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## **The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms**

### **1. INTRODUCTION**

As an introduction, I would like to remind you that Europe is the geographical region of the world where most progress has been made in the protection of human rights. This is largely due to the creation of a regional organisation in 1949, called the "Council of Europe". The Council of Europe pursues the values of democracy, the rule of law and respect for human rights.

The main, but not the only, legal instrument adopted by the Council of Europe on human rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950. I should mention, on the one hand, that the list of protected rights has been supplemented by the Additional Protocol and by Protocols numbers 4, 6, 7, 12 and 13. On the other hand, the monitoring procedure provided for in the European Convention has been amended by



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Protocols numbers 2, 3, 5, 8, 9, 10, 11, 14, 15 and 16.

The addressees of the human rights recognised by the European Convention are all persons under the jurisdiction of a Contracting Party (Art. 1 ECHR). This provision covers: (1) any person, whether national, alien, or stateless, who is in the territory of a Contracting Party and subject to its jurisdiction (not, for example, foreign diplomatic personnel); and (2) any person who is not in the territory of a Contracting Party but remains subject to its jurisdiction. This second case would apply both to national diplomatic personnel accredited abroad and to all persons on board flag vessels, on registered aircraft, on Antarctic bases... of a Contracting Party.

As regards the scope of the obligation to respect human rights, it should be noted, first, that the European Convention does contain subjective rights directly enforceable by individuals before the courts; and second, that the European Convention imposes an obligation of result, since the Contracting Parties "recognise" the rights and freedoms in Title I of the European Convention.

## **2. PROTECTED RIGHTS**

The rights protected by the European Convention are the rights and freedoms set out in Title I of the Convention (Arts. 2 to 18 ECHR). These rights are primarily of a civil and political

nature, such as the right to life, the prohibition of torture, the right to a fair trial, freedom of thought, etc. However, they sometimes have the dual nature of being social rights as well. For example, freedom of association and the right to organise.

The list of rights protected by the European Convention has been increased by the Supplementary Protocols. Thus, the Additional Protocol introduced the right to property; the right to education; and the right to free elections. Protocol 4 added the prohibition of imprisonment for debt; freedom of movement; the prohibition of expulsion of nationals; and the prohibition of collective expulsions of aliens. Protocol 6 provided for the abolition of the death penalty, except in time of war. Protocol 7 enhanced rights of a procedural nature by introducing: procedural guarantees in the case of expulsion of aliens; the right to a second hearing in criminal matters; the right to compensation for miscarriage of justice; the right not to be tried or convicted twice; etc. Protocol 12 established the general prohibition of discrimination. Finally, Protocol 13 abolished the death penalty in all circumstances.

I should point out that the list of protected rights has also been extended by the case law of the European Court of Human Rights. Due to an evolutionary and extensive interpretation of the norms provided for in the European Convention and its supplementary Protocols, starting from the right

to life (Art. 2 ECHR), the European Court has enshrined the obligation of effective investigation in cases of deprivation of life, including terrorist attacks. From the prohibition of torture (Art. 3 ECHR), the Court has affirmed the obligation of the Contracting Parties not to expel or transfer a person to a State where he or she may be tortured. Also from the right to respect for private and family life (Art. 8 ECHR), the Court has enshrined the right to protection of the environment. Even from the right to property (Additional Protocol), the Court has also inferred the human right to receive contributory pensions.

I must also point out that the human rights protected by the European Convention are not absolute rights. In this respect, three distinct aspects must be taken into account. First, in cases of states of emergency (war or other public danger threatening the life of the nation), a Contracting Party may derogate from these rights (Art 15 ECHR). The only exceptions are the rights that constitute the hard core of the European Convention: the right to life; the prohibition of torture; the prohibition of slavery; and the principle of no punishment without law are non-derogable. Secondly, the European Convention does not prohibit legal restrictions on the political activities of foreigners (Art. 16 ECHR). Finally, we should note that the European Convention does prohibit abuse of rights (Art. 17 ECHR).

### **3. COMPLIANCE MONITORING**

Compliance monitoring with the European Convention is ensured by the establishment of a European Court of Human Rights (Art. 19 ECHR). This European Court functions on a permanent basis and is composed of one national judge from each contracting party. The judges have a non-renewable term of office of nine years (Art. 23 ECHR).

As regards the jurisdiction of the European Court, it covers all matters relating to the interpretation and application of the European Convention and its Protocols (Art. 32 ECHR). Three types of jurisdiction can be distinguished.

The first is its contentious jurisdiction, where there is a claimant against a respondent Contracting Party, which comprises: (1) inter-State applications, i.e. between Contracting Parties (Art. 33 ECHR); and (2) individual applications, brought by any natural person, non-governmental organisation or group of individuals who consider themselves to be victims of a violation by one of the Contracting Parties of the rights recognised in the European Convention or its Protocols (Art. 34 ECHR).

Secondly, the European Court enjoys advisory jurisdiction. The original provision was that the European Court may give advisory opinions, at the request of the Committee of Ministers, on legal

questions concerning the interpretation of the European Convention and its Protocols (Art. 47 ECHR). These advisory opinions must be reasoned, taking into account that any judge may give separate opinions (Art. 49 ECHR).

Protocol 16 has extended the advisory jurisdiction of the European Court. This Protocol allows the highest courts of a Contracting Party to request the European Court to give advisory opinions on questions of principle concerning the interpretation or application of the rights and freedoms defined in the European Convention or its Protocols. In Spanish law, only the Supreme Court and the Constitutional Court may request such advisory opinions.

The third type of jurisdiction is the jurisdiction of jurisdiction, since in the event of a challenge to the jurisdiction of the European Court, the European Court will decide on the jurisdiction (Art. 32.2 ECHR).

When the European Court acts in contentious proceedings, it must always carry out a prior examination of the admissibility of each application. On the one hand, in the case of inter-State applications, the European Court will declare an application inadmissible if it does not concern a right recognised in the European Convention or its Protocols (Art. 33 ECHR). On the other hand, in individual actions, the European Court will declare an application inadmissible in four cases. First, if the

application does not concern a right recognised in the European Convention or its Protocols (Art. 34 ECHR). Second, if domestic judicial remedies have not been exhausted or if more than four months have passed since the date of the final domestic decision. Third, if the application is anonymous; or is essentially the same as an application previously examined by the European Court or already submitted to another international investigative or settlement body and contains no new facts. Fourthly and finally, if the application is incompatible with the provisions of the European Convention or its Protocols; manifestly ill-founded or abusive; or if the applicant has not suffered significant damage (Art. 35 ECHR).

When the European Court acts in an advisory capacity, the Court shall decide whether the request for an advisory opinion submitted by the Committee of Ministers falls within its jurisdiction (Art. 48 ECHR). It is also foreseen that a college of five judges of the Grand Chamber of the European Court will decide on the acceptance of the request for an advisory opinion submitted by the highest courts of a Contracting Party (Art. 2 of Protocol number 16).

Should the European Court declare an application admissible, there are two options. The first is that the European Court can make itself available to the parties in order to reach an amicable settlement of the case on the basis of

respect for human rights as recognised by the European Convention and its Protocols (Art. 39 ECHR). The second is to initiate judicial proceedings.

I should recall that, within three months of the date of the judgment of a Chamber, any party to the case may request the referral of the case to the Grand Chamber (Art. 43 ECHR).

Regarding the finality of judgments, two cases can be distinguished (Art. 44 ECHR). The first is to take into account that a Grand Chamber judgment will always be final. Secondly, a judgment of a Chamber will become final when one of three scenarios occur (1) if the parties declare that they will not request referral of the case to the Grand Chamber; (2) if no request for referral of the case to the Grand Chamber has been made three months after the date of the judgment; or (3) if the Grand Chamber's College rejects the request for referral.

On the binding force of judgments, I must stress that the Contracting Parties undertake to comply with the final judgments of the European Court in disputes to which they are parties (Art. 46 ECHR).

With regard to the enforcement of judgments in Spanish law, it should be noted that an appeal for review may be brought before the Supreme Court against a final judicial decision when two conditions are met: (1) when the European Court has declared that said decision has been handed down in violation of any of the rights recognised in the



European Convention and its Protocols; and (2) provided that the violation, by its nature and seriousness, entails effects that persist and cannot cease in any other way than by means of this review (Art. 5 bis Organic Act 7/2015, 21 July, amending the Organic Act on the Judicial Power).

Finally, and only for advisory opinions submitted by the highest courts of a Contracting Party, it is specifically provided that "advisory opinions shall not be binding" (Art. 5 of Protocol number 16).

