Amparo Salom Lucas

Degree in law in 1998, Judge since 2001, Senior Judge since 2009, currently serving in the Court of First Instance and Preliminary Investigation No. 5 in Vila-Real

Modern institutions of effective judicial protection. Special reference to mediation

Abstract:

The main purpose of this article is to analyze the problems that European judges have to face daily in relation to effective judicial protection, as well as to highlight the instruments that we have at our disposal. In addition, this article also studies the jurisprudence of the European Court of Human Rights in relation to said right and the interaction of the same with the mediation.

As a judge, I am very familiar with the real problems that we have to continually address in order to respect human rights when we apply our national law and European law, bearing in mind that there are no concrete answers to the Conventions. This is why I have decided to write about it and give a practical overview of the subject.

The purpose of the article is to reflect, not only on the basis of the right to effective judicial protection, but also on how it materializes in the daily work of a court. Finally, I intend to show how mediation in judicial matters respects this right and can make it more effective.

Keywords: *effective judicial protection, European Court of human rights, jurisprudence, criminal mediation, procedural rights.*

I. Introduction

Prior to the analysis of the European case law in relation to effective judicial protection, it is necessary to take a moment and reflect on the concept of this right itself, even if briefly in order to establish the basis of the ideas that I will expand upon afterward.

This right originates at a moment in history in which the State eliminates private justice and assumes its role, organizing a system to make it effective (Administration of Justice). In turn, not only does it create a public system of conflict resolution, but also recognizes citizens the right to resort to it and obtain the corresponding guardianship. In the words of the Span-

ish Constitutional Court (hereinafter TC), it is the State whose role it is to "create the settings for judicial activity and, more specifically, for the process in which the fundamental right is exercised, ordained for the satisfaction of claims "[1] it is therefore a law that protects individuals against power. [2]

In the case of Spain, this right is recognized in the Constitution of 1978, in article 24:

All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case, may there be a lack of defence. Likewise, all have the right to the ordinary judge predetermined by law; to defense and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; not to make self-incriminating statements; not to plead themselves guilty;and to be presumed innocent. The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences.

In the 1997 Constitution of Poland, it is enshrined in article 45:

1. *Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.*
2. *Exceptions to the public nature of hearings may be made for reasons of morality, State security, public order or protection of the private life of a party, or other important private interest. Judgments shall be announced publicly.*

At the European level, it is recognized in the European Convention of Human Rights and Fundamental Freedoms of 1950, enshrined in article 6.1° whose content we will discuss in the next section.

This right is also enshrined in article 47 of The European Charter of Fundamental Rights in 2000:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

1 STC 99/30 September 1985
2 STC 64/1988 of April 12

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid isnecessary to ensure effective access to justice.

It is worth remembering the difference between both European texts and their practical applicability, given that there is some degree of confusion regarding both.

On one hand, the European Convention Rights and Freedoms is an international treaty by which the State Member of the Council of Europe (therefore separate from the European Union) guarantee the rights contained in the Convention. The attacks on said rights can be reported before the European Court of Human Rights, hereinafter ECHR.

On the contrary, the European Charter of Fundamental Rights is applicable to the countries in the Union[3] and is legally binding since the 2009 Treaty of Lisbon. Its scope of application reaches only in the event that the Member States are applying the Community law [4] (article 51 of the Charter). The violation of the rights contained in the Charter is reportable to the Court of Justice of the European Union.

The Charter itself foresees the possibility of the overlap of both texts, in article 52, by establishing that where a right is recognized in both, its scope will be equal to that under the Convention without detriment so that the European Law provides a more extensive protection. It should be taken into account that the emphasis placed on Community law must be our common ground, to the extent that the right of the Union is allowed

3 Except for Poland and the United Kingdom, for different reasons. The practical consequence of this is that it is implementing the Treaty of Lisbon but does not extend them the jurisdiction of the European Court of Justice as it is the case with other countries. In this way, nothing contained in title IV of the Charter creates rights applicable to Poland and United Kingdom unless those rights are recognized in its national law.

4 C-617/10 case TJUE Hans Åkerberg Fransson: the EU law does not regulate the relationship between the European Convention for the protection of human rights and fundamental freedoms, signed in Rome on 4 November 1950, and the laws of the Member States and also consequences to be deducted a national court in the event of a conflict between the rights granted in this agreement and a rule of national law.

to provide greater protection to the rights recognized in the Convention, but not the Member States[5].

I have chosen to analyze solely the ECHR case law since this Court has a scope of territorial jurisdiction broader than that of the ECJ.

Finally, I want to reflect a little on what it means to be a European judge today. Since it is not only necessary to be proficient in national law, but to also be knowledgeable of and have respect for European law with all it entails, especially when we talk about courts of preliminary investigation or when functioning as on-call with issues which require an immediate solution. An individual may claim a directive directly before a national judge once it has been transposed or incorporated into the domestic law, and the judge must interpret national law with the criteria of the directive itself [6]. But furthermore, in cases where a Directive is precise enough to be applied and is not subject to condition, it can be invoked by a individual before a judge without the need for it to be incorporated into national law[7], which obviously makes our job difficult while at the same time, fulfilling.

In the Spanish case, as in the European, this right has so many nuances, is projected on so many levels when it comes to making it effective that its mere assertion will not suffice. It has to be detailed in its various aspects, as can be seen in the transcript of the three legal precepts. This causes "confusion in practice"[8] which, in the case of the Spanish Constitutional Court, has not meant an obstacle when getting to the bottom of the issues debated, since it has considered on a case-by-case basis and invoked all the guarantees of this right, without distinction, to obtain the pertinent conclusion in each case.

However this Court has pointed out that[9], despite the aforementioned misunderstanding, the right to effective judicial protection transcends what would be the simple sum of the guarantees contained in article 24 of the Spanish Constitution and has its own content, since otherwise, in the

5 Case c-399/11 ECJ Melloni

6 ECHR judgment of the Grand Chamber, on October 5, 2004

7 ECHR judgment of 11 July 2002 C-62/00

8 CORDÓN MORENO, FAUSTINO, The right to effective judicial protection fundamental procedural rights manuals of training of the General Council of the Judiciary 22-2004

9 STC 89/1985 of July 19th

opinion of the Court, it would be redundant. In fact, the TC itself has defined this right from its first rulings[10] such as the right to "a process with full guarantees", which further blurs the boundaries between the right itself, and the specific guarantees. According to TC, since the effective judicial protection has a nature separate and superior to the sum of the guarantees of article 24.2 CE, this causes that a breach of these guarantees may be detrimental to effective judicial protection, but not always.

One of the main features of this right is its projection during the entire procedure, from the start, with access to jurisdiction, until it complies with the Court ruling. However, the TC has pointed out, despite the fact that this right protects all the phases of a process; they are not covered with the same strength.

a. with regard to access to the courts, it is well-known by all that this law implies that any claim deserves a response by the judicial body, which includes the different instances in the case of appeals. Despite the fact that access to second instance is part of effective judicial protection, TC has indicated that once it has obtained a response to a judicial claim, the means of appeals belongs to the scope of the legislator[11]. In this case the constitutional aspect of this right is not the right to appeal, but if that possibility exists, the right includes the right to not be deprived of access to it. [12] Nonetheless, the TC recalls that an excess of formalities and procedural rigor when admitting the remedies can empty this right of content, reason why the guiding criterion in this matter must be antiformalism, the ECHR has ruled in the same sense, as we shall see later.
b. in relation to the scope of this right as to the content of the claim, the constitutional case law indicates that effective judicial protection does not guarantee the success of the claim nor the wise decision of the Court. Its scope is limited to obtaining a substantiated answer in law on the deduced claims.

10 SSTC 48/1984 and 31/1989
11 ATC 100/1996 of April 24th, 115/2002 STC and STC 270/2005 of October 24th
12 STC 69/2005 of April 4th

c. in a third procedural stage we find the sentence, which once dictated must be unmodifiable (except by legal channels) to ensure respect for effective judicial protection. The opposite, that is to say its modification outside the channel of the legally established appeals, would flagrantly infringe this right.
d. finally, after having accessed the judicial channels, obtained a reasoned, binding resolution, we have reached the last step of the process within which the effective judicial protection applies its effect, this is, the execution or fulfillment of the judicial ruling. If the previous procedural steps have been fulfilled but in the end the sentence is not materialized, it would leave them empty of content and without practical scope. [13]

II. European application

The ambitious and praiseworthy European project of forming a single territory with minimum procedural guarantees in all Member States[14] runs into practical difficulties which make it complicated to carry out the principles on which the common area of justice is based and which are, in criminal matters and criminal procedural matters, mutual trust between Member States, approximation of the essential lines of national law, mutual recognition of judicial decisions and the strengthening and simplification of forms of police and judicial cooperation.[15]

Let us not forget that all the Member States of the European Union have signed the ECHR and are subject to the jurisdiction of the European Court of Human Rights and it is precisely the jurisprudence of that body in relation to the "fair process with all guarantees" which is one of the main cornerstones for mutual trust, since all our processes will be reviewed by

13 STC 152/1990 of October 4th

14 Article 83.2 of the Treaty of the European Union article 3 TEU (Treaty of Lisbon)

15 HOYOS SANCHO, MONTSERRAT, Approximation of criminal procedures in the European Union and mutual recognition of judgments and judicial decisions following the Treaty of Lisbon, digital notebook formation of the Council General of the Judiciary 4-2011

the same body, based on the same criteria. This common Court is especially important since there are no common legal traditions in Europe.

We will therefore analyze all the facets of Article 6.1 of the ECHR in detail through its most recent case law of the ECHR[16], analyzing jointly the civil and criminal limb of this right.

a. **right of access to the jurisdiction.** In addition to the meaning of this right to which we have mentioned in the previous section, it is interesting to note how the ECHR emphasizes, both in civil and criminal cases, that such access should be effective and practical[17] and not just a generic statement that ends in a meaningless piece of paper. Thus the Tribunal has considered that the prohibitive costs of a proceeding in relation to the economic capacity of the litigant impede the right of access to the jurisdiction[18], in the same way as issues related to the statute of limitations when the litigant has acted in good faith[19]. ECHR jurisprudence does not negate the limitations of access to jurisdiction (such as procedural requirements of admissibility or fees), but only when it restricts access in such a way that the essential nature of the right is impaired[20]. In the case of Llopis Ruiz v. Spain, dated 7 October 2003, the ECHR considered that there had been no infringement when an appeal for annulment and an appeal for breach of procedural rules were found inadmissible. The Tribunal considered that the error was not committed by the public authority but by the plaintiff. In Weissman v. Romania, dated 4 May 2006, it considered that this right had been violated

16 The main problem encountered is how to make effective a ruling of the ECHR when declares violated a right recognized in the Convention. In the Spanish case the Supreme Court understands that it should proceed by way of judicial review of the art. 954 of the Criminal Procedural Code, since it considered that ruling does not quash the domestic judgment, but is limited to declare the violation of a right, and therefore the case should be reopened. STS 330/15

17 Bellet v. France, 24 November 1994, series A No. 296-B

18 Garcia Manibardo v. Spain, case No. 38695/97

19 Yagtzilar and others v. Greece, no. 41727/98

20 Labergère v. France on September 26, 2006

when a substantial sum was demanded in order to bring an action to claim compensation for confiscation of a property, as it was considered disproportionate and prevented access to jurisdiction.

b. right to waive that disputes are resolved in the courts: (Only in civil proceedings) This aspect in Spain is totally uncommon, although it does not appear to be the case in the rest of Europe, where clauses of this kind, which redirect disputes to arbitration rather than jurisdictional channels, are frequent. The ECHR[21] sees advantages in this waiver, not only for the litigant but also for the administration, and considers that Article 6 of the Convention does not violate, per se, but that the case must be analyzed.

In the case of criminal proceedings, neither the text of the Convention nor its spirit prevents a person from freely, expressly or tacitly, giving up the guarantees of a fair trial. However, in order for such a waiver to be effective, it must be carried out unambiguously, without any error in its interpretation, and minimum and irrevocable safeguards must be maintained, proportional to the importance of the right to which it is waivered. In such cases, this waiver cannot be contrary to the public interest, and it must be ensured that the litigant knows its consequences[22].

c. right to legal counsel. (in civil procedures. In the criminal courts is discussed subsequently) Article 6 of the Convention does not imply that each Member State must provide free legal advice for all matters, but what this article guarantees is that the right of access to jurisdiction is, as we said before, "practical and effective". In this way, it may be that sometimes the Court considers that the State must provide legal advice when it is absolutely indispensable for effective access to jurisdiction[23], and this will depend on each specific case[24].

21 Deweer case v. Belgium, 27 February 1980, series A No. 35
22 Hermi v. Italy # 18114/02 and Sejdovic v. Italy No. 56581/00
23 Essaadi v. France on February 26th, 2002, 49384/99
24 Steel and Morris v. United Kingdom No. 68416/01, and McVicar v. United Kingdom no. 46311/99

However, it is necessary to establish certain requirements so that this free aid can be accessed, such as the economic situation of the litigant and the possibilities of success of his claim[25].

d. right to have a case be heard by an independent and impartial judge established by law, with legal jurisdiction to hear the case and issuing a final binding resolution[26]. Clearing the content of this right, we have on the one hand, -the right to an independent judge. Independence must exist[27] with respect to the other powers and parties[28] The fact that certain judges are appointed by the executive power is not per se a violation of Article 6 of the Convention[29], it requires stronger evidence to prove that there is a causal link between that discretionary appointment and the decision taken by the Court. The criteria which the ECHR assesses in each case to determine whether independence exists or not are: the way in which their members are appointed, the duration of their mandate, if there are protective measures against external pressures, and if the body in question appears to be independent[30] -the right to an impartial judge. Independence and impartiality, despite being concepts which may seem synonymous, are not in the eyes of the ECHR, although it has acknowledged that in some cases they have to be examined together[31]. The concept of independence has already been defined

25 Steel and Morris v. United Kingdom 68416/01

26 Obermeier v. Austria of 28 June 1990, Chevrol v. France 49636/99 and Ouzounis and others v. Greece on April 18, 2002, 49144/99

27 Beaumartin v. France on November 24, 1994, series A No. 296-B

28 Sramek v. Austria on October 22, 1984

29 Clarke v. the United Kingdom no. 23695/02

30 All these requirements are reviewed in the judgment of Findlay v. United Kingdom of 25 February 1997

31 Case No. 65411/01 Sacilor-Lormines v. France, Oleksandr Volkov v. Ukraine No. 21722/11. In the case Tahir Durán v. Turkey, of 29 January 2004, the ECHR valued both concepts, independence and impartiality jointly considering infringed this right in a case of attack on the unity of the country in which of the State Security Court, which sentenced the applicant, was composed of three judges of which one was military and depended on the military judiciary. The ECHR understood that the fears of the applicant over which the Security Court would unduly guided by considerations unrelated to the nature of the cause were objectively justified and considered therefore violated this right.

> in the previous section and means disconnection with the other powers of the State and the parties. Impartiality has been defined by the ECHR as the "absence of prejudice and predisposition"[32].

The double test that the Court establishes to decide whether or not there is impartiality is interesting to note. It is a subjective first step in which one must analyze whether the judge has a personal conviction or a particular behavior that suggests that he is predisposed to a decision (in which impartiality is presumed unless proven otherwise[33]). Also, a second objective step in which it is necessary to take into account the composition of the court itself, the existence of hierarchical or other relationships with the parties[34] and the intervention of the judges in other phases of the same process[35] in order to be able to verify if the judge in question offers sufficient guarantees to exclude any legitimate doubts in this respect. The ECHR in any case considers that it is necessary to examine each specific case in order to decide if a particular link or relation indicates a lack of impartiality. Furthermore, it emphasizes that, even appearances are important so "justice must not only be done, it must also be seen to be done"

It is so, since what is at stake is the trust that the court inspires in democratic society[36]. *"The 2016 EU Justice Scoreboard"* study examines the perception of judicial independence according each country. Occupying the top positions are Denmark, Finland and Sweden, and in last places Italy, Bulgaria, Slovakia. Poland occupies the nineteenth position and Spain the twenty third place on a scale of twenty-eight countries on this public independence perception scale.

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32 Wettstein v. Switzerland 33958/96 and Micallef v. Malta no. 17056/06

33 Le Compte, Van Leuven and De Meyer v. Belgium on June 23, 1981 and Micallef v. Malta no. 17056/06

34 In the Spanish case, sentences as of the Superior Court of Justice in Cantabria, Social Section no. 244/04, have declared that there is violation of this right when one of the judges of the Chamber is also an associate professor at the University sued in the procedure. This decision expressly invoked the ECHR's case Pescador Valero v. Spain on June 17, 2003 in which it happened exactly the same and the Court declared that the fears of the plaintiff that the case was not addressed with the required impartiality were legitimate

35 Morel v. France no 34130/96, Luka v. Romania No. 34197/02 of July 21, 2009 and Pescador Valero v. Spain 62435/00

36 Castillo Algar v. Spain on October 28, 1998.

In the case of Romero Martín v. Spain of 12 June 2006, the ECHR considered that there was no breach of the right to an independent and impartial judge because some of the members of the Tribunal who had convicted him of the attempted murder of his ex-girlfriend had been part of the Section of the Provincial Court that had resolved an appeal against the denial of probation and non-relevance of some evidence. The ECHR considered that there was nothing objectively justifiable showing that those judges had lost their impartiality.

Both demands, independence and impartiality are required not only from professional judges, but also to lay judges and jurors[37].

– right to a tribunal established by Law with competence to resolve the matter. This is a direct and logical consequence of the rule of law inherent in the system of protection established by the Convention. This right implies that both the judicial body, as well as the composition of the same and the assignment of matters must be previously regulated by the national legislation[38]. The ECHR has considered that this guarantee has been breached, and therefore the judge was not preordained by the Law when a Court of Cassation has judged co-defendants together with Ministers, when the connection between them was not established by any standard[39], or when a court made up of lay judges continued to perform trials in accordance with tradition when the rule that allowed them to do so had been repealed and no new rule had yet been issued in this regard[40].

– Finally, regarding the right to a binding decision, we can mention the Ryabykh case against Russia of July 24, 2003, where it was considered that this right had been violated when a final judgment was annulled, which compensated the plaintiff for the loss of value of her savings. It was the president of a Regional Court who filed a petition for judicial review while the first sentence was being executed because it was in conflict with the substantive Laws. As a result, the Presidium of the Regional Court rendered the judgment null and void and completely dismissed the applicant's

37 Holm v. Sweden on November 25, 1993
38 Fatullayev v. Azerbaijan on April 22, 2010
39 Coëme and others v Belgium No. 32492/96
40 Pandjikidze and others v. Georgia on October 27, 2009

claims without the latter having even been informed that the request for review or the request to attend the hearing before the Presidium had been filed. After this first sentence five more happened, and the ECHR finally concluded that violation of the Convention occurred having broken the legal certainty that *res iudicata* gives, since under that principle no party has the right to request a revision of a binding sentence, simply with the object of a new examination and a new resolution on the case. The possibility of reviewing a final judgment is limited to cases in which new evidence appears, or to correct manifest judicial errors, and not to serve as a disguised appeal.

Within Europe there are judicial systems in which certain senior officials, such as the President of the Supreme Court of Arbitration, or the Attorney General, have discretionary power to challenge a judicial decision through review procedures[41] which obviously breaks the entire system of guarantees from the last stage of the procedure and is contrary to the rule of law.

e. <u>right to a fair trial:</u> This guarantee is considered as an crucial pillar for a democratic society, and when the ECHR has interpreted it, it has said that in no case can this right be interpreted restrictively[42], and also affects the entire procedure and not just oral hearings. It has also recognized that Member States are free to regulate civil rights and obligations the same way they regulate criminal matters, since the requirements that must be met by legislation are less demanding when dealing with civil rights than when dealing with criminal charges[43].

The specific content of this right, among others, is the right to allege what is considered appropriate in defense of their position[44], or that the Tribunal makes available the documentation in the possession of the

41 Sovtransavto Holding v. Ukraine No. 48553/99, Tregubenko v. Ukraine on November 2, 2004 No. 61333/00 and Starominskaya v. Ukraine's October 6, 2011 No. 23465/03.

42 Airey v. Ireland on October 9, 1979, case Stanev v. Bulgaria No. 36760/06, Moreira de Azevedo v. Portugal of 23 October 1990, Stran Greek Refineries and Stratis Andreadis v. Greece on December 9, 1994.

43 König v. Germany, on June 28, 1978

44 Van de Hurk v. Holland, 19 April 1994

authorities to the parties, even if that means disclosure confidential documents[45]. However, the ECHR has considered as valid remedies to correct a prior violation of this right, that the decision in question is reviewable by an independent judicial body fulfilling all the guarantees[46].

In the Slimane-Kaïd case (No 2) of 27 November 2003 against France, the ECHR stated that this right had been infringed when the reporting judge's was not disclosed for the other parties when they had been provided to the General Counsel. The ECHR understands that this report became public when it was exposed at trial, and the applicant was therefore able to replicate it. However, after having been communicated the report and the draft judgment (which was hidden because of the secrecy of the proceedings) in advance to the General Counsel, and in the light of the outcome of the procedure, the Court concluded that there was an imbalance due to a lack of communication in the same terms as with the General Counsel who had a privileged position in the proceedings. The fact that the General Counsel was present in the deliberations of the court, even if he did not participate in them, was considered incompatible with Article 6.

f. right to a adversarial proceeding: this right forms part of the most general right to a fair trial and its requirements are the same for criminal and civil proceedings. This right has been defined as the opportunity in a process that all the parties have to know and to argue with respect to all the presented evidence with the intention of influencing the decision of the judge in their favor. To this end, the ECHR considers that any attempt to expedite the procedure and save time should be discarded if this entails that this right is affected[47], in which the necessary postponements are necessarily carried out so that all the parts are equally illustrated of evidence and they can be refuted[48].

In criminal proceedings this right implies that the accusation and the defense must have the same opportunity to take cognizance of the procedure

45 McGinley and Egan v. the United Kingdom, June 9, 1998
46 Obermeier v. Austria of 28 June 1990
47 Niderost Hubert v. Switzerland on February 18, 1997
48 Yvon v. France no. 44962/98

and to plead on the evidence provided by the other party. In cases where there is classified material for reasons of public interest, the ECHR will not review whether or not the disclosure order was justified in a particular case, but will examine the process to reach that decision in order to determine whether it was conducted with respect to equality of arms and protection of the interests of the accused. The right to disclosure documents or evidence is not absolute, as it may be restricted under the Convention for reasons of national security, protection of witnesses against possible reprisals, or to keep certain investigative police methods secret[49]. In any case, when this happens, this limitation should be balanced, to a possible extent, by the national courts. The Inter-American Court of Human Rights rules in the same way even taking into account the recommendations of the Committee of Ministers of the Council of Europe, in the Ruling of December 19, 2006, in the case of Claude Reyes and others against Chile.

In the case of Vaturi versus France of 13 April 2006, the ECHR found that there had been violations of the Convention by not allowing the applicant to examine witnesses in any phase of the procedures followed against him.

g. right to equality of arms: This right also forms part of the right to a fair trial and implies that each party must have a reasonable opportunity to present its case under conditions that do not place it in a situation of inequality or disadvantage with respect to the other party[50]. As an example of a breach of this balance, in civil proceedings, we can cite the case when a party's appeal is not served on the other party, who therefore had no possibility to respond,[51] when only one of the witnesses was allowed to testify or one of the parties had access to relevant information and the other not. However, the ECHR considers that there is no breach of that right where there is a difference of treatment in relation to the witnesses who were heard but this different treatment did not influence the outcome of the procedure.[52]

49 Doorson v. Holland on March 26, 1996
50 Dombo Beheer B.V. v. Holland on October 27, 1993
51 Beer v. Austria no 30428/96 of 6 February 2001
52 Ankerl v. Switzerland on October 23, 1996

In criminal proceedings, it was considered that the right to equality of arms was violated when the plaintiff was prevented from answering the allegations made by the *Avocat General* before the Court of Cassation, and was not given a copy beforehand[53]. It was also considered that this right was violated when a defense lawyer had to wait fifteen hours until he could present his case in the very early hours of the morning.[54]

h. administration of evidence: In the same way as in the fourth instance, the Convention does not regulate norms related to the evidence as such, (burden of proof, admissibility and assessment), but are matters that must be regulated by national law and courts[55]. The role of the ECHR in this case is to ensure that the procedure as a whole is fair, and this includes the way in which the evidence was presented. In this regard it has ruled in cases where the inadmissibility of a witness has not been reasoned, when the parties have not been able to participate actively in the questioning of a witness, or when only allowed to propose evidence to one of the two litigants[56].

There is also jurisprudence on expert evidence, in which, as in witness statements, the ECHR will only rule on whether the process for the appointment of the expert was fair, and not on whether or not the evidence was admissible. The ECHR has stated that what is essential is that all parties have access to expert evidence and can actively participate in its practice,[57] since, when the trial is about technical matters beyond the judge's knowledge, it is clear that it will be crucial.[58]

In criminal jurisdiction this right implies that in order for an accused person to be convicted, all evidence must be presented in their presence,

53 Borgers v. Belgium on October 30, 1991

54 Makhfi v. France on October 19, 2004

55 Garcia Ruiz v. Spain no. 30544/96

56 Wierzbicki v. Poland on June 18, 2002, Mantovanelli v. France on March 18, 1997 and Dombo Beheer v. Holland, 27 October 1993

57 Mantovanelli v. France on March 18, 1997, in which the plaintiffs could not pronounce on the findings and conclusions of the expert opinion, which was the main evidence. The Court considered that there had been infringement of article 6.

58 Storck v. Germany 61603/00 and Mantovanelli v. France on March 18, 1997

in public and with in an adversarial proceeding (with safeguards in special cases in which the evidence can be presented without visual confrontation of the accused, for example in cases of sexual abuse)[59].

i. **right to get a judicial reasoned judicial decisione:** The ECHR again insists on appearances and states that this right shows the parties that their case has really been studied[60] and lays the groundwork for the parties to appeal the decision[61]. However, just as it happens in Spain, the right to a judicial response based on law does not mean that each and every one of the issues raised in the lawsuit should have a specific answer and in any case the requirement of this right depends on the nature of the decision and the circumstances of the case. Only when the party's request is decisive for the outcome of the proceeding is there an express duty of the judicial body to rule in a reasoned manner[62].

This right, which is equally applicable in the civil and criminal courts, presents a specialty in the latter since the Convention does not require that the verdicts of the jurors be reasoned. And yet, the ECHR allows the accused to be tried by judges even if their decision is not motivated[63] since it considers the existence of procedural mechanisms that remedy this deficiency as sufficient guarantee of motivation (such as advice to the jurors or lay judges on the part of the president of the court regarding the evidence; setting unambiguous questions that must be answered in their verdict thus forming a framework in which it should be based[64]; or subsequent motivation carried out by the professional judge so that the general public and the accused in particular, are aware of the reasons which have led the jury to reach such a decision).

In the Spanish case[65], the jury decides whether the accused is guilty or not guilty of the object of the verdict previously set by the Judge-President

59 F and M v. Finland on July 17, 2007
60 H. case v. Belgium on November 30, 1987
61 Hirvisaari v. Finland on September 27, 2001
62 Ruiz Torija v. Spain and Hiro Balani v. Spain, both of 9 December 1994
63 Saric v. Denmark on February 2, 1999
64 R case v. Belgium No. 15957/90, case Zarouali v. Belgium No. 20664/92, case Planka v. Austria no. 25852/94 and case Papon v. France no. 54210/00
65 Organic Law 5/1995 of 22 may

(Article 52 Organic Law 5/1995), and it will be the latter who drafts the Sentence with the same requirements of motivation that the sentences dictated by professional judges have (Article 70)

In the case of Bellerín Lagares v. Spain of 4 November 2003, the ECHR considered that the decision of the Spanish jury had not infringed Article 6 of the Convention because the contested decision had the record of the jury's deliberations annexed which contained a list of facts that the jury had considered proven to find the appellant guilty of the facts, as well as a legal analysis of those facts and a reference to mitigating and aggravating circumstances that could influence the degree of responsibility.

In the case of decisions taken by professional judges, the ECHR in Sakkapoulos v. Greece of 15 January 2004 found that this right was infringed when compensation for preventive detention was denied based on the application of the legal provision in question without any other motivation.

j. right to a public hearing: Article 6 itself establishes exceptions to this right based on grounds of morality, public order, national security, protection of minors, or protection of the privacy of the parties, provided that publicity could harm the interests of justice. If none of the above circumstances exist, the trial must be public in order to avoid overshadowed justice not subject to public scrutiny and to make it transparent. It is a right that usually is linked to first instance because of the public hearing and the ECHR considers that it is not infringed when we go to higher instances, if the national laws do not contemplate the hearing and it has been held in the first instance[66].

In criminal proceedings, the ECHR finds it difficult to fulfill the rights to defend oneself, to question witnesses, to the assistance of a lawyer, or to an interpreter when the accused does not attend the trial and it is held in absence[67]. However, the Court considers that such judgments are

66 Helmers v. Sweden on October 29, 1991

67 In Spain, the code in its article 786.1 allows the holding of the trial in the absence of the accused (properly cited) if the most serious penalty requested does not exceed two years of imprisonment or, if it is of a different nature, not exceeding six years.

not inconsistent with article 6 but this may be violated when the accused's absence was not due to his resignation to appear or intention to escape, and there is no legal mechanism to obtain a new judicial decision after being heard[68].

In De Biagi v. San Marino (15 July 2003), the plaintiff was sentenced at first and second instance to four years and six months imprisonment for fraud and criminal association without a public hearing and without having been seen or heard by the Judge through a written process in both cases. The hearings were held only in the first instance but did not take place before the Judge but before the Law Commissioner. In this Judgment, the ECHR states and reiterates that the right of the accused to a public hearing is not only a guarantee, but also contributes to convincing the accused that the case has been heard by a court whose independence and impartiality he can control. As stated above, the public hearing in the second instance is not necessary if it was held in the first instance, but in this case, it did not happen, therefore considering that there had been breach in both.

In the Martinie v. France case (12 April 2006), the hearing was not public and there were not grounds of general interest to justify it. Consequently, neither Mr. Martinie nor his lawyer could be present at the hearing but the representative of the State who was informed of the view taken by the Judge before that hearing was present and was able to make arguments before the Court therefore the ECHR considered that there had been an infringement of Article 6.

k. right to a procedure to last reasonable a time: Article 6 recognizes the right to a trial within a reasonable time. The question is, what is considered a reasonable time? On the one hand the ECHR addresses the circumstances of the case, its complexity, number of parties, etc. And on the other hand, it addresses the procedural attitude of the plaintiff who, if not affected by the conduct negatively, given that he is exercising his right to appeal, does appreciate that the length of the proceedings could have been extended for reasons not

68 Case Sejdovic v. Italy No. 56581/00

attributable to the Administration of Justice[69]. Finally, the ECHR considers the process as a whole and not the timely delay that a part of the procedure may have[70]. The period of time taken into account for the purposes of the ECHR begins to run in the civil proceedings from the moment the claim has been filed before the competent judicial body[71] unless there is a previous mandatory administrative phase in which case it is also included as "Duration of the procedure"[72]. The final moment for the computation of said period of time also includes the execution of the judicial decision, so that it does not stop until it is fully effective[73]. The ECHR in the Pollifrone case against Italy dated March 11, 2004 considered that 9 years and 3 months for an eviction process (and 5 years in the Montanari case, of the same date) violated this right.

A very curious case is Muzenjak against Croatia, dated 4 March 2004, in which the plaintiff had started civil proceedings in his country to be compensated for injuries caused by a traffic accident. The procedure lasted almost 9 years, of which only 4 years and 9 months fall under the Convention since it entered into force in Croatia on 5 November 1997. The process had a certain complexity because it was necessary to determine the loss of profit and the plaintiff was a temporary worker so he had no fixed income and in addition, if he had not been injured, he would have obtained permanent employment. With respect to the attitude of the plaintiff, the plaintiff did not present the documentation regarding his income and the court had to collect it from different authorities on several occasions. In addition, he changed his claim several times during the procedure. However, the ECHR considers that the subject matter of the action was very important for the applicant, since it was to determine a monthly pension for injuries resulting from a very serious permanent disability resulting

69 Case Comingersoll SA v Portugal no. 35382/97
70 Demuelan v. Germany of 29 May 1986
71 Bock v. Germany of 29 March 1989
72 Case Xv v. France on March 31, 1992
73 Case Di Pede v. Italy on September 26, 1996

from the accident. As for the procedure itself, it was reviewed in three instances and returned to the first to repeat the trial upon reversal of the Judgment. In spite of all these events valued by the Court, it considered that Article 6 of the Convention had been violated because the length of the proceedings had been excessive.

In the case of criminal proceedings, the purpose of this guarantee is to avoid that anyone is under an indictment for too long[74], initiating the computation of time from the moment the accusation is made, and not necessarily in court, but that the initial phase of research is taken into consideration. The period ends when the entire procedure finishes, including the appeal phase[75]. Just as in the civil process, to assess the duration of the procedure in the criminal court, the circumstances of each specific case and the duration of the whole process are taken into account, not just certain phases. As examples, we can name the Milasi case against Italy in which the ECHR declarede that 9 years and 7 months for a non-complex cause violated this right despite the efforts made by the Member State to solve the temporary workload that was endured by the court. Or the Clinique Mozart case against France that lasted 12 years, 7 months and 10 days and was not particularly complex. The ECHR has found that the process lasted a reasonable time at 5 years and 2 months (Ringeisen case against Austria) due to the complexity resulting from multiple related offenses relating to fraud, fraudulent bankruptcy, innumerable requests for freedom by the defense, challenge of judges and referral of the case to other jurisdictions. In the same way the Court understood that the duration was reasonable in the Neumeister case against Austria, which lasted 7 years and 4 months, because it was especially complex due to the number of crimes, persons involved, and national significance which involved the request for judicial cooperation from other countries with certain significant delays to respond.

Regarding to rights applicable only to criminal proceedings, we have to analyze:

74 Kart v. Turkey no. 8917/05

75 Case Neumeister v. Austria on June 27, 1968 and Delcourt v. Belgium of 17 January 1970, respectively

(a') The right to remain silent and not self-incriminate, which applies to all types of criminal proceedings regardless of the seriousness of the alleged offense, as well as police interrogations[76]. The purpose is to avoid procedural nullities and ensure compliance with the rights of article 6. Thus, the prosecution must prove its allegations seeking the evidence without resorting to obtaining it through methods of coercion or oppression against the defendant's will. Therefore, it has been considered that there was an infringement of this right when the accused decided not to testify and the authorities used subterfuge (an informant who shared a cell with him) to obtain confessions or incriminating statements[77].

The right to not testify against oneself and to not confess guilt is not absolute and not just any coercion will violate the right of article 6. The ECHR will also assess the nature and extent of coercion, the existence of relevant protection in the procedure, as well as the employed use of the material obtained in this manner, so that, if it is not used as evidence in the trial the Court considers that there was no infringement. The right not to testify may sometimes mean that this silence, in cases where the accused clearly owes an explanation, is considered along with other evidence provided by the accusation so that it may be incriminating.

(b') right to not use evidence obtained in violation of the rights recognized in the Convention: Article 6 does not regulate any rule on the admissibility of evidence, leaving it to the legislation of each Member State. The ECHR will only examine this issue in assessing the whole process, including the manner in which the evidence was obtained, to consider whether the trial was fair or not. For example, whether the appellant had an opportunity to challenge the authenticity of the evidence and oppose its use will be assessed and whether the evidence, whose validity is disputed, was decisive or not for the resolution of the case.

Therefore, statements or other evidence obtained in violation of the rights of Article 3 of the Convention, such as torture or inhuman and degrading treatment, means that the procedure as a whole is automatically

76 Case John Murray v. the United Kingdom on February 8, 1996
77 Saunders case v. the United Kingdom on December 17, 1996

declared null and void for violation of article 6[78] even in the case where evidence was not decisive for the guilty verdict[79]. This guarantee goes beyond and does not only cover cases where the victim of torture or degrading treatment is the accused but also when third persons to the process and their statement is used as evidence[80]. In this case the ECHR states that the use of said evidence is a flagrant denial of justice.

(c') entrapment: regarding this issue, the ECHR has recognized the need for States to resort to special investigative methods, especially when it comes to organized crime and corruption cases, such as undercover officers, and considers that such methods themselves do not infringe the Convention but must be carried out within clear boundaries[81]. Having once again expressed its understanding of the difficulty of investigating organized crime, the Court states that the right to a fair trial applies equally to the simplest or most complex offense and that the police may act in a covert manner but not incite the commission of a crime[82]. If that were the case, the evidence obtained could not be used in the trial because it would mean definitively depriving the defendant of the right to a fair trial from the beginning, as stated in the Ramanauskas case. In such cases, the ECHR will examine whether there was incitement to commit an offense, and if so, whether the defendant was able to defend himself against it under national law. If this was the case and the evidence was used against him at the trial, the Court shall declare that there is a violation of the right of article 6.

The Court has differentiated the undercover agent from the entrapment or the incitement, considering that the latter happens when the agent is not limited to conducting a passive investigation, but exerts an influence that causes the commission of crimes that otherwise would not have been committed.

78 Gäfgen v. Germany 22978, case Jalloh v. Germany no. 54810/00
79 Jalloh v. Germany case No. 54810/00 and v. Armenia no. 36549/03 Harutyunyan
80 Case Othman (Abu Qatada) v. the United Kingdom 8139/09
81 Case Ramanauskas v. Lithuania No. 74420/01
82 Case Khubodin v. Russia no. 59696/00

(d') the right to the presumption of innocence: enshrined in Article 6 (2), it requires members of the court not to start the trial with the preconceived notion that the accused is guilty so that the burden of proof lies with the accusation and not vice versa[83] and any doubt should be of benefit to the offender. This right remains not only in the first instance, but also in successive instances[84]. It is even applied when there has been an acquittal in criminal proceedings but the authorities make other decisions as if they were in fact guilty. For example, in cases where procedural costs have been imposed following acquittal, a minor was kept out of the custody of a parent even if the prosecution decided not to accuse him of abusing the child or the right to a social home was revoked. [85]

In the Puig Panella case against Spain on 25 April 2006, the plaintiff, whose conviction the Constitutional Court annulled, was denied compensation due to the irregular functioning of the Administration of Justice, on the grounds that there was no absolute assertion of his innocence but doubts about his guilt. The ECHR itself acknowledges that, even though the conviction was annulled, there was always doubt about his innocence that prevented the sought after compensation. However, it points out that the Ministry of Justice should have redirected the claim through a different, also permitted, manner that did not require an acquittal. This right is violated when the judicial authority[86] or other public authorities[87] make statements in the press that reflect an opinion on their guilt before it is proven that the defendant is guilty. Despite the freedom of the press, which also protects severe comments in cases of general interest, the ECHR has stated that an active campaign can adversely affect the right to a fair trial by generating a public opinion against the accused and consequently influencing members of the jury.[88]

(e') right to know the reasons for which a person is charged: the purpose of this right is directly connected with the right to prepare the ac-

83 Case Telfner v. Austria on March 20, 2001
84 Konstas case v. Greece on May 24, 2011
85 Allen v. the United Kingdom no. 25424, which contains many other references
86 Didu case v. Romania on April 14, 2009
87 Case Petyo Petkov v. Bulgaria on January 7, 2010
88 Kuzmin case v. Russia on March 18, 2010

cused's defense, since it is difficult to study an adequate defense when one does not know what one is defending. This occurred with some frequency in Spain until the entry into force of Directive 2012/13/ EU through Organic Law 5/2015, since when an arrest occurred, the police authorities gave the detainee and his lawyer brief information of the facts of the accusation but did not give access to the documentation of the case file. This circumstance was immediately saved in the court on duty, in which, once the report was delivered, a copy was given to the lawyer to prepare his defense.

The Convention does not establish a specific way in which this information should be facilitated[89], so in principle, any form that allows the understanding of the charges against the accused and the legal qualification of the same would be valid. Notwithstanding the jurisprudence of the ECHR, although this formal freedom states that it is not enough to have the information available to the accused[90] and that it must be actually received by him[91] without the presumptions of reception.

(f') right to prepare a defence: Article 6 of the Convention specifically refers to two requirements, adequate facilities, and substantial time to prepare the defense. Evidently, this right, like many others, must be evaluated according to the circumstances of the case, the complexity of the matter and the procedural stage in which the proceedings are. In this way, the ECHR has stated that in the face of doubt, the hearing must be postponed in order to ensure the right to adequate protection. We can cite the Bonzi case against Switzerland in which the ECHR declared that, in that case, nine months to prepare the defense were sufficient. In addition, the Kröcher and Möller case also against Switzerland, in which the plaintiffs met with their lawyers twice per week for periods of one hour, for five months on a non-complex issue, and it was also found that there had been no breach of the Convention.

As to the right to adequate facilities that every accused person must have, it includes a place where there are appropriate conditions for reading

89 Case Pellisier and Sasi v. France no. 25444/94
90 Case Chichlian and Ekindjian v. France 10959/84
91 C v. Italy No. 10889/84

and writing with a certain degree of concentration, and that both the accused and his lawyer are not subjected to excessive fatigue that can prevent their active participation in the procedure.

(g') right to defend oneself or through a lawyer: the main objective of this right is for the accused to take an active part in the trial and the ECHR leaves it to the Member States to determine when a person can defend himself or by a lawyer[92]. This defense must be exercised effectively from the moment of the accusation[93], so that this article is violated so when an attorney is appointed and he dies, falls ill, or has to leave for an extended period from work or evades his obligations[94]. This right also includes designating a lawyer of choice, although the Court has stated that this right may be restricted when the matter of the suit requires a specialized lawyer.[95]

(h') right to an interpreter: the right to a free interpreter applies only when the defendant does not understand or speak the language used in court, so if he understands it he does not have the right to an interpreter to speak in a different language[96]. On the one hand, this right covers the documents necessary to understand the accusation and to defend oneself adequately by giving their version of the facts. In this way, Article 6 is not infringed when all the documents of the procedure are not translated[97]. In Spain, this right has been introduced through Organic Law 5/2015, which transposed Directive 2010/64/ EU, although in practice this requirement was already being fulfilled.

Finally, we will briefly refer to a couple of general matters, which help to understand the case law of the ECHR. On the one hand, the Court complains there is a widespread misconception on the part of litigants

92 Case Correia de Matos v. Portugal no. 48188/99

93 Case Barreto Leiva v. Venezuela from November 17, 2009 by the Inter-American Court of human rights concerning the case Dvorski v. Croatia in October 20, 2015

94 Arctic v. Italy on May 13, 1980

95 In the Spanish case, the organic law 13/2015 modified article 527 of the Criminal Procedure Code and introduced the possibility that the detainee or prisoner is deprived of the right to appoint a lawyer of their own choice in certain cases, as in cases of terrorism.

96 Lagerblom v. Sweden on January 14, 2003

97 Kamasinski v. Austria of 19 December 1989

that the Court's role is to replace national courts and it emphasizes that its scope is limited to verifying whether Member States have complied with human rights commitments they made when they signed the Convention. The opposite would mean that it is a third or fourth instance and would distort the limits of its own jurisdiction[98].

In the civil limb as well as in the criminal limb of law, the ECHR has given its own definitions of what it considers civil rights and obligations, litigation, procedure, crime, accusation, witness, judicial authority [99]etc, for the purposes of the application of the Convention. Therefore, what according to national laws and regulations is an administrative procedure, or a matter that has no access to the courts, it can be considered as such by the European Court. In the case of criminal law, Article 6 of the Convention covers certain disciplinary sanctions of great magnitude[100] even if they are not criminal offenses. Similarly, the administrative infractions related to the circulation of vehicles if they entail fines or restriction of the right to drive motor vehicles or if they are related to the promotion of hatred towards ethnic groups[101] punishable by warning and confiscation of the material in question would also be protected by article 6 of the ECHR despite not be crimes as such in the corresponding State member.

98 Garcia Ruiz v. Spain no. 30544/96

99 Georgiadis v. Greece on May 29, 1997, case Le Compte, Van Leuven and De Meyer v. Belgium on June 23, 1981, Ringeisen v. Austria on July 16, 1971, and case Sramek v. Austria on October 22, 1984 respectively.

100 Case Engel and others v. Holland on June 8, 1976 and Ezeh and Connors v. United Kingdom of 9 October 2003 in which disciplinary sanctions within the penitentiary context given its nature and gravity (40 additional days in prison, 14 days of isolation in cell, exclusion of common work days and 14 days of loss of privileges in the first case and 7 additional days of prison) (3 days of isolation in cell and a fine of eight pounds in the second case), had consideration of accusations in criminal material and therefore was entitled to the assistance of counsel, which was denied them and therefore declared that there was a violation of the Convention.

101 Lutz v. Germany of 25 August 1987 and Balsyte-Lideikine v. Lithuania on November 4, 2008

III. Mediation and effective judicial protection

The evolution of society is not usually accompanied by a simultaneous evolution of the law that regulates it, so that important situations of dysfunction occur sometimes. Let us consider for example that the Law on Criminal Procedure in Spain is dated from 1882. Despite its multiple updates, is still a law built on the basis of society two centuries ago.

It is not necessary to go back so far, just look at the emergence of the Internet and social networks; a revolution not only for the information world but also for crime. The Internet expanded in the mid-nineties, Twitter was launched in 2006, Facebook was created in a university context for which was initially developed in 2007, WhatsApp and Instagram in 2010, as well as many other applications to buy and sell, meet people and an infinite number of purposes. The appearance of all this has generated a culture of immediacy, everything is obtained quickly, information is shared immediately, news is transmitted in mere seconds, etc.

This "high-speed train" which is current society and new technologies collides head-on with a wall of legislation made for another type of society that is going at a very slow pace and has been slow to adapt to new crimes. Crimes such as *Cyber bullying* or school bullying through networks, *phishing* or identity theft, *sexting* or spreading erotic material of a person without his or her consent, or *grooming*, or posing as a child on social networks to gain their trust and sexual abuse of them. This clash between reality and law sometimes violates the right to effective judicial protection and cannot be deployed in all its branches. For example, let us think of a person who insults another through a social network, or uploads private material without consent. In this case, the victim, depending on the case, wants an immediate response and not to wait several months or even years to obtain a judicial response. Meanwhile, if social networks themselves do not remedy it according to their use policies, the material will be on the Internet, prolonging the agony of the victim.

When we speak of the right to effective judicial protection with the content that has been presented in the previous section, we consider how that right is respected if a crime committed today is tried within five years and the sentence is executed within seven, no matter how impartial

the judge is, the reasoned decision, etc. For when the victim receives the compensation, if he or she obtains it, they are not compensated for the damage suffered. The sluggishness of justice[102] makes the victim feel unsatisfied in any case, conviction or acquittal.

In the same way, it is possible to consider where effective judicial protection lies when it is necessary to execute a conviction sentence and the convicted person, whether in civil or criminal proceedings, is reluctant to comply. The experience in the courts demonstrates the ability of certain people not to be notified, causing delays and paralyzing procedures because certain steps have to be carried out personally with the convicted. This attitude is usually coupled with the fact that the decision has been imposed by a third party (the judge), which generates weak commitment, unlike what happens when the decision has been constructed by the parties, since in those cases the times are significantly shortened and the sentence is executed more quickly.

The study conducted by the Directorate-General for Internal Policies of the European Parliament, *Rebooting the Mediation Directive*, shows that the average duration of litigation in the European Union is 566 days, 326 if it results in mediation and the success rate is 50%, and 212.80 days if the success rate is 70%. In economic terms, this study concludes that the average cost of litigation in the European Union is 9'179 euros, 7'690,05 euros if it results in mediation with a success rate of 50% of cases, and 6,124 euros if the success rate is 70%. In addition to the economic advantages and the

102 Due, among other factors, the overload of work, with rates of litigiousness of 124'9 issues per thousand people, according to the study by the General Council of the judiciary concerning the evolution of the year 2016. Spain had in 2014, 11 judges for every 100,000 inhabitants, occupying the last positions of comparative European, source: "The 2016 EU Justice scoreboard" of the European Commission. According to this study, Poland has 26 judges per 100,000 inhabitants and heads the ranking. In 2012 the average of new criminal cases per 100,000 inhabitants in Europe was 2.141'4. Spain entered that year 2.975 (Poland a slightly lower number). Likewise, that year a European judge of media met 158'9 issues, while the Spanish judges knew a significantly higher number, 265'5 criminal matters. Source: "Public expenditure and functioning of the administration of Justice in Spain between 2004 and 2013, Special reference to the autonomous community of Andalusia, comparison with other European countries", author FRANCISCO GUTIÉRREZ LÓPEZ.

duration of the procedures, there are issues that are difficult to assess objectively but with a strong subjective component. Think of the judgments that families face by an inheritance, by insults derived from a grudge that covers generations, by family businesses … the judicial solution, despite being reasoned and respectful of the procedure will only lift the spirits of the "winners" and cause even more resentment for the "losers", which is nothing more than ripe territory for future conflicts.

Let us now focus on neighborhood relationships, which often go to courts for noise pollution issues, such as playing musical instruments, playing loud music, or the noise that pets make. As light as the problem may seem, it may end, as it has happened, in serious criminal acts.[103]. Obviously to reach such extremes there has been a previous history of arguments and disagreements which, had they been brought to mediation, would probably not have ended so drastically. A judicial response, such as limiting the practice hours of an instrument or forcing the removal of the pet from the residence, although possibly effective, is usually not understood by the guilty party who will also place all possible obstacles for compliance. In the process of mediation both parties will have the opportunity to reach a consensual resolution and at least speak of the problem they have had between them for so many years since at the trial we are going to focus only on the concrete facts, not their cause. In the case of criminal trials, the defendant's short personal history, his personal misfortunes, his life trajectory and reasons for his behavior will not surface; neither will the anxiety, fear anguish, nor loss of sense of security that the crime has caused the victim[104], rather, we will focus, principally, on the economic damage and material damage. The Spanish General Council of the Judiciary, in its Guide to the practice of intra-judicial mediation, states: "Criminal types in which the amount of the damage is not specified should not be excluded.

103 In the year 2003, in Cordoba a neighbor killed another by family quarrels occurred for more than twenty years. In August 2014, in Benicarló, Castellon, a neighbor killed another by the barking of his dog. In 2016, in Palermo, Italy, a neighbor killed another because clothes this tending dripped. In August of 2016, in Elda, Alicante, a neighbor killed another by the noise made.

104 SAEZ VALCÁRCEL, RAMON, Restorative mediation in the criminal process. Reflection from an experience.

Mediation repairs not only material damage, but above that, moral damage."

Notwithstanding the necessary legislative changes, mediation is one of the most effective and fastest solutions that exist today to solve conflicts within the *Multi-door courthouse*[105] since it allows us to achieve mutually agreed upon solutions with the inherent advantages of the self-drafted solutions, not imposed by a third party, and the reduction of costs that they can imply. From my experience,[106] I have been able to conclude that even if mediation does not produce an agreement for whatever reason, it does also has a positive effect difficult to contemplate or measure, which is to appease the animosity between the parties and reduce the personal confrontation between them. Perhaps it is because they have been able to listen to each other in a confidential and more relaxed environment than the formality of a courtroom facility where their words can influence the decision of the judge. Or perhaps, because they discover the real intentions that the other party has which will never be allowed to be heard in a trial since, in this case, concrete facts which occurred at a specific time will be judged. The truth is that the tension that is normally coupled with the conclusion of a trial, and that frequently culminates with one of the parties having an anxiety attack, hypertension, fainting etc, is greatly reduced if there had previously been a mediation process.

The execution of mediation agreements is also better carried out than the execution of judicial decisions in which we normally find the guilty party is reluctant to comply and the court has to resort to enforcing compliance. The fact that the parties have settled the dispute[107] places them

105 Term given by Frank Sander, Professor Emeritus of the Faculty of law from Harvard, which defines a system conceived as a court with different doors to resolve conflicts. Cases are selected and are directed to the appropriate 'door'. System aims to facilitate access to justice for citizens, approaching certain services, facilitating other than the judicial means to resolve conflicts.

106 Mainly with police mediation since 2010

107 The study of multiple authors. "The case of the criminal mediation applied to less serious offences" in 2013, central service of publications of the Basque Government, concluded that of derivatives mediation Affairs the percentage of total implementation of the agreement was 87 '80%, the partial fulfillment of 6'10% and breach the 6'10%

in a better position to comply. This causes the right to effective judicial protection to be more considerably respected in mediation than via court proceedings in terms of the right to execution.

The European Union itself has made the potential of mediation significant through Directive 2008/52/EC in relation to civil and commercial matters, or the Directive 2013/11/EU for consumer law, applicable even to cross-border disputes. This directive emphasizes a fundamental issue in regulating the training of mediators and the conditions for the exercise of their functions so that mediation takes place in an effective, impartial and competent manner and subject to codes of conduct.

In the Spanish case, family mediation was introduced in Law 15/2005 on July 8, and at the general level in Law 5/2012 on July 6 in relation to civil and commercial matters, without disservice to the regulation that some Autonomous Communities have developed[108].

Mediation thus conceived, is an auxiliary mechanism within the Administration of Justice, and complementary to it, which can give a swifter and more adequate response to a problem without loss of rights and always keeping open the possibility of judicial proceedings. It does not produce a failure of any of the guarantees that form part of effective judicial protection since the matter has already been distributed to a judge predetermined by law, since it is a voluntary and confidential process which does not imply assuming criminal culpability. It does not go against the right to presumption of innocence. The accused is still informed of the accusation assisted by his lawyer. Neither does it deprive him of the right to use evidence if a trial is to be held, nor will it adversely affect the right to a trial within a reasonable time since the judicial route is not going to be detained in general, and if it does, the deadlines do not usually exceed two months.

Therefore, having arrived at this point, one wonders if mediation is not only a way to make the right to effective judicial protection more efficient.

108 Andalusia, Aragon, Balearic Islands, Canary Islands, Castilla la Mancha, Castilla León, Galicia, Madrid, Basque country, Asturias and Valencia have laws on family mediation. Cantabria has a law on mediation, and Catalonia a law on mediation in the field of private law.

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