

Convergence of the Protection of Fundamental Rights Between the Spanish Constitutional Court and the European Court of Human Rights

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Abstract To make ECtHR rulings prevail over final Spanish judgments is a matter for the legislator, not for an extreme or exaggerated interpretation of a law that has not been promulgated for that purpose.

Within the context of the doctrine introduced by the Administrative Bench of the TS, the current or subsisting character of the violation of the fundamental right turns out to be a key issue. However, from the examination of the Constitutional Court's jurisprudence on this point, in order to assess the extent of the above-mentioned doctrine of our Supreme Court, we conclude that this concept is difficult to pin down.

Obviously, the Draft for the reform of the Organic Law of the Judicial Branch (LOPJ) we have discussed above renders the Supreme Court's interpretation meaningless. Indeed, the aforementioned reform draft of the LOPJ proposes the appeal as a way to implement the ECtHR judgments; on the other hand, a return to pre-2007 wording regarding the nullity suit; the approval of this proposal, for both reasons, would put an end to the practical relevance of the doctrine of the Supreme Court on the motion for dismissal of actions as a way of enforcement of ECtHR's judgments.

The Rules of International Law as Ratio Decidendi of the Judgments of the TC

Formulation, Genesis, Relevance and Content of Art. 10.2 of the Spanish Constitution

1.1. If one were to sum up the Spanish Constitution (hereinafter *CE*) in one article, it would be art. 10. It is true that, within it, the first section is more important than the second but the latter has great relevance.

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Art. 10.1 CE stipulates that “The dignity of the person, the inviolable rights which are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and social peace”.

More interesting for our purpose here today is art. 10.2 EC, which states that “The norms relative to basic rights and liberties which are recognized by the Constitution shall be interpreted in conformity with the *Universal Declaration of Human Rights* and the international treaties and agreements on those matters ratified by Spain”.¹

1.2. In order to understand why our constitutional fathers included this provision, we should take into account that the Spanish democratic transition was essentially led by a government part of which had been in power before the advent of democracy. It is easy to understand why our constitutional fathers, when writing the Constitution, included provisions to prove that they were establishing fully constitutional rules, a system of freedoms comparable to those of the most important Western democracies.

Therefore, they not only drew inspiration from well established constitutions, when they acknowledged the different rights, but also wanted to make sure that these texts would be interpreted in accordance with the prevailing trends in Western democracies.

This provision was incorporated to the constitutional text despite substantial opposition. The decisive point seemed to be securing the guarantee of some rights the Constitution had not explicitly recognized, particularly the right to education, closing the debate about this controversial right.

1.3. We cannot say that art. 10.2 CE is an original Spanish contribution to comparative constitutionalism, since our precept was preceded by art. 16.2 of the Portuguese Constitution of 1976. But it does seem to join a tradition that later inspired other constitutions, such as the Romanian (art. 20) or the Colombian (art. 93.2).

1.4. Since its creation, our Constitutional Court case law has fully implemented that provision, and has stressed its importance. To clarify the meaning of art. 10.2 CE in our system, we should take into account how it has been interpreted and applied by the Spanish Constitutional Court:

1.4.1. This provision does not add to the fundamental rights recognized by the Spanish Constitution. The fundamental rights recognized in Spain are, as our Constitutional Court has established, just those recognized in the Constitution. So, if a claimant invokes a right contained in an international treaty, the action before the Court shall not prosper. Whoever invokes legal rights or positions explicitly recognized in an international treaty (but not in the Constitution) has to prove that they are also recognized in the Constitution. In this regard, we must recall that the right to appeal of any person convicted of a criminal act, recognized in art. 14.5 of the *International Covenant on Civil and Political Rights* (hereinafter ICCPR), has

¹ Sáiz Arnáiz has exhaustively analyzed CE, Art. 10.2; that this synthesis is based on his work is acknowledged. Vid. reference section of the present article.

been recognized by the Constitutional Court in line with either the right to effective judicial protection (art. 24.1 CE) or the right to the due process of law (art. 24.2 CE).

1.4.2. Article 10.2 establishes a requirement of ‘consistent interpretation’ of fundamental rights according to international human rights treaties ratified by Spain, a requirement that somehow has initiated a new kind of interpretative argument.

From its first judgment, our *Constitutional Court* has systematically implemented and emphasized the importance of this provision. Specifically, it has underlined the interpretative value of the *European Convention on Human Rights* (hereinafter ECHR) and the judgments which, pursuant thereto, are issued by the *European Court of Human Rights* (hereinafter ECtHR). One example is the Judgment of the Constitutional Court (hereinafter STC) 91/2000, Legal Ground 7 –‘legal ground’ hereinafter LG-: “To clarify, specifically, what are these rights and contents the CE proclaims in an absolute way and therefore projects universally [...] particularly relevant are [...] *the Universal Declaration of Human Rights* and other international treaties and agreements relating to the same matters ratified by Spain, which art. 10.2 CE refers to as an interpretative criterion of fundamental rights. Therefore, from its earliest rulings, the Court has recognized the important hermeneutic role that the international human rights treaties ratified by Spain have in the determination of fundamental rights [...] and, most uniquely, the *European Convention for the Protection of Human Rights and Public Freedoms* [...]”.

This gives this type of treaties an unusual scope. In the Spanish legal system, international treaties become part of domestic law through the provisions of art. 96.1 CE. Under that provision, “1. Validly concluded international treaties, once officially published in Spain, shall form part of domestic law. Their provisions may be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law”. This applies to all international treaties, not only those that recognize rights but also those on different subjects. This transposition turns treaties into domestic law, in principle subject to the Constitution (without prejudice to the international responsibility to be incurred by the State as a result of the breach of this type of agreement).

Art. 10.2 CE provides international treaties containing fundamental rights with a new and different scope to that of art. 96.1 CE. Pursuant to art. 10.2 CE, international treaties are an interpretative standard for the rights recognized in the Constitution. It should be specified that they are criterion for interpretation, not only in the version they had at the time of the adoption of the Constitution, but also in its future versions.

Virtually all fundamental rights are affected by this: both procedural rights (effective judicial protection and due process of law) and substantive rights (equality, religious freedom and freedom of expression, to name but three of them).

International legislation has exercised a remarkable influence on many sectors, not only in areas such as extradition or immigration, but in others that, at first glance, may seem more remote, such as military and juvenile justice or penal correction law.

The Concept of “Fundamental Rights”

Art. 10.2, in order to determine the circle of rights affected by the interpretation construed in accordance to international treaties, refers literally to “fundamental rights and freedoms recognized by the Constitution”.

This has raised a controversy in Spain about what should be considered ‘fundamental rights and freedoms’. Indeed, the Constitution’s Title I is under the heading “Basic rights and duties” (Articles 11–55). Title I is divided into three chapters: the first one is entitled “Spaniards and aliens” (Articles 11–13). The second, “Rights and Freedoms” (Articles 14–38). The third, “Guiding principles for social and economic policy” (Articles 39–55). In Chapter II, in turn, there are two sections. The first is entitled “Fundamental rights and freedoms” and comprises Articles 15–29; the second, “Rights and Duties of Citizens” and comprises articles 30–38. This raises the question whether the fundamental rights and public freedoms referred to in art. 10.2 CE are only those of Section 1, Chapter II, Title I, entitled “Fundamental rights and freedoms”, or whether a less literal interpretation (that includes Chapter II entirely or Chapters II and III) is in order.

Let us consider the position of the Constitutional Court in this regard. Its jurisprudence seems to suggest that it considers ‘fundamental rights’ those included in Chapter II of Title I. Indeed, it is clear that rights protected by the amparo before the Constitutional Court, i.e., the right to equality (art. 14 CE) and Section 1, Chapter II, Title I rights, entitled ‘Basic Rights, Public Liberties’ including articles 15–29, are included. In addition, the Court has explicitly established the applicability of art. 10.2 to the rights recognized in articles 30–38 CE (i.e., Chapter II of Title I. In this sense, for example, the STC 36/1991, LG 5, says that “[the Constitution] does not give constitutional status to international rights and freedoms that are not also included in our own Constitution, but requires the interpretation of our constitutional provisions in accordance with the content of such Treaties or Conventions [...]” (STC 199/1996, LG 3).

It should be noted that the Court is emphatic in that fundamental rights are only those defined as such in the Constitution, so that if you invoke a right contained only in an international treaty, the action will not succeed. However, an attempt at protecting rights or defending juridical positions explicitly included in an international treaty (though absent from the Constitution) is possible by bringing them in line with a fundamental right that is included in the Constitution. In this respect, Sáiz Arnáiz has suggested that the right to appeal of any person convicted of a criminal act, included in art 14.5 of the *International Covenant on Civil and Political Rights* (hereinafter ICCPR) has been recognized by the Constitutional Court by linking it to either the right to effective judicial protection (art. 24.1 CE) or to the right to a procedure that meets all the standards of the rule of law (art. 24.2 CE).

Treaties and International Agreements on Fundamental Rights

As we have seen, the Constitution recognizes the interpretative value of treaties “on the same matters”. However, how is this expression supposed to be interpreted? Is it to be understood in a formal sense, inclusive only of treaties *stricto sensu*, that,

moreover, by their title and purpose are clearly intended to regulate fundamental rights? Or are we supposed to understand it in a material sense, including any rule of international law that has any reference to fundamental rights?

The Spanish Constitutional Court has opted for a 'material' orientation. Thus, for example, in its resolutions, it has used not only Conventions by the UN (such as the Convention against torture – STC 120/1990, LG 9 – or on the elimination of discrimination against women – STC 12/2008 LG – or on the rights of the child – STC 36/1991, LG6) but also it has referred to Resolutions adopted by the General Assembly, which, in principle, have no binding force, but rather have a limited value: STC 36/1991, LG 5 and STC 215/1994, LG 2. Similarly, within the Council of Europe, a distinction must be made between Conventions (which States ratify, such as the ECHR), Resolutions and Recommendations. The Council of Europe's legislation has had considerable significance in some cases, such as the integration of art. 18.4. a from the *Convention for the Protection of Individuals With Regard to Automatic Processing of Personal Data* (STC 254/1993) or the configuration of the right to conscientious objection (Constitutional Court rulings – hereinafter SSTC – 15/1982, LG 6 and 7, 160/1987, LG 5, and 161/1987, LG 5).

Moreover, and not least, it must be considered that the Spanish Constitutional Court has employed primary and secondary Union law in the interpretation of rights.

The Spanish Constitutional Court's anti-formalism has led it to apply international treaties before they had been ratified by Spain. In this regard, the reference to the *Charter of Fundamental Rights of the European Union* before it was binding should be recalled at this point: STC 292/2000, LG 8, and 138/2005, LG 4.

In some cases, the Spanish Constitutional Court, on the grounds that fundamental rights are basic fundamental decisions that have to inform the entire judicial order, has interpreted a basic right in the light of a treaty, considering a reservation formulated by the State as not having been made: STC 21/1981, LG 10 and 44/1983, LG 1.

Obviously, under art. 10.2 CE, the fundamental rights of the Spanish Constitution have been interpreted in accordance with the *Universal Declaration of Human Rights* (hereinafter UDHR) and with the international agreements to which Spain is a party. Sáiz Arnaiz points at the UDHR, the ICCPR (the *International Covenant on Economic, Social and Cultural Rights*), the ECHR and EU law, as the main sources of international legislation used by the Spanish Constitutional Court and stresses that the most frequently cited international text is the ECHR. In the period 1999–2004, 75 % of the Constitutional Court's rulings on amparo contained references to the ECHR. Surely, the prestige of the ECtHR is a reason for this, but what technically justifies the significant presence of the jurisprudence of the ECHR in the Spanish Constitutional Court's rulings is not just the fact that the Spanish Constitution refers to the European Convention of Human Rights, but also the reference of the European Convention on Human Rights to the European Court of Human Rights regarding its application and interpretation (art. 32.1 ECHR).

This does not mean that there is no discrepancy between these two Courts. Whenever the ECtHR condemns Spain, it is often against the Spanish Constitutional Court's criterion, which would normally be involved in the matter, since all judicial remedies in Spain must first have been exhausted in order to be able to appeal to the

ECtHR. Moreover, the Constitutional Court does not consider itself a mere executor of the ECtHR's criteria, as explicitly stated in STC 245/1991, LG 2: "From the perspective of international law and its binding force (Article 96 CE), the Convention neither introduced in the domestic legal order a higher supranational instance, in the technical sense, that reviews or directly controls the internal judicial or administrative decisions, nor does it impose on Member States specific procedural measures of annulling or rescissory character, to ensure repair of the violation of the Convention found by the ECtHR (or, where applicable, by the Committee of Ministers of the Council of Europe, in accordance with art. 32 of the Convention). The Convention does not oblige Member States to eliminate the consequences of the act that has been found contrary to international legal obligations assumed by the State, restoring, as far as possible, the situation prior to the act; on the contrary, art. 50 allows for a replacement of the restoration (that would question the final and executive character of the internal judicial decision) by a just satisfaction [...]". The interpretation of ECtHR doctrine is a matter for the Constitutional Court, as stated in STC 119/2001, LG 6, regarding the case of López Ostra.

The Constitutional Court does not consider the judgment of the Committee of Ministers of the Council of Europe relevant, from the perspective of Article 10.2 CE, on the grounds of the diplomatic, non-jurisdictional, nature of that body: STC 114/1984, LG 3.

On the contrary, the Spanish Constitutional Court (hereinafter TCe) does take into account decisions by the *European Commission on Human Rights* (which was suppressed by Protocol XI, which entered into force in 1998), in some cases giving them large effect on the outcome of the case. For example, STC 2/1987, LG 2–4, but overall it used to do it in the absence of a ECtHR ruling: STC 53/1985, LG 11.

Undoubtedly, the TCe, from its earliest rulings, has taken the jurisprudence of the ECtHR into consideration as a highly relevant one, under the provisions of art. 10.2 CE (STC 22/1981, LG 3), without acknowledging the need for additional theoretical justifications. Actually, Strasbourg jurisprudence is so important for the TCe that sometimes the Court notes its inexistence on a particular issue, thus making quite clear its decisive value (STC 53/1985, LG 6).

The primary law of the European Union is not oriented, in its origins, to the recognition and guarantee of fundamental rights, and secondary law is not agreed on. Therefore, fundamental rights could only be interpreted in primary and secondary law through a broad interpretation of art. 10.2 CE. Indeed, the TCe started doing so purely for dialectical purposes, as in STC 132/1989, LG 12. However, from 1991, Union Law is recognized as interpretative criteria of fundamental rights, under art. 10.2 CE, as in SSTC 28/1991, LG 5 and 64/1991, LG 4: "Community law, whose rules, besides specific means of enforcement [...] could come to have, where appropriate, the interpretative value assigned to International Treaties, under art. 10.2 CE."

As with the law of the Convention, the TCe recognizes this interpretative value to the Union law, accepting the interpretation provided by the ECJ. For example, EU law and its interpretation by the ECJ have been instrumental for the configuration of sex discrimination, prohibited by art. 14 CE. Reference should be made in this matter to the Constitutional Court's Opinion 1/2004, LG 6. The Spanish

Constitution provides that the Government may request an opinion from the TCe on the compatibility with the Constitution of an International Treaty prior to ratification. During the term of the present Constitution of 1978, the Government has availed itself of this possibility only twice: First, to inquire about the constitutionality of certain aspects of the Maastricht Treaty. At that time, we had to proceed to a small amendment to the Constitution, prior to the ratification of said treaty, to dispel the contradiction that the Constitutional Court had found. The second time the Government consulted the Constitutional Court was on the constitutionality of the Treaty establishing a Constitution for Europe. The Court, on this occasion, did not identify any unconstitutional issues. Although the aforementioned Treaty has not come into force by reason of the refusal of other countries, the doctrine of the Constitutional Court's opinion is fully valid and very valuable to understand the Court's position on the relationship between EU law and Rights of domestic origin and more specifically the value of the Charter of Fundamental Rights of the European Union and even of the jurisprudence of the Strasbourg Court. On this occasion, the TCe was consulted if there was a contradiction between the Spanish Constitution and Articles II-111 (scope of the Charter) and II-112 (criteria for its interpretation). The TCe replied stating the interpretative value of the Charter of Fundamental Rights of the European Union and added that this should not pose any particular problems, since Article II-112 assumed the validity of the ECHR and of the Strasbourg jurisprudence. The validity of the *European Convention on Human Rights* had been affirmed by the Court, because nothing could prevent that "as a convention ratified by Spain, through the procedure established in art. 93 CE, its interpretative effectiveness about the rights and freedoms proclaimed in the Constitution would reach as far as provided for in art. 10.2 CE".

As regards the Strasbourg jurisprudence, the opinion reads as follows: "The interpretative value that the Charter on Fundamental Rights would have in our legal system, within this scope, would not cause greater difficulties than those which currently exist as a result of the Rome Convention of 1950, simply because both our own constitutional doctrine (on the basis of art. 10.2 CE) and article II-112 (as shown in the 'explanations' that, as an interpretation, are incorporated into the Treaty by paragraph 7 of the same article) operate with a set of references to the European Convention that eventually turn the jurisprudence of the Strasbourg Court into the common denominator for the establishment of a minimum set of shared interpretative elements [...]".

This reduction of the complexity inherent to the concurrency of criteria for interpretation says nothing new on the subject of the value that the jurisprudence of the EU Courts should have for the definition of each right. In other words, it means no qualitative change to the relevance of that doctrine in the final configuration of fundamental rights by the Spanish Constitutional Court. It simply means that the Treaty appropriates the jurisprudence of a court, doctrine of which is already built into our legislation by virtue of art. 10.2 CE, so that no new or more substantial difficulties are to be expected in the orderly articulation of our system of rights. And those that are, as stated above, can only be apprehended and solved on the occasion of the constitutional processes that we may come across" (DTC 1/2004, LG 6).

Binding Nature of the Requirement in Art. 10.2 CE and Its Guarantee

Art. 10.2 CE is not confined solely to allow recourse to international treaties in order to interpret fundamental rights, but also obliges to do so. It is not directed only to the Constitutional Court, but to all legal operators and it does not only refer to the constitutional rules, but to all the rules governing fundamental rights. Let us consider these three characteristics of the content of Article 10.2 CE.

As for references to the mandatory character of the content of art. 10.2 CE in the constitutional doctrine, just toned down claims are to be found. In this regard, the STC 36/1984, LG 3, suggests that article 10.2 CE “authorizes and even recommends” to refer to the treaties. However, what these statements mean is that the interpretative value cannot turn these treaties into an autonomous source of Constitutional Law and that art. 10.2 is not a norm violation of which can be remedied by an appeal before the Constitutional Court. Let me stress this point: the treaties cannot add fundamental rights to those already guaranteed by the Constitution. If we consider that a provision of an international treaty on fundamental rights has been violated and we want to remedy the harm done, we will have to justify the simultaneous infringement of a fundamental right in the Constitution.

Secondly, we said that the mandatory character of art. 10.2 CE is addressed to all public authorities and particularly to the legislator. This was stated by the TCe in its STC 236/2007, LG 5: “Like any other public authority, the legislator too is required to interpret the relevant constitutional provisions in accordance with the content of such treaties or conventions, which thus become ‘constitutionally declared content’ of the rights and freedoms set forth in chapter two of title I of our Constitution”. Indeed, it is a common thing that the Explanatory Memorandum of Bills on fundamental rights invokes international law: Organic laws 7/1988, 2/2002, 13/2003 and 6/2007 are examples of this.

Thirdly, the treaty compliant interpretation not only concerns the rules contained in the Constitution, but all norms relating to fundamental rights and public freedoms that are set forth in the constitution. The TCe reminded this in STC 78/1982, LG 4.

Negative or Positive Link of Interpretation and the International Text

In an attempt to be more precise, one is right in questioning, as the legal doctrine did, if the interpreter of the fundamental right can afford all those interpretations that do not contradict the international treaty (i.e., if it is negatively linked by the latter), or, on the contrary, if he or she should only produce interpretations implementing the provisions of the treaty, that is, interpretations that derive from it (positive relationship). Some statements in the doctrine of the Constitutional Court which would suggest a positive link can also be found. Indeed, STC 236/2007, LG 5, said

that the content of the agreements to which we have been referring becomes, under art. 10.2 CE, “the constitutionally declared content of the rights and freedoms set forth in chapter two of title I of our Constitution”; but it seems that the connection, unless from the nature of the regulated domain requires otherwise, will be a negative one. This follows from some statements by the TCe, such as STC 113/1995, LG 7, which says that the rights “should not be interpreted in conflict” with the ECHR.

On the other hand, as for the ECtHR, let us remember that it has stated that it cannot be used to reduce or lower the level of the rights recognized in the various States: Art. 53 ECHR.

The Rules of International Law as Ratio Decidendi of the Judgments of the TCe

It may well be asked whether our Constitutional Court, when it invokes international treaties on fundamental rights and in particular the ECHR – or the jurisprudence of the ECtHR – does so as a supplementary argument or if such an reference is integrated into the *ratio decidendi* of the case. The answer is that examples of both types can be found.

Undoubtedly, there are cases in which the ECtHR jurisprudence is *ratio decidendi*: among others, in the SSTC 51/1982, 37/1988 and 70/2002 the TCe has recognized every criminally convicted individual the right to appeal to a higher court, on the grounds of both art. 14.5 of the *International Covenant on Civil and Political Rights* and art. 2 ECHR Protocol, though rerouting them through the right to effective judicial protection or the right to the due process of law. The STC 254/1993 recognized the right of *habeas data* after the *Council of Europe Convention for the Protection of Individuals* with regard to automatic processing of personal data by linking it to art. 18.4 CE. The STC 5/1984 recognized the right to an interpreter for every accused person who does not understand the language used in court, after articles 14.3 f of the *International Covenant on Civil and Political Rights* and 6.3.e of the ECHR, rerouting it to art. 24.2 CE.

Therefore, we must conclude that the Constitutional Court has used the jurisprudence of the Court of Justice of the European Union and the European Court of Human Rights as *ratio decidendi*. The jurisprudence of the ECJ has been used regarding the prohibition of discrimination on grounds of sex, which is set out in art. 14 of the Spanish Constitution. Many rights included in Chapter II of Title I of the Spanish Constitution, and specifically in the first section, have been interpreted in accordance with the jurisprudence of the ECtHR. The following is a non-exhaustive list:

On the one hand, conceptual categories created or assumed by the ECHR have been incorporated by the Constitutional Court. In this regard, we note that, in deciding whether there has been undue delay or not (forbidden under art. 24.2 CE), the TCe has decided to use the same “test” used by the ECtHR to decide whether the right to a ‘process within a reasonable period’ under art. 6.1 ECHR (e.g. STC

223/1988) has been violated. Another example is provided by the use of the ECtHR interpretation of art. 3 of the ECHR to prohibit inhuman or degrading treatment and tell it apart from torture, when interpreting art. 15 of the Spanish Constitution, as in STC 120/1990, LG 9. ECHR criteria are also used to realize the fundamental right to fair trial (STC 69/2001, FF JJ 14–22) or the right to legal assistance free of charge (STC 37/1988, LG 6).

In other cases, we have to acknowledge the incorporation of new content. For example, the STC 49/1999 incorporates certain aspects of the jurisprudence of the ECtHR to the content of the right to privacy of communications. The STC 167/2002 – requiring a review of the standard of proof in criminal appeal through immediacy and contradiction – perfects the due process of law as established in the jurisprudence of the ECtHR. Moreover, at this point, the STC 167/2002 opens up a whole jurisprudential line that carefully monitors the evolution of the ECtHR’s case law in this regard. The STC 119/2001 initiates protection against noise following on the jurisprudence of the ECtHR, reshaping it to the right to personal integrity and privacy of home and family life. Finally, the STC/2003 acknowledges the principle *non bis in idem*, which our constituents did not explicitly considered subject to amparo appeal before the Constitutional Court.

Effectiveness of the Rulings of the European Court of Human Rights in Spain

7.1. On the question of the execution of the ECHR rulings in domestic law, there have been two recent developments: on the one hand, a Supreme Court ruling holding that an appeal for annulment is suitable for the enforcement of a judgment of the ECtHR. On the other hand, the proposed reform of the Organic Law of the Judiciary, which is suggesting the revision of the final judgment.²

²On the influence of the latter on the execution of ECtHR’s rulings, see the excellent contribution by De Miguel Canuto, E. 2013. “Eficacia interna de las sentencias del Tribunal Europeo de Derechos Humanos”, *Revista Quincena Fiscal*, p. 1 and ff. See also Díez-Picazo, L. M. 2005. *Sistema de Derechos Fundamentales*, 2ª ed., Madrid: Civitas; García de Enterría, E., Linde Paniagua, E., Ortega Álvarez, L., Sánchez Morón, M. 1983. *El sistema europeo de protección de los derechos humanos*, 2ª ed., Madrid: Civitas; García Jiménez, M.E. 1988. *El Convenio de Derechos Humanos en el umbral del Siglo XXI*, Valencia: University of Valencia; García Roca, F. J. and Santaolaya Machetti, P., (coord.) 2005. *La Europa de los Derechos. El Convenio Europeo de Derechos Humanos*, Madrid: Centro de Estudios Políticos y Constitucionales; Martín Retortillo Baquer, L. 1998. *La Europa de los Derechos*, Madrid: Marcial Pons; Martín Retortillo Baquer, L. 2006. *Vías concurrentes para la protección de los derechos humanos*, Madrid: Dykinson; Ripol Carulla, S. 2007. *El sistema europeo de protección de los derechos humanos y el Derecho español*, Barcelona: Atelier; Ruiz Miguel, C. 1997. *La ejecución de las sentencias del Tribunal Europeo de Derechos Humanos: un estudio de la relación entre el derecho nacional e internacional*, Madrid: Tecnos; Salinas Alcega, S. 2009. *El sistema europeo de protección de los derechos humanos en el siglo XXI: el proceso de reforma para asegurar su eficacia a largo plazo*, Madrid, Iustel; Shelton, D. 2005. *Remedies in International Human Right Law*, 2nd ed., Oxford: Oxford University Press.

7.2. The jurisprudence of the last two decades indicated that ECtHR's rulings did not have an annulling effect in Spain, that is, do not deprive the domestic act causing the violation of the Convention of its own validity, and that those sentences are declarative in nature, lacking the executive effectiveness of a genuine sentence.

The amparo resolved by STC 245/1991, of December 16, on the Bultó case, began the debate about the effectiveness of the ECHR judgments. According to our Court, the European Convention neither obliges Spain to recognize in our legal system, the direct enforceability of decisions of the ECtHR, nor to introduce legal reforms to allow judicial review of final judgments as a result of the declaration, by the ECtHR, of a violation of a right guaranteed by the ECHR; however, this does not mean, in terms of our constitutional system of fundamental rights protection, that public authorities are to remain indifferent to the statement of violation of the rights recognized in the Convention (STC 245/1991 of December 16, on the Bultó case, LG 2). In this case, the Constitutional Court argues the permanence or timeliness of the fundamental right infringement and upheld the appeal. Pursuant to this legal theory, a negative position with regard to ECtHR's judgments against the defendant has been gradually taking root. However, periodically, both the legislator and the courts, including the Constitutional Court, are considering how to resolve this contradiction, this shortcoming. What procedure should be followed to enforce the annulment, when appropriate, however exceptional these cases may be? The motion for execution,³ the extraordinary appeal for review,⁴ the motion to void proceedings,⁵ and the amparo itself⁶ have all been attempted but all of them have failed.

However, Recommendation (2000) 2 of the Committee of Ministers on January 19, 2009, requested of the signatory states of the Convention legislative measures which would permit and regulate formulas for the reopening of domestic proceedings in cases of judgment against a defendant, especially when they are the only way to alter the negative consequences for the injured party resulting from the internal decision.

³The problems encountered in the motion for execution this attempt may be found in the case *Fuentes Bobo*, refused when decided upon (STC 197/2006, July 3, on a termination of employment procedure).

⁴Exponent of this attempt is the Castillo Algar case, resolved by ATC 96/2001, of April 24, which did not work out either.

⁵Amparo 114/2003, promoted by Juan Alberto Perote Pellón against the Supreme Court ruling that denied the annulment of acts of a court martial, because he had been convicted of a crime of disclosure of information relating to the national security and defense. The declaration of invalidity was based on the alleged infringement of the rights to fair trial and effective remedy. The issue at stake was the impartiality of the Court resolving a motion for dismissal of actions, denied in a criminal case, after Judgment of the European Court of Human Rights for lack of injury or actual breach. The Constitutional Court upheld the judgment of the Supreme Court and denied the amparo.

⁶This attempt was also unsuccessful: see the *Fuente Ariza* case, decided by ATC 119/2010, of October 4.

In this context,⁷ the thesis of the Administrative Bench of the Supreme Court (hereinafter TS)⁸ has joined the debate: under current regulation, the motion to void proceedings – established by Organic Law 6/2007⁹ – makes it suitable to fit the claim for reconsideration of actions when this is necessary to carry out the enforcement of a judgment by the ECHR, according to a recently published resolution. The aforementioned Supreme Court ruling of May 13, 2013 resolves a motion for dismissal of proceedings in which the appellant seeks the annulment of the judgment of the Supreme Court, taking back actions to the time of sentencing, based on a ruling by the ECtHR for violation of the right to a court. The Supreme Court summarizes the doctrine of the Constitutional Court and argues that the policy change¹⁰ experienced in regulating the motion for dismissal of actions by the LO 6/2007 makes the Constitutional Court competent to enforce an ECtHR judgment.¹¹

⁷In the doctrine, the delivery of this power to the Constitutional Court has been suggested, interpreting, in a very broad way, one of the reasons that, according to STC 155/2009, provides an appeal with ‘special constitutional significance’ (one which provides the same constitutional Court with the opportunity to clarify or change its doctrine, as a result [...] of a change in the doctrine of legal guarantee bodies, responsible for the interpretation of treaties and international agreements referred to in art. 10.2 CE, so that it not only includes rulings decided after the change of doctrine by the ECHR, but also the resolution itself that has led to declare infringement of the right by the Spanish State). This will configure the constitutional protection as a procedural mechanism through which to proceed to the reopening of domestic proceedings following a violation found by the ECtHR. This solution is inspired in STC 245/1991, of December 16, in the Barberá, Messeguer and Jabardo (Bultó) case, a view that has been gradually abandoned by the Court, though it has never been expressly rejected. See García Couso, S. 2010. “El nuevo modelo de protección de los derechos fundamentales tras la aprobación de la L.O. 6/2007: la objetivación del amparo constitucional y la tutela subjetiva de los derechos por la jurisdicción ordinaria y el TEDH”. *Revista Europea de Derechos Fundamentales*, 15, p. 161 & ff.

⁸Supreme Court ruling of May 13, 2013, appeal no. 4386/1998, Oro-Pulido López speaker. An analysis of this ruling and of its consequences is included in Miguel Canuto, E. 2013, p. 9–14.

⁹The key is in the grounds for revocation. Faced with the previous regulation where the motives were based on formal grounds resulting in the absence of legal uncertainty and inconsistency of the correct form of helplessness, and, finally, inconsistency of a court decision, the L.O. 6/2007 expands the reasons to “any violation of a fundamental right under Article 53.2 of the constitution.”

¹⁰As noted by the Court’s ruling regarding the unfeasibility of the motion for dismissal of actions to channel a claim of this kind, the ruling itself—Third Chamber of the Supreme Court of April 27, 2005, appeal no. 2419/1997—reads: “but -and this is important- in relation to the former wording of Article 240 of the Organic Law of the Judiciary [...]”.

¹¹For the Supreme Court, in the legislation now in force, we find that Article 241 of the LOPJ states that the motion for dismissal of actions “founded on any breach of a fundamental right referred to in Article 53.2 of the Constitution” may be admissible and this new legal characterization of the incident, given the breadth of the reference containing the violation of fundamental rights, opens the door to the possibility of including in it, as grounds for invalidity, breaches of such rights as detected and declared by a Judgment of the European Court of Human rights (LG 3).

How do we view this initiative of the Supreme Court?

1. To make ECtHR rulings prevail over final Spanish judgments is a matter for the legislator, not for an extreme or exaggerated interpretation of a law that has not been promulgated for that purpose.¹²
2. Within the context of the doctrine introduced by the Administrative Bench of the TS, the current or subsisting character of the violation of the fundamental right turns out to be a key issue.¹³ However, from the examination of the Constitutional Court's jurisprudence on this point,¹⁴ in order to assess the extent of the above-

¹²The Supreme Court is aware of this, because it says it takes that stand "while waiting for the legislator to address this issue once and for all, through a reform of procedural laws".

¹³The Supreme Court believes to have found a legal way to implement the judgments of the ECtHR (although limited to the rights that are both in the ECHR and also in art. 53.2 of the CE). However, it adds a condition derived from the constitutional doctrine: the intended annulling effect with respect to a previous ruling by a domestic court, specifically by the Supreme Court, can only be obtained if the impairment of the right or the actuality of the breach persists and continues demanding reparations (LG 3 *in fine*, of the STC 197/2006). The Supreme Court further explains that: "Moreover, this nuance or exception to the general rule, expressly qualified by the TC itself in its recent resolutions as 'most exceptional', has only been applied on matters of criminal nature, although we can not rule out the possibility of extending such casuistry to other fundamental rights' violations appreciated and declared by the ECtHR, not strictly related to criminal matters, as long as they are violations of rights that may be considered current or persistent compensation of which necessarily requires a procedural action in the form of taking the proceedings back to the time when the violation was committed."

¹⁴Undoubtedly, the starting point is the doctrine developed in STC 245/1991, of December 16, Bultó case. "[...] The problem then is not the lack of enforceability of that judgment (the ECHR's) but [that] once verified the actual infringement of Art. 24.2 CE (which implies the simultaneous violation of Art. 17.1 CE), it is up to this Court, to the extent that the actors have not received adequate compensation for the infringement of that right, to declare the alleged infringement of the right to due process, and correct and repair the violation of fundamental rights, taking into account the characteristics of the sentence" (LG 5).

In the ATC 96/2001, of April 24, Castillo Algar case, that equitable satisfaction is enough to consider the breach repaired and therefore ineffectual.

In the STC 197/2006, of 3 July, Fuentes Bobo case concerning a process for dismissal, it was understood that there remained no injury, which, besides the just satisfaction, supposed the full repair of the said injury: "That claim cannot be accepted, since, on one hand, the breach of the fundamental right to freedom of expression of the appellant, when he was dismissed from his post in TVE (Spanish public television) effective April 15, 1994, no longer exists at present (unlike what we have seen when it came to custodial sentences still being served), [...] and, on the other, because, in any case, the damage was no longer present, given that it was the European Court of Human Rights in its judgment of February 29, 2000, ... that, having declared the violation of freedom of expression, had awarded compensation to the plaintiff because of economic and moral damage caused by the dismissal [...]" (LG 4, IV).

However, the absence of subsistence of the injury is not an issue without controversy, but thoroughly discussed in a separate opinion of Judge Pérez Tremps, revealing it is a difficult notion to grasp.

In the ATC 129/2008, of May 26, Puig Panella case, it is considered that the injury is not present but past because equitable compensation involves repair. This is in harmony with the solution given to the Castillo Algar case.

In the STC 119/2010, of October 4, Case Source Ariza, actuality of the injury is refused, because the ECtHR had already rejected the baseless grounds he now seeks to assert in this (his

mentioned doctrine of our Supreme Court, we conclude that this concept is difficult to pin down.

3. Obviously, the Draft for the reform of the Organic Law of the Judicial Branch (LOPJ) we have discussed above renders the Supreme Court's interpretation meaningless.¹⁵ Indeed, the aforementioned reform draft of the LOPJ proposes the appeal as a way to implement the ECtHR judgments; on the other hand, a return to pre-2007 wording regarding the nullity suit; the approval of this proposal, for both reasons, would put an end to the practical relevance of the doctrine of the Supreme Court on the motion for dismissal of actions as a way of enforcement of ECtHR's judgments.
4. The Proposed Reform of the Judicial Power includes the following provision: "1. The provisions of the preceding Articles shall not preclude recognition of the jurisdiction of those supranational and international courts established by international treaties to which Spain is a party. 2. In particular, the judgments of the European Court of Human Rights, in cases in which Spain has been the defendant and the violation of a right has been declared, will be ground for review of the final judgment of the Spanish Court in its *a quo* process, at the request of those who would have been the claimants before that particular Court" (Article 5).

The following comment may be made, at this point: The upholding of the appeal will bring the annulment of the judgment under review. But it is unclear whether the following confirmatory judgment of the domestic Court may be object of further review. However, this proposed rule, part of the new LOPJ, does not affect the Constitutional Court, which is not integrated into the judiciary, and whose rulings are not subject to review. When the Constitutional Court is the author of the violation, the problem remains unsolved. The solution to this problem would require the reform of the Organic Law of the Constitutional Court (LOTC). Moreover, the Constitutional Court will normally either have caused or, at least, confirmed the violation, so that the Court in charge of enforcing the sentence of the ECtHR will somehow make the latter's interpretation prevail over that of the Constitutional Court, unless we admit that the resulting ruling of the domestic court is in turn subject to appeal before the Constitutional Court.

second) amparo appeal. What the ECtHR had declared contrary to the Convention was the rejection of the first amparo.

¹⁵ The explanation given by the Explanatory Memorandum to the Proposal for a reform of the Judiciary Act is relevant in this respect: "beginning with the judicial power itself, the only new relief is given by the expectation that the judgments of the European Court of Human Rights declare the impairment of a right shall be grounds for review of the judgment handed down in the process *a quo*. This will, in line with what other European countries do, strengthen the influence of the institution that is entrusted with the creation of a *ius commune* of human rights at a continental level and—what is even more important—to provide satisfactory remedies to people whose rights the ECtHR has declared violated, but cannot see them re-established to the previous juridical situation. Note too that it takes a much needed precaution: the review is open only to the final judgment in the case which was then considered by the Strasbourg Court, however similar the case would be. In other words, the review of final judgments for real or alleged infringement of the jurisprudence of the ECtHR is not allowed".

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