Constitutional Court Judgment No. 12/2008, of January 29 (Unofficial translation)

The Plenum of the Tribunal Constitucional ("Constitutional Court"), made up of Ms María Emilia Casas Baamonde, Presiding Judge, Mr Guillermo Jiménez Sánchez, Mr Vicente Conde Martín de Hijas, Mr Javier Delgado Barrio, Mr Roberto García-Calvo y Montiel, Ms Elisa Pérez Vera, Mr Eugeni Gay Montalvo, Mr Jorge Rodríguez-Zapata Pérez, Mr Ramón Rodríguez Arribas, Mr Pascual Sala Sánchez, Mr Manuel Aragón Reyes and Mr Pablo Pérez Tremps, Judges, has pronounced

ON BEHALF OF THE KING

the following

DECISION

In constitutional review issue number 4069-2007, brought by Juzgado de lo Contencioso-Administrativo núm. 1 de Santa Cruz de Tenerife ("Contentious-Administrative Court number 1 of Santa Cruz de Tenerife"), in relation to article 44 bis of the Ley Orgánica 5/1985, de 19 de junio, del Régimen Electoral General (Organic Law 5/1985, of 19 June, on the General Electoral Regime, LOREG), introduced by the second additional provision of Ley Orgánica 3/2007, de 22 de marzo, para la Igualdad Efectiva de Mujeres y Hombres (Organic Law 3/2007, of 22 March, on the Effective Equality between Women and Men), and in the appeal for constitutional review, joined to the above, number 5653-2007, filed by over fifty members of parliament (Diputados) of the Popular Parliamentary Group (Grupo Parlamentario Popular del Congreso de los Diputados), against the second additional provision of Organic Law 3/2007, of 22 March. The Counsel for the Government and the State Attorney General have taken part and made arguments. The Judge Rapporteur was Ms Elisa Pérez Vera, who gives the Court's opinion.

II. Points of law

1. In constitutional review issue number 4069-2007 the Contentious-Administrative Court number 1 of Santa Cruz de Tenerife sets out the doubts that have arisen regarding the constitutionality of article 44 bis of Organic Law 5/1985, of 19 June, on the General Electoral Regime, introduced by the second additional provision of Organic Law 3/2007, of 22 March, on the Effective Equality between Women and Men (hereinafter "LOIMH"). On the other hand, appeal for constitutional review number 5653-2007, filed by over fifty members of parliament (Diputados) of the Popular Parliamentary Group challenges the various amendments to the LOREG contained in that additional provision; namely, insofar as, apart from introducing the new article 44 bis LOREG, it modifies other precepts of that statute, specifically its articles 187.2 and 201.3 and the first additional provision, adding a new transitional provision, the seventh.
The writ setting out the issue of unconstitutionality brought by the Contentious-Administrative Court number 1 of Santa Cruz de Tenerife, and the claim formulated by the appellant members of parliament (Diputados) of the Popular Parliamentary Group, challenge the legal precepts at issue - the new article 44 bis LOREG in the first case, and the various modifications introduced into the articles of this Organic Law by the second additional provision of LOIMH in the second - for violation of articles 14 and 23 of the Spanish Constitution. Infringement is also pleaded of article 6 in relation to article 22 of the Spanish Constitution and, in the appeal for constitutional review, also articles 16.1, 20.1.a) and 68.5 of the Spanish Constitution. The grounds put forward for the purpose have been stated in detail in the background of this judgment, where it is also stated that State Attorney General and the Counsel for the Government defend the full

conformity of the provisions under challenge to the Constitution.
The text of the new article 44 bis LOREG is as follows:
" 1. The lists of candidates presented for elections for the lower house of parliament (Congreso), for municipal elections and elections for members of island councils (consejos insulares) and for inter-island councils (cabildos insulares) of the Canary Islands under the terms set out in this Act, members of the European Parliament and members of the legislative assemblies of the devolved regions (comunidades autónomas) must have a balanced composition between women and men, so that in the list of candidates as a whole each sex represents a minimum of forty percent. When the number of positions to cover is less than five, the proportion between women and men shall be as numerically balanced as possible.
In the elections for the members of the legislative assemblies of the devolved regions, the laws regulating their respective election regimes may establish measures which favour a greater presence of women in the lists of candidates which are presented for the elections of the said legislative assemblies.
2. The minimum proportion of forty percent shall also be maintained in each phase of five positions. When the last phase does not achieve the five positions, the said proportion between women and men in that phase shall be as numerically balanced as possible, although the required proportion must be maintained in the list as a whole.
3. The rules contained in the above paragraphs shall be applied to the lists of substitutes.
4. When the lists of candidates for the upper house of parliament (Senado) are grouped in lists, in accordance with article 171 of this Act, such lists must also have a balanced composition between women and men so that the proportion between them is as numerically balanced as possible."
On the other hand, a new paragraph is added to section 2 of article 187, drafted as follows:
"Article 44 bis of this Act shall not apply to lists of candidates which are presented in municipalities with a number of residents equal to or less than 3,000 inhabitants."
The following new paragraph is also added to section 3 of article 201:
" Article 44 bis of this Act shall not apply to lists of candidates which are presented in islands with a number of residents equal to or less than 5,000 inhabitants."
The reform of the first additional provision of LOREG consists in modifying its section 2 in order to introduce a new article 44 bis LOREG in the precepts which shall be applicable to the elections for the legislative assemblies of devolved regions.
Finally, a new seventh transitional provision is introduced into LOREG, drafted as follows:
" For the calls for the municipal elections which are made before 2011, that article 44 bis shall apply only in municipalities with a number of residents greater than 5,000. After 1 January of that year there shall apply the number of inhabitants set out in the second paragraph of article 187 of this Act."
2. The challenged additional provision is inserted in a statute the title of which – "Organic Law for the effective equality between women and men" – states its purpose, which is none other than achieving effective, substantial equality between the sexes. In order to achieve this objective, the Act, in its various articles and provisions, uses a range of techniques, including resorting to positive actions and positive discrimination measures in favour of women, the obligation to have a balance between the sexes when it comes to presenting lists of candidates for elections, or the introduction of other formal equality measures, for both sexes. Out of all of the measures contained in the Act only the provisions relating to the aforementioned balance between the sexes for electoral lists of candidates have been challenged, and this Judgment will deal with them exclusively.
Both the court bringing the issue of unconstitutionality and the parties in the appeal for constitutional review use, in favour and against the constitutionality of the challenged provisions, arguments drawn from international law and comparative law. Despite the relevance

that such arguments have in the discourse supported by the various parties, one must remember that according to our doctrine, "International treaties do not constitute a canon for judging whether parliamentary statutes are in line with the Constitution (Constitutional Court Judgments 49/1988, of 22 March, Point of law 14; 28/1991, of 14 February, Point of law 5; 254/1993, of 20 July, Point of law 5)" (Constitutional Court Judgment 235/2000, of 5 October, Point of law 11), which does not gainsay the importance of the Constitution making reference (article 10.2 of the Spanish Constitution) to certain instruments of international law for the purposes of interpretation of fundamental rights. As we have repeated in Constitutional Court Judgment 236/2007, of 7 November "that judgment of the framers of the Constitution expresses the recognition of our [Spain's] agreement with the scope of values and interests which those instruments protect, and our desire as a nation to join an international legal order which advocates the defence and protection of human rights as the fundamental basis for the organisation of the State" (Point of law 3).

Both the general international law texts – including the Convention on the Elimination of all forms of Discrimination against Women, of 18 December 1979 (ratified by Spain by an instrument dated 5 January 1984), in which the State parties undertake to guarantee for women "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" [article 7 b)], and those from the Council of Europe in the European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950 (ratified by Spain on 26 September 1979), show that the quest for formal and substantive equality between women and men constitutes a cornerstone of international human rights law.

This conclusion is also endorsed within EU Law, the insertion of which into our legal system has already been pronounced by this Court in its Declaration 1/2004, of 13 December, as seen by the recent modification of the EU Treaty by the Lisbon Treaty of 13 December, which has still not entered into force, but which puts more emphasis on promoting equality between men and women. Specifically, to the definition of the horizontal objective for all EU activities, consisting in "eliminating the inequalities between men and women and promoting their equality", which already appears in article 3.2, is added a new article 1a, in accordance 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 rights 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 list of fundamental values has as its correlate in the acceptance of a commitment to promote it in the second paragraph of this new article 2.3 of the European Union Treaty.

Apart from the generic mandates in favour of equality between men and women, the international conventions (which unlike the other international texts referred to by the parties and despite their indisputable political value are not covered by the mandate of article 10.2 of the Spanish Constitution) do not pronounce, in theory, on the specific instrument that the States can use in order to comply with them. And it is in this ambit that one must place the comparative law considerations contained in the pleadings presented in both proceedings. Without entering into assessing that which lies outside our purview, one must stress that the vicissitudes of the Italian and French jurisprudence also referred to by the parties are explained precisely due to a fundamental difference between those systems and ours, which is the singularity in our case due to the range of the content of article 9.2 of the Spanish Constitution, which expressly extends to political participation, and to the idea of removing obstacles adds the ideas of promoting and facilitating. Hence, the introduction in the countries around us of measures similar to those now debated has been preceded or accompanied, depending on the given case, by constitutional reforms which have incorporated the idea of promoting equality between men and women in the area of political representation – thereby exceeding a strictly

formal vision and going beyond the mandates removing obstacles in order to achieve their effectiveness – in terms similar to those which have always been in the Spanish Constitution, which is obviously our only rule of constitutionality.

3. Having stated the above, one must first discover the exact content of the reform of the electoral legislation which is challenged in the two processes (joined issue and appeal for constitutional review) which we have settled. That legislative reform, incorporated by the second additional provision of LOIMH, seeking the effective equal participation of men and women in the membership of the representative institutions of a democratic society, does not establish an inverse or compensatory discrimination measure (favouring one sex over another), but rather a formula for balance between sexes, which is not even strictly equal as it does not impose total equality between men and women, but rather stipulates that neither can make up the election lists of candidates in a proportion below 40 percent (or above 60 percent). It operates in two directions, insofar as that proportion is ensured equally for both sexes.

In the opinion of the appellant members of parliament and of the petitioning judicial body, that measure may involve sacrificing certain principles and constitutional rights. In particular the principle of equality (articles 14 and 23 of the Spanish Constitution), the right to participate in public affairs (article 23 and 68.5 of the Spanish Constitution) and the right of association in political parties (articles 6 and 22 of the Spanish Constitution), with a capacity in order to articulate the citizen's political will around any ideology (articles 16 and 20.1 a) of the Spanish Constitution). But also the breakdown of categories as essential to a democratic State as the principle of unity of the sovereign people.

The diversity of the constitutional issues which have arisen due to the questioned reform is therefore clear, all of them very significant as they affect very sensitive elements of the electoral regime, which is tantamount to the model of the democratic State. That same diversity requires that we take great care in identifying the right perspective in order to achieve the most correct approach to the fundamental constitutional problem.

The starting-point for our analysis lies in the fact that the requirement for electoral balance between sexes is exclusively aimed at those who can present lists of candidates, in other words, in accordance with article 44.1 of the LOREG, exclusively the parties, federations and coalitions of parties and to groups of electors. It is not therefore strictly speaking a condition for eligibility/cause for ineligibility, as it does not immediately affect individual rights to stand for election. It is a condition relating to political parties and groups of electors, in other words, legal entities which are not holders of rights to vote and stand for election, the infringement of which is claimed.

The substantive constitutional problem is therefore, and above all, in the area of articles 6 and 9.2 of the Spanish Constitution, with immediate connections with articles 22 and 16 of the Spanish Constitution and an unavoidable derivation towards the principle of equality (articles 14 and 23 of the Spanish Constitution), mainly, to the extent that the said balance is also required of groups of electors. It is in any event clear that that egalitarian dimension also occurs, because it is essential in the context of legislation which seeks to go beyond a social reality characterised by the lesser presence of women in public life; but it only does so as a perspective superimposed on the principal issue, in other words, the freedom of the political parties and groups of electors to define their lists of candidates as a specific means for performing their constitutional task as instruments for citizen political participation.

4. The first and main issue to resolve is that of the constitutional legitimacy of imposing on political parties the obligation to presents lists of candidates with "a balanced composition between women and men" in percentages that also ensure a minimum of 40 percent for each gender. We must look for the answer both in the analysis of the mandate upholding formal equality, contained in article 9.2 of the Spanish Constitution, and in the constitutional configuration of the political parties (art. 6 of the Spanish Constitution).

As regards article 9.2 of the Spanish Constitution we were able to affirm that "the equality which article 1.1 of the Constitution proclaims as one of the higher values of our legal order – inherent, together with justice, to the form of social State taken by that legal order, but also to the rule of law – does not only relate to the equality formally considered in article 14 and which, in theory, only seems to involve a duty to abstain from generating arbitrary differences, but also to the substantive equality under article 9.2, which obliges the public authorities to promote the conditions so that the equality of individuals and of groups is real and effective" (Constitutional Court Judgment 216/1991, of 14 November, Point of law 5).

Said in a different manner, article 9.2 of the Spanish Constitution expresses the framers' desire to attain not only formal equality but also substantive equality, aware that only via this substantive equality is it possible effectively to perform the free development of the personality; hence the framers complement the negative aspect, prohibiting discriminatory actions, with positively favouring that substantive equality.

The incorporation of that perspective is part of the characterisation of the State as social and democratic under the rule of law, which is the opening to the articles of our Constitution and which transcends the entire legal order (Constitutional Court Judgment 23/1984, of 20 February, Point of law 4). A characterisation which must be given full sense and effect when it comes to interpreting the scope of the different constitutional precepts, taking into account that, as we have stated, "the Constitution is not the sum and the aggregate of a multitude of unconnected mandates, but precisely the fundamental legal order of the political community, governed and guided in turn by the proclamation of its article 1, section 1, from which there must be a coherent system in which all of its contents find the space and the effectiveness that the framers sought to give to them"(Constitutional Court Judgment 206/1992, of 27 November, Point of law 3).

Hence the characterisation of our model of State as social and democratic under the rule of law, with the higher values of freedom, justice, equality and political pluralism which give meaning to that characterisation, represents the axiological basis for understanding the entire constitutional order.

This constitutional precept entrusts to the legislator the task of updating and materialising the effectiveness of equality, which touches upon, inter alia, the ambit of representation; it falls to the Constitutional Court to examine whether the decisions adopted on the matter are in accordance with the constitutional framework defined here. In particular from article 9.2 of the Spanish Constitution, and from the systematic interpretation of all of the constitutional precepts which impact this area, there emerges the constitutional justification of the fact that the channels and instruments established by the legislator facilitate the participation of all citizens, removing when necessary all kinds of obstacles, whether regulatory or strictly factual, which prevent or hinder it, and promoting the conditions to guarantee citizen equality. On this point we could add that substantive equality not only facilitates the effective participation of everyone in political affairs, but is a defining element of the notion of citizenship.

5. Having stated the above, if we ask ourselves about the constitutional legitimacy of the condition imposed on the parties by article 44 bis of LOREG, the answer, as we shall explain, must be affirmative, because political parties, as associations qualified by their constitutional functions (Constitutional Court Judgment 48/2003, of 12 March), are a valid channel through which to uphold the formal equality advocated by article 9.2 of the Spanish Constitution, and it is this precept which gives legitimacy to the legislative configurations of the parties' legal underpinnings, or their public activities, aimed at the effective performance of as fundamental principle of the constitutional order as equality (articles of 1.1 and 14 of the Spanish Constitution).

As already synthetically stated above, and there is no problem in repeating, the challenged second additional provision incorporates the principle of balanced composition between women

and men as a condition for forming the lists of candidates for elections. Specifically, this principle requires that "in the lists of candidates as a whole each sex must have a minimum of forty percent" (article 44 bis.1), proportion which must be maintained equally in each of the phases of five positions (article 44 bis.2), in the lists of substitutes (article 44 bis.3) and, subject to the modulations indicated in article 44 bis.4 LOREG, in the lists of candidates for the Senado which are grouped in lists. These provisions do not imply a pejorative treatment for either sex, since, strictly speaking, they do not even express a differentiated treatment due to the sex of the candidates, in view of the fact that the proportions are established equally for the candidates of each sex. It is not therefore a measure based on majority/minority criteria (as would happen if race or age for example were taken into account as elements of differentiation), but rather paying attention to a criterion (gender) which universally divides each society in two groups which are balanced in percentage terms.

As indicated in the preamble of the Organic Law into which this additional provision is inserted: "The call in the Act for balanced presence or composition, which aims at ensuring sufficiently significant representation of both sexes in bodies and positions of responsibility, also therefore covers the rules regulating the general electoral regime, opting for a suitably flexible formula in order to reconcile the requirements deriving from articles 9.2 and 14 of the Constitution with the legal requirements of standing for election for public office (passive suffrage) included in article 23 of the same constitutional text. The recent international texts on the matter are thereby accepted and advance is made towards guaranteeing a balanced presence between women and men in the ambit of political representation, with the fundamental objective of improving the quality of that representation and thereby of our own democracy."

Hence article 44 bis LOREG seeks the effectiveness of article 14 of the Spanish Constitution in the ambit of political representation, where, although men and women are formally equal, it is clear that the latter have always been substantively passed over. Demanding that the political parties comply with their constitutional condition as instruments for political participation (article 6 of the Spanish Constitution), by drawing up their lists of candidates so that both sexes have a balanced participation, is to use the parties to make effective the enjoyment of the rights demanded by article 9.2 of the Spanish Constitution. And also to do so in a constitutionally lawful manner, as with the composition of the legislative houses or of local government councils the incorporation of women (who are half of the population) in legislative procedures and in the exercise of public power in a significant number is ensured. This is in short consistent with the democratic principle which demands the best identity possible between those who govern and those who are governed.

That the political parties, given "their double condition as instruments to update the subjective right of association, on the one hand, and as the necessary channels for the functioning of the democratic system, on the other" (Constitutional Court Judgment 48/2003, of 12 March, Point of law 5), contribute, by legal imperative – in other words, by mandate of the lawmaker constitutionally authorised to give final form to their legal underpinnings – to perform an objective unequivocally set out in article 9.2 of the Spanish Constitution, is not an issue which can give rise to objections of constitutional legitimacy, as we will now see. And it is because it is their condition as instruments for political participation and the means for expressing pluralism as persons who formalise and manifest the popular will (article 6 of the Spanish Constitution) which qualifies their associative conditions as parties and clearly differentiates them from other associations, so that it is perfectly legitimate that the lawmaker defines the terms for the performance of those functions and tasks so that the popular will which they form and express and the participation for which they are instruments are always the result of the exercise of the "real and effective" freedom and equality of individuals, as expressly required by article 9.2 of the Spanish Constitution.

It is clear that the parties' freedom to present lists of candidates (which like in their other activities is subject to the Constitution and the law as stated in article 6 of the Spanish Constitution) is not nor can be absolute. The legislator has already, in relation to other constitutionally protected values and interests, limited that freedom by imposing certain conditions on the preparation of the lists of candidates (referring to the eligibility of candidates, to residency in some cases, or even specifying that such candidacies must be via closed and blocked lists). This new limitation of balance between the sexes is not the only one and does not lack, as we have just seen, constitutional basis.

The parties' freedom to select candidates is clearly limited by all of these requirements. What we are specifically examining here also does so. That restriction on the parties' freedom is perfectly constitutional and lawful, as it is reasonably instrumented and does not infringe fundamental rights. In other words, in order to satisfy the constitutional requirements to limit the freedom of the parties and the groups of electors to prepare and present lists of candidates, which is not even a fundamental right, but rather impliedly conferred in the Constitution (article 6 of the Spanish Constitution), which is granted by the legislator (expressly authorised by that article to do so); a legislator who enjoys a broad freedom of configuration (although of course not absolute). The constitutional validity of these measures is clear in view of the above considerations. First of all, because it is legitimate in order to achieve the effective equality in the field of political participation (articles 9.2, 14 and 23 of the Spanish Constitution). Secondly, because the regime instrumented by the legislator is reasonable and is limited to requiring a balanced composition with a minimum of 40 percent and without any imposition, considering exceptions for the populations with under 3,000 inhabitants and a diluted effect of the Act until 2011 for those with less than 5,000 inhabitants, and which therefore only excludes from the electoral processes those political parties which do not accept citizens from one or another sex in their lists of candidates. In short, because it is harmless for the fundamental rights of those who are the recipient, the political parties, who are not by definition holders of the fundamental rights of active and passive suffrage.

As regards the pleaded infringement of article 6 in connection with article 22 it should be pointed out that although this Court has identified four facets or dimensions of the fundamental right of association – freedom to create associations and to join those already created; freedom not to join and to stop being a member; freedom of internal organisation and functioning without political interference; and, as an inter privatos dimension, guarantee of a series of powers for the individually considered members against the associations which they belong to or seek to join (Constitutional Court Judgment 133/2006, of 27 April, Point of law 3) – the challenge in question does not refer to any of them but rather to the freedom of external action. As regards the indicated areas, in view of the fact that the questioned provision does not refer to the individual aspect of the fundamental right, we must rule out that there is any interference in the first two dimensions, positive and negative freedom of association, or of the so-called "inter privatos dimension" of the fundamental right of association. And, as that provision does not deal with any aspect of the ordinary internal life of the political parties, neither is there any infringement of the dimension relating to the freedom of internal organisation and functioning.

Having stated this, we only have to add that the limitation on political formations' freedom to act which is expressed in the provision under challenge does not constitute an infringement of article 6, in connection with article 22 of the Spanish Constitution. As we have already indicated that limitation is not in itself unconstitutional. As regards the rest, and in any event, the mandate for balance between the sexes imposed on the parties, limiting a freedom to present lists of candidates which is not attributed because they are associations, but rather specifically because they are political parties, constitutes a proportional limitation and, therefore, constitutionally legitimate, for the reasons stated above and to which we refer.

6. As opposed to that affirmed in the appeal and in the issue, nor does the challenged provision infringe the political parties' ideological freedom or their freedom of expression (articles 16.1 and 20.1 a) of the Spanish Constitution). First, it does not do so with regard to feminist ideology. A rule such as article 44 bis LOREG does not make feminist parties or ideologies unnecessary, but, from this precept, it is article 9.2 of the Spanish Constitution which, once specifying its effective mandate in terms of positive law, makes constitutionally lawful the impossibility of presenting lists of candidates which wish to make feminist statements by presenting lists made up entirely of women. In the new regulatory context it is not now necessary to compensate the greater masculine presence with exclusively female lists of candidates, for the simple reason that that historical imbalance becomes impossible. It is true that a radical feminist ideology which seeks female predominance cannot be constitutionally prohibited, but nor can it hope to elude the constitutional mandate of formal equality (article 14 of the Spanish Constitution) or the rules pronounced by the legislator in order to make effective substantive equality as established in 9.2 of the Spanish Constitution.

Hence the second additional provision of the LOIMH does not prevent the existence of parties with ideology which goes against effective citizen equality. If this were so, we would have to agree with the appellants on the unconstitutionality of the measures contained in the challenged legal precept, because this Constitutional Court has already indicated that there is no room in our system for a model of "militant democracy" which imposes positive adherence to the system and, primarily, to the Constitution (Constitutional Court Judgments 48/2003, of 12 March, Point of law 7, and 235/2007, of 7 November, Point of law 4). On the contrary, and as we indicated in the latter of the above judgments, our constitutional system is based, for historical circumstances linked to its origin, on the broadest guarantee for fundamental rights, which cannot be limited on the grounds that they are used for an anti-constitutional purpose. Therefore the requirement that the political formations which seek to participate in the elections must necessarily include candidates from both sexes in the proportion contained in the second additional provision of the LOIMH does not involve requiring that these same political formations share in the values upon which the democracy of equality is based.

In particular, the existence is not prevented of political formations which actively defend the primacy of people of a certain sex, or which advocate postulates which we could call "male chauvinist" or "feminist". What the second provision in question requires is that when these tenets are sought to be advocated by accessing elected public positions that they are done so starting with lists of candidates which are made up of both sexes.

On the other hand, neither does the ideological freedom suffer of the parties in general, in other words, those which do not make feminism the core of their ideological definition. More precisely, the instrumental component of this freedom does not disappear which consists of their capacity to include in their lists of candidates those who are most capable or suitable for the public offer of their election programme and, afterwards, if applicable, in order to defend the party's programme in the institutions which they join as representatives of the popular will. That freedom of the parties is not, as already stated, absolute or unlimited, and it can also be constrained by all of the legal requirements constituting the capacity for election, including amongst others and for the case of general elections, that of nationality, or by those which, like that being examined here, do not affect individual capacity but rather that of the parties and groups authorised to present lists of candidates, and including the requirement of a certain number of candidates or involving the system of blocked lists.

As a result, given the constitutional legitimacy of the new requirement for a balance between the sexes imposed on the parties for the presentation of the lists of candidates, as we already stated in the previous legal ground, it must be rejected that said measure violates the freedoms guaranteed in articles 16.1 and 20.1 a) of the Spanish Constitution. In any event, were it to be held that, at least instrumentally (although not substantially), the limitation on the freedom to

present lists of candidates to which we are referring could affect the rights in articles 16.1 and 20.1 a) of the Spanish Constitution, such limitation would have to be held as constitutionally legitimate insofar as it would be proportionate according to the reasons set out in Point of law 5 to which we refer.

As far as the rest is concerned, it is obvious that both political formations and citizens considered individually can defend and advocate the reform of the second additional provision of the LOIMH in legitimate exercise of their ideological freedom and their freedom of expression. In view of the above, the grounds of the challenges are inexorably rejected.

7. Everything stated above in relation to the political parties requires some clarification for the case of groups of electors, due to their different nature as indicated by this Court in the Constitutional Court Judgments 16/1983, of 10 March (Points of law 3 y 4) and 85/2003, of 8 May (Point of law 24).

If the parties, as already stated above, are not subject to the fundamental right of suffrage (passive or active), but rather only the citizens who are clearly separate from the party which presents them in its lists of candidates, a similar effect could be advocated, albeit with less intensity, for the groups of electors, not considered in the Constitution, which are the gathering together of individual persons for the sole purpose of presenting lists of candidates, in other words, to stand in the elections other than through the parties. It should not be forgotten that in the political party there is a distinction between the party itself and its lists of candidates, while the groups of electors are inexorably linked with the lists of candidates that they present. In any event, what is important here is not that conceptual, structural and organisational difference between parties and groups. The determining factor is that neither of them are holders of the right to stand for election to public office (passive suffrage). The members of a group of electors do not exercise the right to passive suffrage, and neither do the members of the bodies of the political parties competent for the purpose. They only exercise that right if apart from promoting a list of candidates they are part of it. The members of a group of electors who are not candidates exercise the right of participation in public affairs in a broad sense (art. 23.1 of the Spanish Constitution), but not the specific right of participation consisting in standing as candidates in elections. This right does not cover the power to form lists of candidates with full freedom, but rather under the conditions fixed by the law. Amongst such conditions it is lawful that there is the condition for a balanced composition which is based on article 9.2 of the Spanish Constitution.

We must also consider whether imposing on such groups that the lists of candidates that they present respect the condition of balance between sexes could be considered as constraining in some way the eligibility of their members.

Now then, it is undeniable that formally, or substantively, there is no cause for ineligibility due to the fact that the group is obliged to present lists of candidates where the citizens in them have to seek the support of other persons in accordance, apart from criteria of ideological and political affinity, with the issue of gender. Such requirement, within the field of the legislator's free disposition, is based on article 9.2 of the Spanish Constitution.

Those who wish to exercise the right to stand for office (passive suffrage) through a group are not only required to be unaffected by any of the grounds for ineligibility as set out in LOREG, but must also comply with other conditions which do not affect their capacity for election in the strict sense, for example, and most importantly, that of standing with other persons forming a list. An individual list or candidacy is not possible, and this obliges the individual to look for company. Nobody however would say that that requirement involves a material breach of the right to stand for election (passive suffrage); or that solitude becomes a ground for ineligibility.

That to the requirement to stand in a list is added the requirement that it has a balanced composition in terms of sex does not intolerably encroach on the actual possibility of exercising the right. It is a condition that is integrated naturally into the area available to the legislator in

its task of configuring the fundamental right of political participation: a right of collective exercise is thereby configured in a list of candidates the personal integration of which aims to be a reflection of the integration of the social community, in other words, gender-balanced.

Like in the case of the political parties, the composition of the lists of candidates promoted by the groups of electors is not constrained by the differentiating criteria which are the determining factors of a majority/minority dialectics, as would be the case if the presence was required of a number of persons or a percentage of persons from a certain race or certain age group, but rather that the criterion in question is that which in any case, and universally, divides the society into two quantitatively balanced groups. And by virtue of article 9.2 of the Spanish Constitution the aim is that that material balance is transferred from society to the political bodies of citizen representation; which is again consistent with the democratic principle.

The aim is in short that the equality that effectively exists insofar as the division of the society in accordance to gender is not distorted in the bodies of political representation with the overwhelming majority of one of them. Political representation which is organised from the supposition of the necessary division of society into two sexes is perfectly constitutional, as it is considered that that balance is a determining factor in order to define the content of the regulations and acts which must emanate from those bodies. Not their ideological or political content, but rather the pre-content or substratum upon which any political decision must be based: the absolute equality between men and women. Requiring those who wish to perform a representative function and to rule over their fellow citizens who stands for election in a group which is balanced in terms of gender is to guarantee that whatever their political programme they will share with all of the representatives a representation which includes both sexes cannot be waived when governing a society which is, necessarily, thus composed.

To sum up, the challenged measures, in their application to groups of electors, for the stated reasons and for the reasons set out in Point of law 5, from the perspective of the limitations on the political parties' freedom to draw up and present lists of candidates, pass the rule of proportionality, as their purpose is legitimate in accordance with article 9.2 of the Spanish Constitution, and they are reasonable and suitable for the intended purpose.

As there are no obstacles from the point of view of the pleaded fundamental rights in order to impose the said condition on the groups of electors, it is suitable that, as they perform the same electoral function as regards presenting lists of candidates as the political parties, they must be treated equally as regards the legal duty that these lists of candidates must be balanced in terms of gender.

8. The appellant members of parliament (Diputados) also plead that the exceptions to the general application of the new article 44 bis LOREG introduced by the new articles 187.2 and 201.3 show the lack of an objective and reasonable foundation for the debated legislative reforms as they operate over the cases where there is the clearest traditional lack of participation of women in the political life. We recall that those exceptions refer to the municipalities with a number of residents less than or equal to 3,000 inhabitants (5,000 up to 2011, according to the seventh transitional provision of the LORE added by the Act in question) and to the islands with a number of residents equal to or less than 5,000 inhabitants, respectively.

This objection cannot possibly be accepted, given the interpretation that we have made of the challenged legal precept and of its purpose and the constitutional legitimacy offered by article 9.2 of the Spanish Constitution, which, it is clear, does not impose a provision like the one in question, although it does provide it with the indicated support in order to uphold equality and the effective participation of men and women intended by the rule and which is expressly demanded by the Constitution. Hence article 9.2 does not force the application of that provision in all cases, and it rests with the democratic legislator freely to configure the design of the electoral regime on the terms in force until the entry into force of the reformed article 44 bis

LOREG or in the terms of the new legal precept, which without doubt contributes towards the mandate unequivocally directed by article 9.2 of the Spanish Constitution at the public powers, with the exceptions that the appellant members of parliament question: exceptions which aim to facilitate or make flexible their application, constituting particularly appropriate instruments in order to satisfy the requirements of proportionality of the new legal regulation. Strictly speaking, articles 187.2 and 201.3 of the LOREG make an exception from the principle of balanced presence or composition of the lists of candidates in certain electoral districts characterised by their reduced population, so that those lists of candidates either made up of a majority of men or women are equally legitimate.

The second paragraph of the new article 44 bis 1 LOREG is criticised because it covers establishing regulations which raise the share of women's representation up to almost 50 percent in the composition of the lists of candidates for the legislative assemblies of the devolved regions. In any event this authorisation in itself, and thus understood, is constitutionally covered by article 9.2 of the Spanish Constitution. On the other hand, its correct application, as noted by the Counsel for the Government, can be performed through different formulas in relation to which it is not appropriate that we pronounce now, because, as we have said so often, it does not correspond to this Court to make pre-emptive pronouncements about hypothetical legislation or about legislation which, although already in place, is not the subject-matter of these proceedings.

9. The appellants and the questioning judicial body also set out the possible infringement by the appealed provision of articles 14 and 23 of the Spanish Constitution. Apart from the fact that, as indicated in Point of law 3, such infringements should be predicated only of citizens and not of the bodies addressed by the provision, the very content of the precepts in question mean that infringement can be rejected.

As regards the equality of the citizens, it cannot be upheld that a legal measure like the one being challenged can infringe it, as on the contrary, as indicated above, it is precisely this equality that the measure ensures. In deed the modifications of the LOREG object of our study do not incorporate compensatory formulas in favour of women as an historically disadvantaged group (without prejudice to the singularity of the authorisation to the regional electoral legislation contained in the second paragraph of article 44 bis 1 LOREG, in relation to which we have already ruled in Point of law 8), but rather give expression to a criterion which refers indistinctly to candidates of both sexes, as shown by the fact that the said article 44 bis LOREG establishes that the lists presented for the elections mentioned therein "must have a balanced composition between women and men, so that in the list of candidates as a whole each sex has a minimum of forty percent."

As regards the right to stand for election (passive suffrage) it is important to repeat that article 23.2 of the Spanish Constitution does not incorporate amongst its content a purported fundamental right to be proposed or presented, by the political formations, as a candidate in elections (Constitutional Court Judgment 78/1987, of 26 May, Point of law 3). As such, it can not be considered that there has been a breach of the essential content of the right to stand for election (passive suffrage), identified in our Constitutional Court Judgment 154/2003, of 17 July, as the guarantee that "accessing public positions are those candidates that the electors have chosen as their representatives, thereby satisfying that right provided that the due correlation is maintained between the will of the electoral body and the proclamation of the candidates [...] [ibid; also Constitutional Court Judgment, 185/1999, 11 October, Point of law 2 c)]" [Point of law 6 c)]. There is nothing in the second additional provision of the LOIMH which alters the correlation between the will of the electoral body manifested through the exercise of the right to vote and the candidates who have obtained the confidence of the electors and insofar as they must be proclaimed elected and access the elective public positions. The principle of balanced composition is an instrument in the service of equal opportunities in the exercise of the right to

stand for election as it shapes the preparation of the lists of candidates; hence one could only consider a possible infringement of the essential content of the fundamental right proclaimed in article 23.2 of the Spanish Constitution if it is applied in the phase proclaiming the elected candidates, coming into operation after the election results.

In relation to the right to vote, just like article 23.2 of the Spanish Constitution does not require a certain electoral system, or a certain mechanism for attributing the representative positions under election according to the votes obtained (Constitutional Court Judgment 75/1985, of 21 June, Point of law 4), nor can article 23.1 of the Spanish Constitution lead to a subjective right for citizens for a specific composition of the election lists. The affirmation that nobody holds a fundamental right to be presented as a candidate in certain elections (Constitutional Court Judgment 78/1987, of 26 May, Point of law 3) has its natural correlation in the verification that neither can anybody claim to hold the fundamental right that the political formations listed in article 44 LOREG present third parties as candidates. The right to vote contained in article 23.1 of the Spanish Constitution is exercised by citizens through the election, through free, equal, direct and secret suffrage, amongst the options presented for their consideration by the political formations authorised for the purpose by the electoral legislation, and this right does not include the authority to grant the condition of candidate to those not proposed as such by the political parties, groups of electors or federations of parties. There cannot therefore be held to be any contradiction between the second additional provision of the LOIMH and articles 14 and 23.1 of the Spanish Constitution.

10. Finally, as regards the complaint which must be considered as referring to section 1 of article 23 of the Spanish Constitution about the fragmentation of the electoral body, it is not held that the debated measures violate the unity of the category of citizen or involve a certain risk of dissolving the general interest into a set of partial interests or by categories. As we have already indicated, the principle of balanced composition of the electoral lists of candidates is based on a natural and universal criterion, namely sex. Now then, here we must add that the provisions of the second additional provision of the LOIMH do not involve creating special links between electors and those eligible, nor the compartmentalisation of the electoral body according to gender. The candidates defend diverse political opinions before the electorate as a whole and, if they receive its support, will also represent it as a whole and not only the voters of their same sex.

The appellants' argument that the requirement of equality prejudices the unity of the sovereign people insofar as it introduces in the category of citizen – "one and indivisible" for the appellant members of parliament – the dividing line of sex, cannot be upheld. It is sufficient to say that the electoral body is not confused with the holder of the sovereignty, in other words the Spanish people (article 1.2 of the Spanish Constitution), although its will is expressed through it. This electoral body is subject to the Constitution and the rest of the legal order (article 9.1 of the Spanish Constitution), insofar as the sovereign people is the ideal unit to attribute the constituent power and, as such, foundation of the Constitution and of the law. The grounds determining the condition of elector do not therefore affect this ideal unit, but rather to the group of those who, as citizens, are subject to Spanish law and they only have the rights guaranteed to them in the Constitution, with the content which, ensuring an indispensable constitutional minimum, is determined by the constituted legislator.

Now then, the same reasons which lead us to reject that the legal provisions under challenge introduce a new ground for limitative ineligibility on the exercise of the right to stand for election (passive suffrage) or establish a closer link between electors and those eligible according to the sex that they share introducing an unacceptable division in the unity of the sovereign people, directly lead us to reject the existence of the violation of article 68.5 of the Spanish Constitution as claimed by the members of parliament who filed the appeal for constitutional review number 5653-2007.

In view of the above we must conclude that the second additional provision of the LOIMH is not contrary to articles 23 and 68.5 of the Spanish Constitution.

JUDGMENT

In light of that stated above, the Constitutional Court, BY THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To reject the issue of unconstitutionality number 4069-2007, brought by Contentious-Administrative Court Number 1 Santa Cruz de Tenerife, and the appeal for constitutional review number 5653-2007, filed by over fifty members of parliament of the Popular Parliamentary Group of the lower house of parliament.

Publish this Judgment in the Boletín Oficial del Estado (Official State Gazette).

Done at Madrid, this twenty-ninth day of January, two thousand and eight.