legislators to determine such appeals, we have set forth a body of doctrine, starting fundamentally with CC Dec. 70/2002, of 3 April (RTC 2002, 70), F. 7, which determines that «there is a functional assimilation between the appeal for cassation and the right to review of a conviction and sentence as set forth in Art. 14.5 ICCPR, provided a broad interpretation exists of the review possibilities in the cassation court and that the right set forth in the Covenant is interpreted not as a right to a second review with full repetition of the proceedings, but rather as a right to have a higher Court review the correctness of the proceedings undertaken in the first instance, reviewing the correct application of the rules allowing for declaration of guilt and the imposition of sentence in the specific case. These rules include, of course, all provisions that govern the criminal process and make it a fair one, with all due guarantees; those which inspire the principle of presumption of innocence and the rules of logic and experience according to which inferences must be made that lead to the consideration of a fact as proven» (in this same regard, CC Decs. 80/2003, of 28 April [RTC 2003, 80], F. 2, 105/2003, of 2 June [RTC 2003, 105], F. 2, and 116/2006, of 24 April [RTC 2006, 116], F. 5).

Dealing now with the case to which the appeal refers, this Court has also had the occasion to confirm (as in CC Dec. 296/2005, of 21 November [RTC 2005, 296], F. 3) that «the absence of an instrument to review the conviction Decision in appeal [now in cassation], does not amount to the absence of a

procedural guarantee of constitutional rank. In any case the possibility of a later decision by a higher Court after a criminal conviction is not an essential part of Art. 14.5 ICCPR as an instrument for the interpretation of the right to a process with all due guarantees (Art. 24.2 Spanish Constitution), a decision that could be the third in a case in which the initial decision was an acquittal or even in the event that the review increased the sentence originally imposed. What is required in this context as a guarantee, as ordered both in the exercise of the defence and in the absence of error in the judicial decision, is that in the judgment of criminal matters there be two reviews». With the perspective of the right to effective judicial protection without lack of defence, now chosen by the appellant, it is important to point out that Constitutional Court Order 318/1995, of 22 November, F. 2, stated that «from a teleological standpoint, what is underlying in the finalistic context of the right to effective judicial protection under Art. 24.1 of the Spanish Constitution is the prohibition of lack of defence in a general judgment, which does not take place when, as in the case at hand, the allegations of the plaintiff have been examined and found to be in conformance with Law by two different judicial bodies. Following this, the decision can hardly be considered non-reflective, and there is therefore no reason that conviction in the second instance would require the opening of a new cycle of ordinary justice» (in this same sense CC Order ATC 306/1999, of 13 December [RTC 1999, 306 AUTO], F. 5, cited by the Prosecutor in his/her allegations). Under such circumstances, this Court also confirms that «there is no violation *per se* inherent in a conviction being handed down in the second instance, and it is not constitutionally necessary to provide for new review in a chain of new jurisdictions that could be endless» (for all, CCD 104/2006, of 3 April [RTC 2006, 104], F. 8). All this doctrine is consistent, furthermore, with the provision in Art. 2 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, of 22 November 1984, signed and pending ratification by Spain, that considers that there may be an exception to the right to have a conviction examined by a higher jurisdictional body, when a person is found guilty and sentenced as a result of an appeal of his/her acquittal. This Court has interpreted that such a possibility should not be considered an exception to the right of access to appeal in criminal matters as proclaimed by Art. 14.5 ICCPR, but rather a limitation of its essential content, whereby for a better understanding of our doctrine in this regard it must be pointed out that the procedural instruments available to guarantee the defence of the parties and good judicial decisions, such as the provision of new appeals for prior decisions, may collide with other interests of constitutional rank, such as legal protection and speedy Administration of Justice, and may also lose part of their virtual protection by excessive time transpiring between the fact being judged and the date of the judgement (thus, already cited CC Dec. no. 296/2005, of 21 November [RTC 2005, 296], F. 3).

In accordance with what has been set forth above we can state that there is no violation of the right to a process with all due guarantees and to effective judicial protection as alleged by the appellant, since he/she had two instances

for the judgment of his/her case, where it was possible to refute the arguments of the other parties with full procedural weapons, in particular those pertaining to the Prosecutor, on the occasion of his/her challenge of the appeal for cassation entered against the initial acquittal issued by the Provincial Court. Thus there is no finding of lack of defence of any constitutional relevance, especially when observing the testimony of the cassation roll received by this Court which held an oral hearing on the appeal in this case on 18 November 2003, when the appellant's representative sought to exercise his/her right to counter defence before the judicial body that would issue the conviction Decision.

(…)".