

SPAIN / ESPAGNE

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Criminal proceedings

1) How has the reopening of criminal proceedings been addressed in your domestic law and have there been examples of successful reopening in such cases?

The Constitutional Tribunal of Spain established in its leading judgment 245/1991, of 16th December, that the judgments of the ECHR will have an effect a reopening of the previous criminal proceedings if:

- a) The ECHR has declared a violation of the Convention that implies a violation of the fundamental rights provided for in the Constitution which may entitle to raise a “Amparo appeal” before it.
- b) The violation stems from a decision by a Criminal Court of Justice.
- c) The effects of the violation still remain
- d) The freedom of the applicant is at stake.

In that case the Constitutional Tribunal considered that the judgment of the ECHR declares violation of the right to a fair trial in criminal matters (art 6.1 of the Convention) and that entails that there has been a violation of art 24.1 of the Spanish Constitution, with the effect of declaring the nullity of the whole criminal procedure, which has to trace back to the point where the violation took place. In the instant case, it had to go back to the moment when the public hearing begun.

The Constitutional Court developed this jurisprudence in its judgements on cases 96/2001, 240/2005, 313/2005 and 197/2006, as a consequence of several judgments of the ECHR.

National Courts have followed this criteria ever since.

In the Great Chamber’s Judgment of 21st October 2013 on the Del Rio Prada vs. Spain Case, the Court indicated an individual measure consisting in the release of the applicant from jail as soon as possible. The Criminal Chamber of the Audiencia Nacional, one of Spain’s highest Criminal Courts, declared on a judicial decision of 22nd October 2013 that when the ECHR declares that there has been a violation of articles 5 and 7 of the Convention this entails a breach of article 17 of the Constitution and, therefore, the questioned national jurisdictional decisions had to be immediately revised and –in that case– quashed. This led to the reopening of all the national procedures where the Spanish jurisprudence had been the same, and those persons still in prison who had to benefit from the ECHR judgment were immediately released. The Tribunal Supremo adopted a general internal rule declaring that all these decisions could be subject to revision before it.

In order to generalize the procedure to reopen criminal cases deriving from ECHR judgments, the Tribunal Supremo in non jurisdictional agreement of 21st October 2014 has established that the revision appeal regulated in article 954 of the Law on Criminal Procedure can be used as procedural mean to achieve that end.

Following the Organic Law 7/2015, the possibility to request the revision of a final judgment following an ECHR judgment is provided for by the legislation (see Appendices).

- 2) *What practical or procedural difficulties have been encountered in practice? How have they been overcome?*

At the beginning the practical difficulty lied in the fact that the procedural law did not expressly contemplated how to act when an execution of a ECHR judgment ha to lead to the reopening of a criminal procedure. This difficulty was overcome through dynamic interpretation of the existing provisions of the Constitution, the Organic Law of the Constitutional Tribunal and of the Law on Criminal Procedure, as detailed above.

- 3) *Have you encountered specific difficulties with respect to reopening of cases following friendly settlements or unilateral declarations?*

To date we have not had to make any friendly settlement or unilateral declarations concerning criminal cases. Criminal prosecution on serious offences entails a public interest and can't be subject to such agreements. Only a judgment on the merits from the ECHR may have the effect of reopening the procedure.

Civil proceedings

- 1) *How has the reopening of civil proceedings been addressed and have there been examples of successful reopening in such cases?*

It depends on whether the affected decisions of the civil jurisdiction are final or not. If it refers to decisions that are subject to change when the underlying reality changes (for example, decisions concerning the wellbeing of minors in some cases, decisions on provisional pensions,...) it is possible to reassess the previous judgment, safe when –due to the time passed– it is impossible to do so.

Following the Organic Law 7/2015, it is possible to request the revision of a final judgment following an ECHR judgment.

– What were the obstacles / How have they been overcome?

The main obstacle foreseen following the entry into force of the new legislation is the effect that the reopening of civil procedures may cause on parties to it that have not had the opportunity to post observations before the ECHR.

In this respect we would like to gather information on this issue on other Member States. It could be envisaged that the ECtHR, in cases where this may happen, should call the other parties on the national proceedings using the possibility established in 36.2 of the Convention.

– What are the positive outcomes and remaining gaps?

On this issue we would refer to our previous answer

- 2) *If the reopening has been introduced on the basis of the case law of domestic courts, it would be useful to share the relevant examples.*

We have not registered any example.

Appendices

Act no. 41/2015, of 5 October, amending the Code of Criminal Procedure in order to accelerate the criminal justice and to strengthen procedural safeguards.

Sole Article. *Amendment to the Code of Criminal Procedure.*

Fifteen. Article 954 is amended to read as follows:

[...]

“3. A review of a final judgement may be requested when the European Court of Human Rights has declared that such judgement was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.

In this event, the review can only be requested by whom, being entitled to lodge this review, had acted as claimant to the European Court of Human Rights. The requirement shall be formulated within a year of the said Tribunal’s Judgement has become final”.

Sole Transitory provision. Relevant law.

[...]

“2. Article 954 will also apply to judgements becoming final following their entry into force.

The event provided for in section 3 of article 954 will apply to judgements of the European Court of Human Rights becoming final following their entry into force”

[...]

Organic Law 7/2015, of 21 July, amending Organic Law 6/1985, of 1st July, on the Judiciary.

[...]

PREAMBLE

[...]

II

[...]

It is also included a provision regarding the European Court of Human Rights' judgments that declares the violation of some of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, stipulating that they will be reason enough to lodge an appeal on review strictly of the final judgment in the "a quo" process. Here from, the legal certainty is without doubt increased in a sensitive sector such as the protection of fundamental rights, foundation of political order and social peace, as declared in Article 10.1 of our Constitution.

[...]

Sole Article. Amendment to Organic Law 6/1985, of 1st July, on the Judiciary.

The Organic Law 6/1985, of 1st July, on the Judiciary is amended as follows:

[...]

Three. A new article 5 bis is added to read as follows:

“Article 5 bis.

An appeal review may be lodged to the Supreme Court against a final judgment, according to procedural regulations of each jurisdictional order, when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.

[...]

Second final provision. Amendment to Organic Law 2/1989, of 13 April, on Military Procedure.

Law 2/1989, of 13 April, on Military Procedure is amended as follows:

One. Article 328 is amended to read as follows:

“Article 328:

1. The appeal review against final judgments will be granted when:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human

Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.

In these cases, the review proceedings shall be conducted according to the rules therein under the Code of Criminal Procedure and it shall not be applicable the stipulations of Articles 329 to 333, 335 and 336. Standing rules set forth in that Code for these proceedings shall be applied.

Likewise, judgments issued on such proceedings shall have the effects set forth for these cases in the Code of Criminal Procedure”.

[...]

Three. Article 504 is amended to read as follows:

“Article 504.

1. Final judgments issued in contentious-disciplinary judicial appeal by the Military Chamber of the Supreme Court, as well as the final orders to which Article 478 are referred, issued by that Chamber, may be object of an appeal review in the following cases:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review.

3. The provisions of the Code of Civil Procedure will govern the legitimacy, deadlines and procedure with regard to this review proceedings.

Exceptions shall be made for the cases provided for in sections a), b) and g) of this article, for which the appeal review shall be lodged within a month of notification of the judgement has become final.

[...]

Third final provision. Amendment to Act 29/1998, of 13 July, regulating the jurisdiction for judicial review.

[...]

Three. Article 102 is amended to read as follows:

“Article 102.

1. The review against final judgments will be granted:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review, without this prejudicing the *bona fide* rights acquired by third parties.

3. The provisions of the Code of Civil Procedure will govern the legitimacy, deadlines and procedure with regard to this review proceedings. Nevertheless, there will only be a public hearing when requested by all the parties or the Chamber deems it necessary.

4. Review in the matter of accounting liability shall operate in the cases provided for in the Law on the Functioning of Court of Auditors”.

Fourth final provision. Amendment to Act 1/2000, of 7 January, on Civil Procedure.

[...]

Thirteen. Article 510 is amended to read as follows:

“Article 510. *Reasons.*

1. The review against final judgments will be granted:

[...]

2. Additionally, an appeal review may be lodged against a final judgment when the European Court of Human Rights has declared that such judgment was passed in violation of any of the rights recognised in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, provided that the violation, due to its nature and seriousness, has a persistent effect and cannot cease in any other way than by means of this review, without this prejudicing the *bona fide* rights acquired by third parties.”.

Fourteen. Article 511 is amended to read as follows:

“Article 511. *Locus standi.*

The party aggrieved by the challenged final judgment may request a review.

In the event provided for in section 2 of the preceding article, the review can only be requested by whom had acted as claimant to the European Court of Human Rights”

Fifteen. Section 1 of article 512 is amended to read as follows:

“1. In no case the review may be requested after five years from the date of publication of the judgment that is being challenged. Any request of review produced after this deadline shall be rejected.

The provisions foreseen in the preceding paragraph shall not apply when the review is reasoned on a Judgment by the European Court of Human Rights. In this case, the requirement shall be formulated within a year of the said Tribunal's Judgment has become final".

[...]

Tenth final provision. *Entry into force*

This act shall enter into force on 1 October 2015, except sections one, two and five of the third final provision, that shall do it within a year of its publication.

Therefore,

I hereby order all Spanish citizens, individuals and authorities, to observe and enforce this organic law.

[...]