Judgment 99/2019, 18 July 2019.
Full bench of the Constitutional Court of Spain.
(State Gazzette num. 192, 12 August 2019).

Full bench of the Constitutional Court of Spain, judgment 99/2019, 18 July 2019. Question of unconstitutionality 1595-2016. Promoted by the First Chamber of the Supreme Court, in regards to art. 1 of Law 3/2007, of 15 March, regulating the register rectification of the entry related to a person's sex. Rights to physical and moral integrity, intimacy and health protection, related to the person´s dignity and the free development of the personality. Unconstitutionality of the legal measure insofar it prohibits to change the registers of sex and name for minors who have sufficient maturity and who are in a steady state of transsexuality. Dissenting opinion.

ECLI: ES: TC: 2019: 99

The Constitutional Court, in full bench, composed by the Judge Mr. Juan José González Rivas, President; the Judge Ms. Encarnación Roca Trías; the Judges Mr. Andrés Ollero Tassara, Mr. Fernando Valdés Dal-Ré, Mr. Santiago Martínez Vares García, Mr. Juan Antonio Xiol Ríos, Mr Antonio Narváez Rodríguez, Mr. Alfredo Montoya Melgar, Mr. Ricardo Enríquez Sancho, Mr. Cándido Conde-Pumpido Tourón and the Judge Ms. María Luisa Balaguer Callejón, has pronounced

IN THE NAME OF THE KING

the following

J U D G M E N T

In the question of unconstitutionality number 1595-2016, promoted by the First Chamber of the Supreme Court, in regards to art. 1 of Law 3/2007, of 15 March, regulating the register rectification of the entry related to a person's sex, for alleged violation of arts. 15, 18.1 and 43.1 CE, in connection with art. 10.1 CE. The State Attorney, the Public Prosecutor's Office, and Mr. M.V.G. and Mrs. N.A.B., as parents and legal representatives of the minor P.G.A., have been parties and have submitted their pleadings. The reporting Judge is Mr. Juan José González Rivas.

I. The facts.

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II. Grounds

1. Approach and positions of the parties.

The present question of unconstitutionality, lodged by the Plenum of the First Chamber of the Supreme Court, although formally aimed on art. 1 of Law 3/2007, of 15 March, regulating the register rectification of the entry regarding sex, is in fact reduced to the word "person of legal age" contained in the first subsection of the first paragraph of the aforementioned article. In other words, the question of unconstitutionality focuses on the legal age as a necessary condition to be able to request the Civil Register a rectification of the entry related to sex and, in accordance with that change, the rectification of the person's first name.

Concretely, art. 1 of the referrred law provides:

"Any person of Spanish nationality, of legal age and with sufficient capacity to do so, may request the register rectification for sex change.

The rectification for sex change will entail the change of the person's own name so that it is not discordant with its registered sex."

The reason for putting this clause into question is that its content could violate articles 15 CE (right to physical and moral integrity), 18.1 CE (right to personal and family privacy) and 43.1 CE (right to protection of health), in relation to art. 10.1 CE (human dignity and free development of personality).

The Civil Chamber of the Supreme Court raises the issue on the occasion of the appeal in cassation and the extraordinary appeal in procedural infringement filed by the parents of a minor who, as legal representatives, asked for the register rectification of the entries related to sex and first name under the protection of the quoted Law 3/2007 when the minor was twelve years old, first in government procedures before the Civil Register and then in an ordinary trial before the Court of First Instance and Instruction No. 5 of Huesca, with subsequent appeal to the Provincial Court of Huesca, being his claims denied in all cases in attention to the minority of their son. The State Attorney expresses his opposition to grant the question of unconstitutionality, while the Public Prosecutor's Office and those who acted as plaintiff in the *a quo* procedure, all of them being present at the proceedings, request that the question should be sustain basing on the reasons given in the background facts of this sentence. Furthermore, the latter contend that the necessary overcoming of the pathological vision of this phenomenon should lead to understand that the requirements imposed by art. 4 of Law 3/2007 (diagnosis and hormonal treatment) are contrary to the Constitution.

2. Preliminary consideration: identification of the appellant in the *a quo* procedure.

Prior to the presentation of the grounds of this sentence, and in a similar manner to what we explained in STC 176/2008, 22 December, FJ 9, considering that "it is incumbent upon this Court to adopt, regarding the form of its resolutions, 'the measures that it consideres approppiate for the protection of the rights recognised in art. 18.4 CE' (art. 86.3 LOTC), this judgment does not include the complete identification of the appellant [in the *a quo* procedure, nor of his or her parents, with the aim of respecting the child's privacy], [...] as this Court has

noted on previous occasions (SSTC 288/2000, 27 November, FJ 1; 94/2003, 19 May, FJ 7; 30/2005, 14 February, FJ 7, and 114/2006, 5 April, FJ 7)". Moreover, it should be pointed out that the references made throughout this judgement to the minor in relation to whom this procedure has been followed, are intended to be written in a generic or neutral sense, as equivalent to a minor, without expressing any opinion or comment about his or her sex nor about his or her gender identity.

3. Delimitation of the object.

Those who were the appellants in the *a quo* procedure have being present in this constitutional procedure and, in addition to urging the upholding of the question raised with respect to art. 1.1 of Law 3/2007, request that the requirements imposed by art. 4 of Law 3/2007 (diagnosis and hormonal treatment) should be declared unconstitutional because, since they constitute a hetero-assignation of sexual identity, they damage the dignity of transsexuals.

The Court considers that this claim should not be attended. The judicial organ that raised the present issue, both by conferring the hearing procedure and by reasoning the applicability and relevance of the precepts questioned with respect to the underlying litigous case (both procedural requirements foreseen in art. 35.2 LOTC), considers that the conditions established by art. 4.1 of Law 3/2007 for rectifications to be admissible, either are fulfilled by the requesting party or the individual in question is exempt from complying with them ex art. 4.2 of the same law. In both cases, the consequence is that the judicial organ does not raise any question with respect to the aforementioned article 4.1 of Law 3/2007. This issue, which ultimately calls into question if it is contrary to the Constitution that the legislator conditions the register rectification of the entry regarding a person's sex to any other requirements different from the will expressed by the transsexual (art. 4.1 requires medical diagnosis and hormonal treatment), does not form part, for the reasons already indicated, of the object of the proceedings and, therefore, this Court will not make any pronouncement on it.

4. Fundamental rights and constitutional principles affected by the contested norm.

Solving the substantial question of this constitutional procedure implies that this Court has to decide whether to reserve persons of legal age the right to rectify in the Civil Register the entries relating to the person's sex, which in conformity with Law 3/2017 immediately entails the right to modify the register entries concerning the first name (second paragraph of art. 1.1), constitutes or not a disproportionate restriction of the legal status of the minor guaranteed by the Spanish Constitution.

According to reiterated constitutional doctrine, the principle of proportionality, as a constitutional requirement of the mentioned law, does not operate in abstract terms. The Court has repeatedly insisted that this principle acts only by reference to specific fundamental rights (SSTC 64/2019, 9 May, FJ 5, and 55/1996, 28 March, FJ 3) or specific constitutional

principles [STC 60/2010, 7 October, FFJJ 7 and 8 b)], rights and principles that would be violated in the event that the legislator restricts them in a disproportionate way.

In line with this pronouncement, repeated and consolidated in the constitutional doctrine, the cited STC 60/2010 emphasized that “the first question that sholud be analysed as a prerequisite of the verification of the proportionality of a [legal] measure is the identification of constitutional principles or rights whose content is restricted as a consequence of their adoption, as the proportionality requirement applicable to the rule would be meaningless in case that a restriction of this nature would not be imposed”.

a) As highlighted in the order lodging the question of unconstitutionality, the first legal asset of constitutional relevance that art. 1.1 of Law 3/2007 affects is the constitutitonal principle that guarantees the free development of the person (art. 10.1 CE). In effect, the impugned norm allows transsexuals of legal age to rectify the register entries relating to their sex, and correlatively to change the register entries regarding their first names (paragraph 1.1) and to "exercise all the rights inherent to their new status" (art. 5.2). In this manner, the precept is enabling individuals to make decisions about their identity in a legally effective way. One's own identity, within which are inscribed aspects such as the first name and sex, is a main quality of human persons. Establishing one's identity is not one more personal act, but a vital decision, in the sense that it places the subject in a position to be able to develop his/her own personality. Anyone forced to live in the light of law according to an identity different from his own carries a burden that conditions him in a very remarkable way with regard to the ability to shape his characteristic personality and with respect to the effective possibility of establishing relationships with other people.

This link between deciding on one's own identity and the enjoyment by an individual of autonomy to organize his/her own life and personal relationships is recognised and affirmed by various institutions of our legal environment, making clear that there is a widespread consensus on this link and the European Court of Human Rights, which jurisprudence has a special hermeneutical value for this Court, when this organ addresses complaints in which the transgender situation is relevant, alludes expressly to the protection of personal development and puts it in relation with "the right to establish and strengthen relationships with other human beings and the environment in which he or she lives" (by all, STEDH, 10 March 2015, Case Y.Y. v. Turkey, § 57).

In the same vein, the Court has stressed on numerous occasions that the concept of “private life” includes not only the physical and mental integrity of the person, but may also sometimes cover aspects of the physical and social identity of the individual. Elements such as gender identity, name, sexual orientation and sexual life fall within the personal sphere protected by art. 8 of the European Convention on Human Rights (CEDH). This has led to the recognition, in the context of the application of this principle to transgender people, that it implies a right to self-determination, that the freedom to define one's own sexual identity is one of the most basic essential elements and that the right of transgender people to free development of personality and to physical and moral security is guaranteed in art.8 (STEDH Case A.P. Garçon and Nicot v. France of 6 April 2017).

The German Federal Court has ruled several times on situations which transgender people might confront (1 BvR 938/81, 16 March, 1982; 1 BvL 38/92, 26 January, 1993; 1 BvL 3 / 03, 6 December, 2005; 1 BvL 1/04, 18 July, 2006; 1 BvL 10/05, 27 May, 2008; 1 BvR 3295/07, 11 January, 2011 and 1 BvR 2019/16, 10 October, 2017). In all of them, the basic analysis framework has been the general right to personality (arts. 1.1 and 2.1 GG). Furthermore, Resolution 2048 of the Parliamentary Assembly of the Council of Europe, 22 April 2015, urges to States, as far as it concerns the legal recognition of gender, "to initiate quick, transparentent and accesible procedures based on self-determination that empower transsexuals to change their first name and their sex on birth certificates, on identity documents, on passports, on diplomas and other similar documents: to make the procedures available to everyone who wants to use them, regardless of age, state of health, financial situation, or the existence of a past or present condemnation". Finally, the First Chamber of the Supreme Court based on the right to free development of personality ex 10.1 CE the jurisprudential line (STS 929/2007, 17 September; 158/2008, 28 February; 182/2008, 6 March; 183/2008, 6 March; 731/2008, 18 July; 465/2009, 22 June) according to which, by establishing the prevelance of psychosocial factors regarding sex determination, the use of sexual reassignment surgery is no longer demanded to admit the register rectification of the entries concerning sex and first name.

This criterion that associates the autonomous determination of one's own identity with the free development of the person was also present in the legislative act that introduced the registry rectification of sex. Not by accident, the explanatory memorandum of Law 3/2007 clarifies that the aim of the new regulation was the realisation of this constitutional principle. This is shown in a meridian way as the Court reasons that it consists of "a response of the legislator to facilitate that the initial assignment of sex and first name can be modified, with the purpose of guaranteeing the free development of personality and the dignity of the persons whose gender identity does not correspond to the sex which was initially registered".

If, for the reasons indicated, the right to obtain the register rectification relating to sex enabled by Law 3/2007 is aimed at the realization of the free development of personality (art. 10.1 CE), the limitation of its enjoyment only in favour of people of legal age, a restriction contained in its art. 1 which excludes those who do not meet the age requirement from the subjective scope of such a right, implies that the latter are deprived of the effectiveness of the abovementioned constitutional principle when it comes to deciding about one's own identity.

This restriction, observes the Court already on this point thay will be taken up again at a later stage as a relevant element to resolve the issue, is particularly intense because it constrains an important manifestation of personality and, consequently, it has a significant impact on his dignity as individual, whose safeguard is the ultimate justification of the existence of a constitutional state like the one established by the 1978 Constitution.

In conclusion, the questioned legal precept has a restrictive impact on the legal consecuences deriving from the clause on the free development of personality ex art. 10.1 CE, insofar as it does not allow those who do not meet the age of majority requirement to decide autonomously on a particular aspect of their life which is essential to their identity.

To sum up, the legal provision in question has a limiting effect on the implications resulting from the clause on the free development of personality ex art. 10.1 CE, as much as

it does not allow someone who does not meet the legal age requirement to decide independently on an essential aspect of his/her identity.

b) The order lodging the question of unconstitutionality also states that the contested rule affects the fundamental right to personal privacy (18.1 CE) of the transsexual minor, since it exposes —the order affirms— his/her condition of being transexual to public scrutiny each time he/she has to identify himself at school, in relations with public administrations, etc.

In the Court's view, there is a connection between the contested rule and this situation, which is underlined by the initial resolution lodging a preliminary ruling. Actually, the fact of excluding transsexual minors from the option of requesting the register rectification relating to sex, and of the correlative modification of the first name, has an effect reflected in the sex and name references included in their official documents, and generally conditions each and every action in which the person has to identify himself.

Resolving whether the situation described affects personal privacy is a question that should be based on the constitutional doctrine on this dimension of Article 18.1 EC. It has been repeatedly stressed (see STC 60/2010) that "the right to personal privacy (intimacy) of art. 18 CE implies "the existence of a reserved and independent area with regard to the action and knowledge of others, necessary -according to our cultural patterns- to maintain a minimum quality of human life" (STC 231/1988, December 2, FJ 3)". Moreover, "what Article 18.1 guarantees is the right to secrecy, to be unknown, for others not to know what we are or what we do, forbidding third parties, whether individuals or public authorities, to decide which are the boundaries of our private life, being everyone able to reserve a space for himself or herself which is protected from the curiosity of others, regardless of the content of that space (SSTC 127/2003, 30 June, FJ 7, and 89/2006, 27 March, FJ 5)".

The Court, applying the doctrine outlined above, understands that discordance between the sex genetically assigned at birth, which is the one recorded at the Civil Register, and gender identity is one of those particularly relevant circumstances that the person has the right to prevent from the knowledge of others. This is due to the fact that this reserve provides an effective way to make the second one appear as unique and true –the gender identity- and, consequently, his/her condition of being transexual does not become public knowledge.

It follows from the foregoing that the contested provision also affects the right to personal privacy ex. art.18.1 CE. Furthermore, it constitutes a serious interference with this fundamental right since it concerns a circumstance relating to the innermost circle of the individual.

c) On the contrary, the Court does not consider that the contested rule affects the other two legal assets of constitutional relevance referred to in the order lodging the question of unconstitutionality.

Note that the invocation of arts. 15 and 43 CE is not linked to the need to undergo sexual reassignment surgery (the Spanish legislation does not establish this requirement for the register rectification of the entry relating to sex) or another treatment with physical incidence (the judicial organ that raises the question does not consider that requirement applicable to the plaintiff in the *a quo* procedure). The initial resolution lodging a preliminary ruling considers arts. 15 and 43 CE to be concerned as it points out that a minor who is forced

to deal with the disharmony between the sex assigned at birth and recorded in the Civil Register and his/her gender identity is subjected to humiliating and inhuman treatment, a circumstance that affects his health. The European Court of Human Rights addressed this issue in judgement of 11 September 2007, Case L. v. Lithuania, § 46 and 47, emphasizing that, in principle, this situation, while acknowledging the anguish and frustration it can generate, is not intense enough to find appropiate coverage in art. 3 CEDH, considering it more convenient to examine the complaint in the context of art. 8 CEDH, a precept that the European Court of Human Rights finally declared infringed in his decision.

5. Hold and exercise of those juridical positions by minors.

Following a consolidated constitutional doctrine, which is summarized in the order lodging the question of unconstitutionality, it is able to affirm that also minors are able to hold fundamental rights. There is an abundant doctrine (for all, STC 183/2008, 22 December, FJ 5) saying that it is "part of the essential content of article 24.1 CE" the right of all minors, with enough capacity and maturity, to be heard on judicial procedures that adopt measures affecting their personal scope, and it is added that "moreover, and because it is the logical ground, it is part of article 24.1 CE to make possible that any minor, with enough capacity and maturity, to require from judicial organs a defense on any interest that affect their personal scope, even against the will of those who exercise their legal representation".

More related with this process —because it is related with rights related with the freedom rather than rights related with State activity such as the right to access to justice— is STC 141/2000, 29 May, FJ 5, when establishing that "from the perspective of art. 16 CE, minors are able to fully hold fundamental rights, in this case, their rights for freedom of beliefs and for moral integrity, and the decisions related to the exercise or disposal of those rights, are not fully ceded to those who exercise their guard, cusdody or exercise the parental power, and the incidence on the exercise of those fundamental rights by the minors will be regulated in regards the child´s maturity and the different steps that norms establish in order to grade their capacity to act".

On STC 154/2002, 18 July, FJ 9 a), that was expressly based on the aforementioned STC 141/2000, it is recognized that the scope of self-determination on personal decisions —rejection to a blood transfusion despite of a risk on life— does not only belong to person of legal age, but to minors too, and that minors hold the right of freedom of beliefs, and it has to be recognized his or her responsibility on the exercise of this fundamental right, when there are high personal decisions such as the vital choice to accept or to reject a blood transfusion due to his beliefs and when he has sufficient maturity.

In that precedent (STC 154/2002) the attribution to a space for self-determination, with the exceptions needed by other juridical principles, is justified on the respect to his or her personal beliefs, thus in the fundamental rights entitled in art. 16.1 CE. However, there are no obstacles to generalize this criteria (recognize both, person of legal age and minors, with the exceptions needed by other juridical relations, a margin of self-configuration for the fundamental options of life, on which it lays de definition to the self-identity) and to create effects, as established on the order lodging the question of unconstitutionality, on the capacity

of self-determination of the individual in all the scopes on which this right is protected. Not in vain the Convention on the rights of the child, 20 November 1989, that it is relevant in terms of art. 10.2 CE, links all state parties "to respect the right of the child to preserve his or her identity".

6. The reach of the test of proportionality on a legislative measure.

The fact that the questioned norm affects the fundamental right to personal intimacy and the constitutional principle to self-development of personality does not necessarily mean that it is unconstitutional. It will only be if the incidence on the constitutional rights and principles is clearly disproportioned. The test of proportionality on a legislative measure, as a presuppose for its constitutionality, has two phases (for all, STC 60/2010, FJ 9): a) the first phase of this canon of control seeks to examine that the norm pursuits an objective that is constitutionally legitimate; and b) the second phase implies to review if the legal measure is grounded on this constitutional objective in a proportional way. This second phase of the test also needs to verify (for all, STC 64/2019, 9 May, FJ 5) that the observance of "the triple condition of (i) adequacy of the measure to the proposed objective (test of adequacy); (ii) need of the measure to fulfill the objective, when the fulfillment is not reachable by other measure that is more moderate and with equal efficacy (test of the necessity) and (iii) ponderation of the measure when it derives more benefits or advantages for the general interest than damages on another values that are in conflict (test of proportionality in strict sense)".

Before examining the analytical phases that conform the test of proportionality, we should make some previous considerations on the reach of the test of proportionality that is made by this Court.

a) The first observation is from an institutional perspective and is related to the delimitation of the functions of the legislator and those of this Court. On STC 55/1996, FJ 6, after establishing that it was possible to make a test of proportionality on an act, this settlement was nuanced taking in account "the constitutional position of the legislator" that "obliges the appliance of the test of proportionality to control the constitutionality of its decisions in a manner and intensity that is qualitatively different to the control applied to the organs that are in charge to interpret and apply the law".

This reference to the position of the legislator makes sense considering that art. 53.1 CE confers to it the competence to delimit the content and reach of the fundamental rights. Competence that is develop as long as it does not ignore the central elements that make identifiable the fundamental rights. This function of the legislator to define the reach of the fundamental rights imply a wide margin of configuration, which this Court have highlighted in relation with constitutional principles (STC 60/2010, FJ 7). This Court, when ruling on certain legislative measures in terms of the test of proportionality, have specified that this margin of configuration remembers that "the legislator is not limited to execute or apply the Constitution, but also within the constitutional frame, it freely adopts the political options that are considered more adequate" (STC 55/1996, FJ 6).

Thus, it will be the legislator the one that concretes the conditions for the manifestations of the right to personal intimacy and the constitutional principle that protects the right to develop the personality.

However, there are decisions of the legislator that, with the finality to legislate according to what his criteria is required to fulfill an objective that has constitutional legitimacy, lay under central elements of a certain fundamental right or constitutional principle, putting restrictions that go forward to the margin of configuration that the Constitution reserves to the legislator. On this scenarios of collision between contents with constitutional relevancy, the legislator, with the aim to provide a satisfactory response to one of the finalities that are in conflict, adopts restrictions to central elements of the contents of a fundamental right or a constitutional principle. This is the scenario where the Constitutional Court is called to develop the control of the constitutionality of an act according to the test of proportionality. In this sense, the Court has declared that "when fundamental rights collide or are limited in the seek to preserve some other constitutional rights, the function of the constitutional interpretation reaches the highest importance and it is obliged —as stated on STC 53/1985— to balance principles and rights according to the certain case, trying to harmonize them if possible or, if it is not the case, determining the conditions and requirements on which it is admissible to prevail one on the other" (SSTC 64/2019, 9 May, FJ 5, and 215/1994, 14 July, FJ 2).

b) The second consideration is from a substantial perspective and implies that the reach of the constitutional judgement on the legislator depends "on the object in which it is highlighted or the kind of decisions that are incorporated", in such a way that "the more intense the restriction of constitutional principles is, particularly of fundamental rights and freedoms recognized in the constitution, the more exigent the substantive presupposes of constitutionality of the measure are" (STC 60/2010, FJ 7).

c) Now it is time to discuss in the light of the two aforementioned criteria on the particular circumstances of this case. In this process the challenged norm makes an exclusion of certain persons —minor age transsexuals— to the right generally recognized to the rest of Spanish people to have a civil register that is coherent with the sex and the names according to their particular gender identity. This implies, as a direct consequence, that minor age transsexuals have no documentation that allow them to identify themselves on their daily activities in accordance with their desired sex and names, so they cannot reserve from external awareness the difference between their original sex and the sex that is personally perceived. So they are prevented to exclude from external awareness their transsexual condition, and that forced publicity creates obstacles to freely conform their own personality and to establish the personal relationship that they prefer.

This Courts holds that this legal measure affects the right to intimacy, for exposing to the public personal circumstances that the individual is able to maintain reserved, and for conditioning the personal autonomy since it is not possible to develop a personal life and social relationships according to the gender identity that is felt by the person. Both damages have a particular, relevant intensity because they underline in aspects that are specially linked with human dignity and with self-identity. All this determines that the control of constitutionality that is required by this Court in this case, must be held by the test of

proportionality on a legal measure through the two phases aforementioned, control that must be held by verifying on an exigent manner the substantial presupposes of constitutionality of the legal measure.

7. The first step of the test of proportionality: the constitutionally legitimate objective that justifies the legal restriction.

The first step of this test consists of verifying that the exclusion of minors from the option of requesting the register rectification relating to sex pursues some legitimate constitutional objective of relevance. The infringement of proportionality —this Court has pointed out— could be declared at the beginning of the procedure "if the restriction of liberty that the rule imposes pursues, not only an unconstitutional objective, but also an irrelevant end from a social perspective" (STC 55/1996, FJ 7).

The order lodging the question of unconstitutionality, refers to two different aims that could justify the challenged regulation. One the one hand, it refers to the elements of public order related to the stability and unavailability of civil status. On the other hand, it mentions the "need to protect minors that the Constitution recognizes (art. 39.3 and 4 CE)" referring to STC 274/2005.

It is proper to discard, for the same reasons that the order lodging the question of unconstitutionality does, the first option. In the type of State set by the Constitution of 1978, the recognition and protection of fundamental rights and liberties of citizens constitutes the core of public order. In consequence, other traditional elements of public order, such as the stability and unavailability of civil status, or the security that the latter offers to social and legal relations, have now less importance than the guarantee of an effective exercise of fundamental rights. This criterion was followed to deny that the legal security reasons alleged to justify the legal conditions under which the register rectification relating to sex was allowed prevailed over the individual's autonomy to choose its own gender identity. In particular, relating to the need of surgery to change sex (STS 929/2007, 17 of September) or to be subjected to a sterilization procedure (judgment of the Federal Constitutional Court, 11 of January 2011 – BvR 3295/07).

On the contrary, the Court admitted that art. 39 CE demands from public powers to give priority to minor's situation, creating special regimes of tutelage in any case the legislator considers it necessary. STC 274/2005, 7 November, FJ 4, expressly cited by the order lodging the question of unconstitutionality, recognizes that the legal distinction between the eldest and youngest brothers of a person who died in a traffic accident pursues the legitimate aim of "giving the right to be indemnified to a group of people that usually needs a higher protection: the minors (art. 39.3 and 4 CE)". In addition, STC 141/2000, FJ 5, declared that "minor's statute is, undoubtedly, a rule of public order which is mandatory for all public powers and constitutes a legitimate restriction to the right to express his/her own beliefs to third parties, even to his parents". The same judgment declared that "liberties and rights of ones and the others […] should be weighed up taking into account the "superior interest" of minors (arts. 15 y 16.1 CE in connection with art. 39 CE). In line with these judgments, STC 64/2019

declared that the superior interest of minors is a constitutional legitimate objective that can justify restrictions to the fundamental right of effective judicial protection.

Considering the above mentioned, it is possible to conclude that the superior interest of minors inherent to some provisions of art. 39 CE is, in the abstract, a constitutional value relevant enough to justify the adoption of legal measures restricting constitutional rights and principles.

Additionally, it must be clarified that the previous consideration is not contrary to the fact that, in the present case, the restriction of the constitutional right or principle —the exclusion of the transsexual minor from the option of requesting the register rectification relating to sex— could, at the same time, imply a benefit for those subject to the restriction. It is not contrary, on the one hand, because it is grounded on the constitutional duty of all public powers of giving a special protection to minors. On the other hand, because the constitutional doctrine has already admitted that other expressions of the *agere licere* of the individual, which are grounded also in the clause of free development of personality (art. 10.1 CE) and in the protection given by some fundamental rights (art. 16 CE), could be restricted in order to guarantee the protection of the same person subject to the restriction. (SSTC 120/1990, 27 June and 60/2010, 7 October).

8. The second step of the test of proportionality: the proportionality in the pursue of the legitimate objective.

The second step of the test of proportionality consists in verifying that the rule restrictive of constitutional rights and principles —the exclusion of the transsexual minor from the option of requesting the register rectification relating to sex— pursues in a proportionate way the legitimate objective that justifies it —the priority given to minors as a group of people that need special protection— which could happen only if the restrictive measure is adequate (a), necessary (b) and proportionate in the strict sense (FJ 9).

a) About the test of adequacy of a restrictive legal measure to the constitutional objective that justifies it, this Court has determined, paying special attention to the constitutional position of the legislator, that "the necessary respect of the margin of appreciation of the legislator demands that, in order to determine the adequacy of the challenged regulation, it is enough for the Constitutional Court to verify that the regulation leads in some way to the legitimate objective that it pursues. As a result, the declaration of unconstitutionality only can take place on this step of the trial if is evident that the regulation does not lead in any way to the legitimate objective." (STC 60/2010, FJ 2).

The order lodging the question of unconstitutionality does not contain any reasoning aiming to probe that is evident that the challenged regulation implies, in any case, an impediment for the special protection of the minor or, at least, that it is irrelevant to achieve the legitimate objective.

In fact, despite the expansion of the scope of application of art. 1.1 of Law 3/2007 to transsexual minors would mean an important benefit to him/her, at least regarding his/her right to privacy and the autonomy to make decisions about his/her person, it is not possible to affirm without any doubt that the general restriction that the rules contains does not suppose

any benefit to the minor, in particular in all those cases in which the manifestations of transsexuality are not clear. When this happens, although the exclusion of the minor from the option implies a restriction of the constitutional rights and principles before mentioned, that restriction is justified in the better protection of minor's interest as the measure avoids the negative consequences that could follow from a premature decision. In consequence, it is not clear that the challenged regulation is, in any case, irrelevant to the protection of minors or implies and impediment to that objective.

b) The constitutional doctrine, taking into account the special position of the legislator, has dealt on various occasions with the test of necessity of the legal measure restrictive of constitutional rights and principles in relation with the legitimate objective that justifies those measures.

STC 64/2019 highlights that the Court "has reiterated that, prima facie, the test of necessity competes to the legislator, which is justified […] above all [by] its nature as 'representative of the popular sovereignty' (SSTC 11/1981, and 332/1994)".

More precisely, STC 136/1999, 20 July, FJ 23, determined that, from a constitutional perspective, it is only possible to categorize a regulation as unnecessary when "is evident that a measure less restrictive of rights could be adopted to successfully achieve the objective pursued by the legislator". Moreover, STC 161/1997, FJ 11, ruled that the control that the Constitutional Court exercise over "the existence of other lees restrictive measures equally efficient […] has a very restricted scope, to avoid taking the place of the legislator and making political decisions that are not proper to its institutional design".

The order lodging the question of unconstitutionality declares that the challenged regulation represents an unnecessary restriction of the right to privacy (art. 18.1 CE) and of the principle that guarantees the free development of personality (art. 10.1 CE). It argues that "when talking about a minor with sufficient maturity that makes a serious requirement for being in a steady state of transsexuality […] this Court has serious doubts that the restriction that requires to be a person of legal age to demand the register rectification relating to sex can pass the test of necessity".

As a result, the less restrictive measure is that one in which the requirement of being a person of legal age does not apply to minors with "sufficient maturity" that are in a "steady state of transsexuality".

The challenged regulation introduces a restriction that affects constitutional assets of the highest importance: the right to privacy and the principle that guarantees the free development of the individual.

Furthermore, this restriction affects personal identity, which is particularly relevant because of its relation with human dignity. As well, the restriction of these rights and principles is really intense: it supposes the complete deprivation of some of their aspects for an entire group of people.

Considering that the challenged regulation in this procedure contains a hard restriction of a constitutional asset related to human dignity, the test of proportionality of that measure has to be specially intense, which implies verifying that the gains obtained from the enforcement of that regulation compensate the sacrifices imposed to the conflicting fundamental rights.

9. Proportionality, in a narrow sense, of the challenged regulation.

In the order lodging the question of unconstitutionality, we read: "when it is a minor endowed with maturity enough who brings a serious claim because he/she is in a steady state of transsexuality […] this Courts doubts about the necessity of the restriction […] furthermore, does not find reasons to consider it reasonable […] In the light of the above mentioned circumstances, preventing the minor requesting the adjustment of his/her name and sex in the official records could be considered a disproportionate restriction of his/her fundamental rights […] considering the serious consequences that can result therein, consequences that do not assure an adequate balance of advantages and disadvantages".

The requesting Court does not contest the constitutionality of Article 1.1 of Law 3/2007 as a whole. On the contrary, it claims that a part of the regulation —that excluding the change of name and sex in the official records— can be considered a disproportionate restriction when that exclusion applies to minors "endowed with maturity enough who make a serious petition because they live in a steady state of transsexuality".

The contested regulation causes serious restrictions to the constitutional rights of those who cannot change the mentions to their sex in official records. These intense restrictions casting on constitutional values of the highest relevance, get worse when the minor is endowed with "maturity enough" so he/she demands an enhanced protection of his/her privacy and of the deciding space enabling him/her the free development of every trait of his/her personality.

However, the legal restriction under scrutiny does not only concern certain constitutional rights and principles. It also entails important advantages for other legal values of constitutional importance. With this restriction, the legislator is accomplishing the command contained in Article 39 CE and deploying a special protection of minors. For two reasons, these advantages, whose importance we cannot dismiss, play down gradually as persons approach their legal age. Firstly, as the minor grows up, his/her understanding improves and consequently his/her needs of special protections decrease (see the regulation of minor children emancipation in Articles 314 and others of the Civil Code). Secondly, as stated in the request of a preliminary ruling, the chances of a reversal of the demonstration of transsexuality reduces as the minor approaches his/her legal age.

As a consequence, this Court confirms that the challenged legal restriction, when applied to minors endowed of "maturity enough" and in a "steady state of transsexuality" —circumstances regarded in Article 4 of the contested Law— provides lower degree of protection in regards the best interests of the child. On the contrary, in this case the disadvantages for the minor's privacy increase and the guarantee of a space for the free development of his/her identity is not ensured. The intensity of these disadvantages grows due to the automatic application of the regulation and the lack of an intermediate regime (i.e., change of the name but not of the sex) for the situations in transition.

So, Article 1.1 of Law 3/2007 contains a disproportionate restriction of the aforementioned constitutional principles and rights. In particular, because when it is applied to the situations mentioned in the request, does not offer the possibility of an individualization

of minors endowed with "maturity enough" and in a "steady state of transsexuality", and does not foresee a specific treatment of these cases. As a result, the disadvantages of the regulation clearly exceed the need of protection of these specific categories of minors. Accordingly, we must conclude its unconstitutionality.

As we have already stated in SSTC 26/2017, 16 February, and 79/2019, 5 June, we must specify that Article 1.1 of Law 3/2007 is contrary to the Constitution as far as it is applied to minors endowed with maturity enough and who live in a steady state of transsexuality.

RULING

For these reasons, the Constitutional Court, BY THE AUTHORITY THAT IS CONFERRED BY THE SPANISH CONSTITUTION,

Has decided

To sustain the question of unconstitutionality in regards to art. 1 of Law 3/2007, March 15th, regulating the register rectification of the entry related to a person's sex, and in consequence, to declare it unconstitutional, but only in those cases related to the subjective scope of the prohibition to minors with "sufficient maturity" and who live in a "steady state of transsexuality".

This judgment must be published in the "State Gazzette"

Delivered in Madrid, on July 18th 2019. Juan José González Rivas, Encarnación Roca Trías, Andrés Ollero Tassara, Fernando Valdés Dal-Ré, Santiago Martínez Vares García, Juan Antonio Xiol Ríos, Antonio Narváez Rodríguez, Alfredo Montoya Melgar, Ricardo Enríquez Sancho, Cándido Conde-Pumpido Tourón, María Luisa Balaguer Callejón. Undersigned and stamped.

Abbreviations.

CE: (*Constitución Española*), stands for Spanish Constitution.
CEDH: (*Convenio Europeo de Derechos Humanos*), stands for European Convention of Human Rights.
FJ: (*Fundamento jurídico*), stands for Grounds.
LOTC: (*Ley Orgánica del Tribunal Constitucional*), stands for Organic Law of the Constitutional Court.
STC: (*Sentencia del Tribunal Constitucional*), stands for Judgment of the Constitutional Court.
STEDH: (*Sentencia del Tribunal Europeo de Derechos Humanos*), stands for European Court of Human Rights.