

RIGHT TO PROTEST

Protection,
Guarantee
and Advocacy
Mechanisms
in the European
Union and
the Council
of Europe



International Institute
for Nonviolent Action

Irīdia_

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ACRONYMS

(in the order of appearance)

OHCHR Office of the United Nations High Commissioner for Human Rights

ICCPR International Covenant on Civil and Political Rights

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

ILO International Labour Organization

OSCE ODIHR Organization for Security and Co-operation in Europe, Office for Democratic Institutions and Human Rights

UN United Nations

HRC United Nations Human Rights Council

EU European Union

CJEU Court of Justice of the European Union

LOPJ Organic Law on the Judiciary (Ley Orgánica del Poder Judicial)

TVE Spanish Television

1

PRESENTATION

About the Project

This Guide *Right to Protest: Protection, Guarantee and Advocacy Mechanisms in the European Union and Council of Europe* is part of the *RIGHT2PROTEST – Defence, advocacy and training for civil and political rights in Europe* project, funded by the Barcelona Provincial Council. RIGHT2PROTEST develops in a two-year timeline (2019-2021), and seeks to create a channel for the exchange of experiences and strategies to defend the right to protest among representatives of civil society in Germany, France, Hungary, Poland and Spain.

The project stems from the need to deal collectively with the regression in civil and political rights that are occurring in various European countries as well as in other latitudes. In recent years, two major trends have been detected in Europe, entailing the securitization of public space and the criminalization of protest: on the one hand, an inappropriate use of force and riot gear by the police; on the other hand, the approval of criminal and administrative norms which upgraded the punitive apparatus of States to contain social criticism?

This guide is intended as a useful tool for civil society organizations which carry out their work in the European territory, especially with regard to the defence of the Right to peaceful assembly and association as well as freedom of ex-

This Guide was prepared on the initiative of Novact and Irídia and was elaborated by Clàudia Nadal*, with the indispensable help of Tomás Rojas and Paula Boet, and under the technical supervision and coordination of Laura Medina and Thais Bonilla.

The English version is a translation of the original in Spanish. In case of a discrepancy the Spanish original will prevail

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pression and information. Thus, the European mechanisms discussed in this paper cover a wider range of human rights, but they will be studied in the present paper with a focus on the right to protest.

In the first section, the scope of the right to protest is presented, as well as the rights and restrictions related to its exercise.

The following sections explain the protection, guarantee and advocacy mechanisms for the defence of fundamental rights both in the European Union and in the Council of Europe. Such mechanisms are divided into:

Protection and guarantee mechanisms:

- The European Court of Human Rights, which may rule on the violation of fundamental rights by member States.
- The Court of Justice of the European Union which, through a preliminary ruling proceeding, may examine whether the national legislation violates EU law, including the Charter of Fundamental Rights of the European Union. Preliminary rulings are requested by national courts on their own initiative or upon the request of the parties.
- The European Ombudsman, who may make recommendations in cases of maladministration by the institutions and bodies of the European Union.

Mechanisms of advocacy:

- The Commissioner for Human Rights of the Council of Europe, who can make recommendations to Member States to improve the protection of fundamental rights.
- The filing of a complaint with the European Commission, which can rule on the infringement of the EU regulations.

Other mechanisms:

- The petition to the European Parliament with the aim of opening a debate on the violations of rights that might be occurring in the Member States of the European Union.
- The Venice Commission, which is tasked with giving legal advice to the States of the Council of Europe on their legislation. The Venice Commission cannot be accessed by civil society, but it is still relevant owing to the value of the opinion it issues, which may be useful for complaint and advocacy actions.

2

THE RIGHT
TO PROTEST

CHARTER

What is the right to protest?

The *right to protest* does not exist in a codified form as such in the principal treaties on human right; rather, it is a concept which comprises a group of fundamental rights, individually recognized. Fundamental rights whose objective is to safeguard plurality in the political participation of the society. Specifically, we are talking of the right to peaceful assembly, freedom of expression and freedom of information as instruments to voice the diverse opinions existing in the society, and to channel dissent and disagreement. These rights are intertwined at such a level in the exercise of the right to protest that it is difficult to distinguish them from one another. For example, by participating in a peaceful protest, the right to freedom of assembly, association, expression and participation in public affairs can be exercised simultaneously.¹

Looking back in History, the possibility to show disagreement with the State Administration and other power centres has been essential for the achievement and maintenance of other human rights. In this sense, the right to protest is a right of special relevance because it is at the base of the maintenance of the current system of guarantees, since it allows the protection of the social advances already achieved and the pursuit of new ones.

It is important to highlight its close relationship with the freedom of association. Although protest does not necessarily happen in an organized and collective way, it often does. The freedom of association, however, encompasses another dimension: the right to organization and structured action. Thus the freedom of association also protects the creation of political and social action entities, such as trade unions and political parties, and all the elements that ensure the independence and the capacity to act of these institutions. The freedom of association in a broad sense is beyond the scope of this guide, which focuses on the protection mechanisms of social action, that are not necessarily organized and collective.

1 United Nations, General Assembly; Human Rights Council. (2013). The promotion and protection of human rights in the context of peaceful demonstrations. A/HRC/RES/22/10, 22nd session (9 April 2013). [Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/128/43/PDF/G1312843.pdf?OpenElement>]

What are my rights and duties in the exercise of the right to protest?

All the aforementioned rights are protected internationally under the name of “civil and political rights”. The rights included in this category try to limit the intervention of public authorities in private life, guarantee the freedom of individuals and protect the participation in public affairs from reprisals, censorship or sanctions. Among the international mechanisms that protect these rights, we highlight:

- the International Covenant on Civil and Political Rights (hereinafter, ICCPR),² approved by the United Nations General Assembly in 1966. The body responsible for ensuring compliance with the ICCPR is the Human Rights Committee of the United Nations (hereinafter, UN).
- the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR),³ approved by the Council of Europe in 1950. The body responsible for ensuring compliance with the Convention is the European Court for Human Rights (hereinafter, ECHR).
- the Charter of Fundamental Rights of the European Union, proclaimed by the Parliament of the European Union, the Council of the European Union and the European Commission in 2000.⁴ It does not have a specialized body to resolve complaints about possible violations of its provisions.

Although the United Nations and its protection, guarantee and advocacy mechanisms do not fall within the scope of this guide, the ICCPR serves us to obtain a more complete definition of the rights we are analyzing. All European

2 United Nations, General Assembly. (1966). International Covenant on Civil and Political Rights, Resolution 2200 A (XXI) (16 December 1966). [Available at: https://www.ohchr.org/Documents/ProfessionalInterest/ccpr_SP.pdf]

3 Council of Europe, European Convention on Human Rights, approved in Rome on 4 September 1950. [Available at: https://www.echr.coe.int/documents/convention_spa.pdf]

4 European Parliament, Council of the European Union and European Commission, Charter of Fundamental Rights of the European Union (2000/C 364/01), approved in Nice on 7 December 2000. [Available at: http://www.europarl.europa.eu/charter/pdf/text_es.pdf]

Union countries (from now on, EU) have ratified the ICCPR, and international law prescribes that there must be a harmonious interpretation of the various instruments in force in the same territory.

Before entering into an analysis of where you can turn if you consider that your right to protest has been violated, we will try to explain – in general terms – what actions are protected by this right according to the aforementioned treaties. We intend to offer a brief outline of the legitimate exercise of the right to protest, which can help to discern whether it is worthwhile to use the international mechanisms.

> In *Annexe I – Legal Framework* you will find the text of the three treaties mentioned above, as well as a brief comparative text on the contents and objectives of each of them.

To answer the question asked, the right to protest protects:

1. The right of any person to express their opinion and receive information of any kind, as well as the freedom to communicate it without any interference of the Administration of any State. In this regard, the freedom of expression encompasses criticism regarded as inoffensive or as a matter of indifference, but also those forms of criticism that offend, shock or disturb.⁵ The ECHR considers that those who dedicate themselves to politics place themselves consciously under continuous examination of each of their words and actions, and should show a greater degree of tolerance for criticism.⁶

Political discourse is considered especially protected, particularly in the context of a public debate of general interest⁷ or when exercised by a holder of an elected office.⁸

5 ECHR judgement *Otegi Mondragón v. Spain*, no. 2034/07 of 15 March 2011.

6 ECHR judgement *Prager and Oberschlick v. Austria* no. 15974/90 of 26 April 1995.

7 ECHR judgement *Otegi Mondragón v. Spain*, no. 2034/07, op. cit.

8 ECHR judgement *Féret v. Belgium*, no. 15615/07 of 16 July 2009.

With regard to defamation, the ECHR distinguishes between “facts” and “value judgements”.⁹ According to the Court, the existence of facts can be demonstrated, whereas the truth of value judgments is not susceptible of proof. Therefore, defamation consists in affirming facts which cannot be demonstrated, whereas statements that are considered value judgements do not need to rely on concrete evidence, although they do need some factual support.¹⁰

Under this interpretation, it would be defamation to accuse a holder of a political office of corruption by citing false evidence, although it would not be defamation to call this person a “crook”.

The following are specifically excluded from the freedom of expression and information:

- a. Any propaganda in favour of war, and
- b. Any statement in support of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.¹¹

The Committee of Ministers of the Council of Europe has defined as “hate speech” all those forms of expression that spread, incite, promote or justify racial hatred, xenophobia, anti-Semitism and other forms of hatred based on intolerance, including: intolerance expressed through aggressive nationalism and ethnocentrism, discrimination and hostility towards minorities, migrants and persons of migrant origin.¹²

9 ECHR judgement *Lingens v. Austria*, no. 9815/82 of 8 July 1986, para 46.

10 ECHR judgement *De Haes y Gijssels v. Belgium*, no. 19983/92 of 24 February of 1997, para 47.

11 International Covenant on Civil and Political Rights. Part III, Art. 20.

12 Council of Europe. Recommendation 1997/20 of the Committee of Ministers of 30 October 1997 on hate speech. [Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680505d5b>]

Examples:

To say that a certain ethnic group is the reason for crime in the city is an offensive phrase which could be legitimate when expressed in a private context as long as it did not include harassment. However, expressed publicly through a loudspeaker at a demonstration, it could be considered as incitement to racial hatred.¹³

In the case *Norwood v. United Kingdom*,¹⁴ the appellant had hung in a window a banner with a picture of the Twin Towers on fire and the following message: "Islam out of Britain - Protect the British People". It also showed a symbol of a crescent and a star in a prohibition sign. The ECHR considered that such a generic and vehement comment against a religious group implied blaming the entire religious group for terrorism, and this was incompatible with the values of tolerance, social peace and non-discrimination.

2. Everyone has the right to freedom of association and peaceful assembly at all levels, especially in political, trade union and civic matters.¹⁵ This right includes the right to *establish* trade unions, political parties and civil society organizations.

According to the European Court of Human Rights, the freedom of peaceful assembly is interpreted broadly to include the organization of

13 Freedom of expression. Equality and Human Rights Commission, 2015. [Available at: <https://www.equalityhumanrights.com/en/publication-download/freedom-expression-legal-framework>]

14 ECHR judgement *Norwood v. United Kingdom*, no. 23131/03 of 16 November 2004. [Available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67632&filena-me=001-67632.pdf>]

15 European Union. Charter of Fundamental Rights of the European Union Article 12, pp. C364/11. Official Journal of the European Union, 18 December 2000. [Available at: https://www.europarl.europa.eu/charter/pdf/text_en.pdf]

and participation in marches, processions and sit-ins,¹⁶ both public and private, formal and informal.¹⁷ The right does not protect meetings, assemblies or protests of any kind that occur on private property without the consent of the owner.

However, although the right to protest protects any meeting or assembly with an economic, political or social purpose, it is more difficult to apply it to events of a purely social or sporting nature.¹⁸ In these events, the right to assembly is equally applicable, but the protection requirements imposed on the States are milder.

On the other hand, the freedom of assembly is protected as long as the assembly is peaceful. Demonstrations convened with violent intentions are therefore excluded. Also excluded are those whose purpose is contrary to democratic principles, even without the demonstrations being violent. In this regard, the jurisprudence of the ECHR claims the State can prohibit an assembly without breaching the right to freedom of peaceful assembly if the State has sufficient reason to believe that it will result in violence, even though the organizers do not intend it, but it must duly justify its decision.

States have the negative obligation not to interfere with peaceful meetings. In general, the most common ways of interference are:

- (1) The denial (systematic or not) of the authorization or permission to conduct a protest.
- (2) Dispersion of the protest without justified reasons.
- (3) Evacuation of the people from the site where the assembly takes place.

¹⁶ ECHR judgement *Christians against Racism and Fascism v. Great Britain*, no. 8440/78 of 16 July 1980.

¹⁷ ECHR decision on the admissibility *Rassemblement jurassien et Unité jurassienne v. Switzerland*, no. 8191/78 of 10 October 1979.

¹⁸ European Court of Human Rights. Article 11: The conduct of public assemblies in the Court's case-law, May 2013. p. 6 and following [Available at: https://www.echr.coe.int/Documents/Public_assemblies_ENG.pdf]

(4) Post-assembly prohibitions and penalties, both administrative and criminal.¹⁹

Penalization and legal proceedings are an interference with the right to freedom of demonstration, even if they are discontinued or no penalty is imposed, and they have a chilling effect on the rest of civil society.

3. International law allows the rights to peaceful assembly, freedom of expression and information to be subject to restrictions. Any restriction that does not cumulatively meet the following requirements constitutes a violation of individual freedoms. The restrictions must:

- be prescribed by law,
- have the purpose of protecting public interests, such as national security, public order, the rights and freedoms of other persons, and
- be demonstrably necessary and proportional to achieve this end.²⁰ A measure would not be necessary and proportional if a milder restriction of rights could achieve the same objective.²¹

19 European Court of Human Rights. Article 11: The conduct of public assemblies in the Court's case-law, May 2013, p. 10. [Available at: https://www.echr.coe.int/Documents/Public_assemblies_ENG.pdf]

20 International Covenant on Civil and Political Rights, Part III, Art. 21; and European Convention on Human Rights, art. 11.2, Freedom of assembly and association.

21 ECHR judgement *Axel Springer AG v. Germany*, no. 39954/08 of 7 February 2012.

What restrictions may be imposed?

We will study now some recurring situations of restriction of the right to protest. Keep in mind that there are many factors which can affect the application of the general rule: a case-by-case analysis must be made in order to know whether the exercise or limitation of the right to protest is legitimate.

Regarding the freedom of expression and information in the digital age²²

People have the right to express themselves online, to access information and opinions of other people, including political and religious discourses. This includes political and religious discourse. The right to freedom of expression protects statements that may be offensive, shocking or disturbing. However, special attention should be paid to the possibility of undermining the reputation or rights of third parties, including their right to privacy.²³

You can create, reuse and distribute content, as long as you respect intellectual property, including copyright.²⁴ In addition, whoever manages an online platform can and should restrict certain content and behaviour in accordance with the adopted content policies, including those publications which they consider illegal or inappropriate.²⁵

22 See: <https://www.coe.int/en/web/freedom-expression/freedom-of-expression-and-information>

23 On weighing up the right to reputation and the freedom of expression see the judgement of the ECfHR *Renaud v. France* no. 13290/07 of 25 February 2010. See also the ECfHR judgement *Pihl v. Sweden*, no. 74742/14 of 7 February 2017.

24 About copyright see the ECHR judgement *Asby Donald and others v. France* no. 36769/08 of 10 January 2013. See also the decision on admissibility in *Neij and Sunde Kolmisoppi v. Sweden* no. 40397/12 of 19 February 2013.

25 For more information see the ECHR judgement *Magyar Tartalomzolgáltatók Egyesülete and Index.hu Zrt v. Hungary* no. 22947/13 of 2 February 2016. See also the ECfHR judgement *Delfi AS v. Estonia* no. 64569/09 of 16 June 2015 (Grand Chamber).

You can choose not to reveal your identity online, for example by using a pseudonym, although national authorities may take measures that ultimately lead to the disclosure of your identity.²⁶

The controversial articles in the *Return of Kings* blog, “24 signs she’s a slut” or “Street Harassment is a Myth invented by Socially Retarded White Women”, would not be suable in the abstract.²⁷ However, if they were especially addressed to any person, they could imply legal consequences.²⁸

Regarding offences to national symbols:

The European Court of Human Rights considers that attacks on institutions and state symbols, as opposed to those that represent a personal attack, fall within the scope of criticism and dissent. The ECHR has maintained that the use of symbols within the framework of a political act is protected by freedom of expression, even when portraits of constitutional representatives and flags are burnt.²⁹ The ECHR places the limit on tolerance and respect for the equality of all human beings, considering an abuse of the freedom of expression those actions or statements that incite to or justify hatred, or imply support for violence.³⁰ Moreover, a prison sentence imposed for an offence committed within the framework of the political debate may only be compatible with the freedom of expression in exceptional circumstances.³¹

It should be mentioned that the ECHR does not consider that the reputation of heads of state should have any special privilege or protection, in particular

26 Council of Europe. Statement of 28 May 2003 on the freedom of communication on the Internet. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dfbd5]]

27 Available at: <http://www.returnofkings.com/>

28 Example inspired by freedom of expression – Equality and Human Rights Commission. [Available at: <https://www.equalityhumanrights.com/en>]

29 ECHR judgement *Christian Democratic People’s Party v. Moldova* (n°2), no. 28793/02 of 14 February 2006.

30 ECHR judgement *Sürek v. Turkey* (n°1) [GS], no. 26682/95 of 8 January 1992, para. 62; and *Gündüz v. Turkey* no. 35071/97 of 14 June 2004, para. 40.

31 ECHR judgement *Stern Taulats and Roura Capellera v. Spain* no. 51168/15 and 51186/15 of 13 March 2018, para. 34.

in relation to the right to inform and express opinions concerning the heads of state.³²

Notwithstanding the foregoing, many countries continue to punish under criminal or administrative law the persons who burn photos of political representatives and flags at peaceful demonstrations.³³

In its judgement *Stern Taulats and Roura Capellera v. Spain* of 13 March 2018, the ECHR considered that burning photos of the King of Spain during a demonstration should not be criminally punishable, since it was part of the political criticism against the institution of the monarchy in general. The Court considered that in this specific case these types of acts went no further than the use of a certain permissible degree of provocation in order to transmit a critical message, and they did not constitute incitement to hatred or violence.³⁴

Regarding restrictions of place and time in demonstrations:

The freedom of assembly and demonstration includes both private and public meetings, either in stationary meetings or public marches. In the latter case the Administration may impose restrictions of place and time, provided that they are duly justified and the ultimate objective of this type of events is respected; that is, to give visibility to an idea.

Public meetings are held to convey a message and must occur in places and at times that allow them to be seen and heard by the people to whom they are addressed. Therefore, when the Administration imposes any restrictions on

32 ECHR judgement *Otegi Mondragón v. Spain*, op. cit 5, para. 55-56.

33 In Spain, the burning of flags as such is not classified separately as an offence but falls under the category of "insults" to democratic institutions. Likewise, it is prohibited to burn photographs of the King by interpretation of article 491.2 of the Criminal Code: "*The penalty of a fine of six to twenty-four months shall be imposed on who uses the image of the King or of the Queen, or any of their ascendants or descendants, or of the Queen consort or of the consort of the Queen, or of the Regent, or of any member of the Regency, or of the Prince (...)*". Regarding the burning of images of de political representatives, see the ECHR case *Christian Democratic People's Party v. Moldova* (nº2), op. cit. 29.

34 ECHR judgement *Stern Taulats y Roura Capellera c. España* of 13 March 2018, op. cit. 31.

the time, place or manner of holding a meeting, reasonable alternatives must be offered.³⁵

Regarding the prerequisites for the exercise of the right to peaceful assembly

Both the OSCE guidelines and the ECHR have recognized that meetings are as legitimate use of public space as commercial activities or traffic.³⁶

The exercise of the right to peaceful assembly, both stationary and in the form of a march, may entail the obligation to notify in advance the event to the competent authorities. The UN Human Rights Committee and the ECHR have considered that this requirement is compatible with the exercise of the right, although such notification cannot be equivalent to asking for an authorization.³⁷ The purpose of such communication is that the authorities can take reasonable and appropriate measures to ensure that the exercise of the right occurs without incidents.³⁸

The ECHR has pointed out that the risk of counter-demonstrations is not a sufficient reason to prohibit the holding of a demonstration. The authorities should take measures to avoid violent encounters between two demonstrations with opposing ideologies, avoiding the deprivation of any of the two of their right to peaceful assembly.³⁹

35 Joint OSCE/ODIHR-Venice Commission Guidelines on Fundamental Rights, September 2015. Guideline 3.5, para. 99 and 101. [Available at: <https://book.coe.int/en/human-rights-and-democracy/6844-joint-osceodihr-venice-commission-guidelines-on-fundamental-rights.html>]. See also the Report of the Special Rapporteur on the rights to peaceful assembly and of association to the Human Rights Council, A/HRC/23/39, para. 60. [Available at: <https://undocs.org/es/A/HRC/23/39>]

36 Joint OSCE/ODIHR-Venice Commission Guidelines on Fundamental Rights. Guideline 3.2 and ECHR judgement *Patyi and Others v. Hungary* no. 5529/05 of 7 January 2009.

37 The UN Human Rights Committee, in its concluding observations on Morocco (1999), doc. UN CCPR/C/79/add.113, para. 24. [Available at: https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.113&Lang=es]

38 ECHR judgements *Sergey Kuznetsov v. Russia* no.25691/04 of 23 January 2003, para. 42; and *Bukta and Others v. Hungary* no. 25691/04 of 17 October 2017.

39 ECHR judgement *Alekseyev v. Russia* no. 4916/07, 25924/08 and 14599/09 of 21 October 2010.

It should be noted that the special rapporteur Maina Kiai and the ECHR have stated that the lack of notification cannot, by itself, be the reason to dissolve the protest.⁴⁰ Moreover, according to the OSCE-ODIHR spontaneous demonstrations should be legal and tolerated, since they are a predictable and not exceptional feature of a healthy democracy.⁴¹ This means that a demonstration or public meeting not notified or spontaneous should not be considered illegal only for this reason.

Deterrent methods used by the authorities

A person cannot be punished for the mere fact of participating in a demonstration. The ECHR has stated that: “the freedom to take part in a peaceful assembly is of such importance that a person cannot be subjected to a sanction – even one at the lower end of the scale of disciplinary penalties – for participation in a demonstration which has not been prohibited, so long as this person does not himself commit any reprehensible act on such an occasion.”⁴²

The use of force by the authorities is not prohibited, provided that it is an exceptional, strictly necessary measure and to the extent required for the performance of their duties.⁴³ It is important to remember that in the face of violent behaviour it is the obligation of the police to distinguish between those

40 Special Rapporteur A/HRC/23/39, op. cit, para. 51; and ECHR judgement *Bukta and Others v. Hungary* no. 25691/04 of 17 July 2007, para 36. See also United Nations, General Assembly; Human Rights Council (2016). Joint report of the Special Rapporteur on the rights to the freedom of peaceful assembly and of association and the Special Rapporteur on the extrajudicial, summary or arbitrary executions on proper management of assemblies. A/HRC/31/66 of 4 February 2016, para. 21 and 22. [Available at: <https://undocs.org/es/A/HRC/31/66>]

41 Joint OSCE/ODIHR-Venice Commission Guidelines on Fundamental Rights. Principle 4.2.

42 ECHR judgement *Galstyan v. Armenia* no. 26986/03 of 15 November 2017, para. 15.

43 United Nations, General Assembly; Resolution 34/169. UN Code of Conduct for Law Enforcement Officials of 17 December 1979. Article 3. [Available at: <https://www.ohchr.org/SP/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>]

who act violently and those who do not.⁴⁴ The arbitrary or abusive use of force by the law enforcement official must be punished as a crime.⁴⁵

On the correct use of force by law enforcement authorities we would like to refer you to the *UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*,⁴⁶ widely recognized by both States and international organizations. Likewise, the document "*Principles on the Freedom of Assembly*", jointly authored by the OSCE ODIHR and the Venice Commission, may also be useful.

> You can find links to these documents
in *Annexe II – Useful links*.

44 Amnesty International (2014) *Spain – the right to protest threatened*. Amnesty International Publications. [Available at: <https://www.amnesty.org/download/Documents/8000/eur410012014es.pdf>]

45 UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. Adopted by the Eighth Congress of the United Nations on Crime Prevention and the Treatment of Offenders. Principle 7. [Available at: <https://www.ohchr.org/sp/professionalinterest/pages/useofforceandfirearms.aspx>]

46 Op. cit.

3

EUROPEAN PROTECTION, GUARANTEE AND ADVOCACY MECHANISMS

Legal and institutional framework

There are various mechanisms at the European level to which you can resort if you consider that your right to protest has been unduly prohibited or restricted. Below we will offer a list of the protection and guarantee mechanisms existing within the institutional framework of the European Union and of the Council of Europe.

The European Union is a supranational economic and political institution, which has 28 member States. Due to the economic reasons underlying the establishment of the European Union, there are few regulations or directives that directly address the issue of human rights at the European community level.⁴⁷ However, in recent years we have seen a shift in the areas of interest of the European Union aimed at an increased scope of competence and at a greater political integration. The European Union approved a number of legally binding acts which affect in various ways the freedoms analysed in this study, although in an indirect manner. For example, the framework decision on combating certain forms and expressions of racism and xenophobia by means of criminal law,⁴⁸ the copyright directive⁴⁹ or the adoption of common anti-terrorism measures.

This trend makes it very possible for the European Union to increase its regulatory activity in areas that directly affect human rights. This is important because some of the mechanisms we will see admit only violations based on community law and, although in theory the invocation of the Charter of Fun-

47 Consolidated version of the Treaty on the Functioning of the European Union (2012) Official Journal of the European Union. Articles 2 to 6. [Available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/PDF/?uri=CELEX:12012E/TXT&from=ES>]

48 Council of the European Union, Framework Decision 2008/913/JAI of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law. Official Journal of the European Union. [Available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=celex:32008F0913>]

49 Parliament of the European Union, legislative resolution of 26 March 2019 on the proposal for the directive of the European Parliament and of the Council on copyright in the digital single market. [Available at: http://www.europarl.europa.eu/doceo/document/TA-8-2019-0231_EN.html]

damental Rights should be sufficient, its scope of application is usually interpreted restrictively.

The limited interpretation so far is based on article 51 of the Charter of Fundamental Rights of the European Union, which states that the provisions of the Charter “are addressed to the institutions and bodies of the Union, respecting the principle of subsidiarity, as well as to the member States only when they apply EU law.” This position seems to be evolving. The main strategy is to justify the complaint under a regulation or pillar of the European Union, even if tangentially. Once such justification is found, the complaint could be admissible and the body responsible for resolving the case could also rule on the application of the Charter of Fundamental Rights of the European Union.

The “No *callarem*” platform requested the European Parliament to investigate Spain for the systematic violation of the right to the freedom of expression and artistic creation. The platform filed a complaint against the Citizen Security Law as well as against the prison sentences imposed on Valtònyc and Pablo Hásel, two rappers who had been charged for exalting terrorism and insulting the crown. The petition, which was based on articles 11 and 2 of the Charter of Fundamental Rights of the European Union, was rejected at first because the Committee on Petitions understood that it was part of an internal matter of the member State. However, some Members of the European Parliament insisted on the competence of the Parliament regarding compliance with the European legislation, arguing that the Charter of Fundamental Rights of the European Union was part of the core of the community law. The petition was filed for the second time and was accepted.⁵⁰

The European Commission initiated an infringement procedure against Poland before the Court of Justice of the European Union (CJEU) for threatening the rule of law. Poland approved a series of measures that call into question the independence of the institutions and the separation of powers. In June 2019, the CJEU ruled that the new disciplinary regime for judg-

50 Regué, J. (25.05.2018) “La Eurocámara lanza el trámite para investigar si España vulnera el derecho a la libertad de expresión” (The European Commission launches the investigation of whether the right to the freedom of expression is violated in Spain) El Periódico. [Available at: <https://www.elperiodico.com/es/politica/20180525/comision-europea-investigara-espana-vulnera-libertad-expresion-6839615>] (Accessed on 25.04.2019)

es violated the principle of judicial independence. The CJEU supported the Commission's position and considered that Poland had not fulfilled the obligations contained in article 2 of the Treaty on the European Union – human dignity, freedom, democracy, equality, rule of law and respect for human rights – read in conjunction with article 47 of the Charter of Fundamental Rights of the European Union – right to effective judicial protection and an impartial judge. In this way, it has been possible for the Court of Justice of the European Union to rule on the application of the Charter of Fundamental Rights, invoking the pillars of the European Union.⁵¹

On the other hand, the Council of Europe is a larger institution, with 47 State members. The primary objective of the Council of Europe is the promotion of democracy, rule of law and the protection of human rights. The European Court of Human Rights is the body responsible for the application of the European Convention on Human Rights and, it is probably, the most effective institution to solve an individual case of violation of the right to protest.

51 Decision of the Court of Justice of the European Union on the case C-619/18, *Commission v. Poland (Independence of the Supreme Court)* of 24 June 2019. [Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-06/cp190081en.pdf>]

Existing mechanisms

On the next page you will find a summary table of the various existing protection, guarantee and advocacy mechanisms, and the reference to the section of this guide where the respective mechanism is presented. We believe that it may be useful to identify which mechanism is the best according to the objectives you pursue with your complaint. The guide proceeds to a practical explanation on how to file a complaint in each mechanism, which are presented in two blocks. The first block studies in detail the *protection and guarantee mechanisms* understood as those that seek to resolve a violation – individual or collective – of human rights. The second block analyzes the *political advocacy mechanisms* understood as those that serve to give visibility to cases of violation and seek to attract the attention of international bodies so that they pressure the authorities to change their behaviour.

It is interesting to mention the “*Your Europe Advice*” mechanism available online. It is an EU advice service for the public, currently provided by the legal experts who are familiar with both European Union law and national law of member States. It answers questions in all official languages of the European Union asked directly by citizens and residents of the European Union (as well as of Norway, Island and Liechtenstein), and by persons whose relatives are citizens or residents of a member State. This service does not replace legal representation, but it helps to identify which legal provision may have been contravened. The link can be found in *Annexe II – Useful Links*.

	Part of	Type of body	Outcome
European Court of Human Rights	Council of Europe	Judicial, binding	Binding judgement.
Court of Justice of the European Union – Preliminary ruling	European Union	Judicial, binding	Binding decision, meant for cases of non-application of national legislation.
European Ombudsman	European Union	Intermediary, quasi-judicial, not binding	Amicable resolution proposals, recommendations to the State. Pressure on the Government.
Commissioner for Human Rights of the Council of Europe	Council of Europe	Political, not binding	Report, observations, recommendations to the State. Pressure on the Government.
Complaint to the Commission – Court of Justice of the European Union	European Union	Political, not binding. Note: If the case it referred to the CJEU, the judgement of CJEU would be binding	Report, recommendations to the State, referral to the CJEU. Pressure on the Government.
Petition to the European Parliament	European Union	Political, not binding	Report, recommendations to the State, resolution of the Parliament. Pressure on the Government.

Intended for	Defendant	Argumentation	Section (page)
Individual or collective cases of violation of the European Convention on Human Rights due to action or inaction of the state Administration or any of its bodies. Only available once all judicial remedies at the state level have been exhausted.	State Administration	European Convention on Human Rights	Page 19
Violation of the Community law by the national authorities, either at the legislative level or when applying the laws. There is no direct route to the CJEU, the court can only be accessed through national courts via the remedy called "Preliminary ruling".	State Administration	National law that contravenes the Community law, the law of the European Union	Page 26
Individual or collective cases of poor administration of the institutions of the European Union	Administration of the European Union	The violation of a legal provision is not necessary, but a bad practice or procedure.	Page 29
General trends, repressive collective situations.	State Administration	European Convention on Human Rights	Page 32
Violation of the Community law by the national authorities, either at the legislative level or when applying the laws.	State Administration	National law that contravenes the Community law, the law of the European Union	Page 35
Violation committed by the member States, local authorities or other institutions.	State Administration and European Union	Any problem related to the area of competence of the European Union	Page 38

Protection and guarantee mechanisms

European Court of Human Rights

What is it?

The European Court of Human Rights (ECHR) is a judicial body with seat in Strasbourg. It consists of forty-seven judges, a number equal to that of the member States of the Council of Europe that have ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is the body responsible for the interpretation of this Convention and the resolution of cases of violations of the rights contained therein.

The Court is assisted by a Secretariat consisting essentially of lawyers (*référéndaires*) from all member States. Both the judges and the *référéndaires* are totally independent from their countries of origin and do not represent either the appellant or the member States.⁵²

Paradigmatic case brought before the ECHR:

The already mentioned case *Stern Taulats and Roura Capellera v. Spain*, where two individuals were tried for insulting monarchical institutions and incitement to violence after burning photos of the King and the Queen of Spain at a demonstration.⁵³ The case was previously brought the Constitutional Court, which considered that the crime had been committed and there had been no violation of human rights.

52 European Court of Human Rights: Questions and Answers. Page 3 [Available at: https://www.echr.coe.int/Documents/Questions_Answers_SPA.pdf]

53 ECHR judgement *Stern Taulats y Roura Capellera v. Spain*, op. cit 31.

Who can access the ECHR?

Any natural or legal person – for example, a non-governmental organization or a group of individuals⁵⁴ – who is in the jurisdiction of the States Parties to the Convention⁵⁵ and who is a direct or indirect victim,⁵⁶ without the need to be a citizen or resident.

You cannot file a complaint on behalf of other persons, unless such persons have appointed you as their official representative.

The applicant must have been the victim of a violation. A complaint against general causes cannot not be filed, for example, against a law or an act considered unfair.

Anonymous applications will be rejected, although anonymity may be requested when filling out the form, so that the identity is not made public. For the request to be accepted, reasons why anonymity is requested must be explained.⁵⁷

The violation must be attributable to a State Party to the Convention. The violation may originate from action or omission of any State body (executive, legislative, judicial). Moreover, it may have been carried out by a central State organization or by sub-state entities. The Court cannot handle applications against private institutions or individuals.

54 European Court of Human Rights, European Convention on Human Rights of 1 June 2010, art. 34: *“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”* [Available at: https://www.echr.coe.int/Documents/Convention_SPA.pdf]

55 Jurisdiction is understood as *the real power of a State regarding persons, property and territory. Normally, the jurisdiction of a State coincides with its territory, but it is possible for a State to exercise effective control or authority in other context.* For example, a ship with the national flag, military missions abroad, or occupied territories.

56 An indirect victim is understood as *a person with the legitimate interest required in his or her capacity as a relative of the deceased. In the event that the alleged victim of a violation dies before filing the application, the person's next of kin or partner may file an application specifying the complaints related to the death or disappearance.* [Available at: https://www.echr.coe.int/Documents/Admissibility_guide_SPA.pdf]

57 My application to the ECHR: How to submit it and the development of the procedure. Page 10. [Available at: https://www.echr.coe.int/Documents/Your_Application_SPA.pdf]

The review of the application is free. However, the parties have to pay for their legal assistance, means of investigation used and other evidence. The ECHR has a free service of legal assistance, but it can only be requested once the case has been referred to the Government.

Under what conditions?

Deadline for submission: 6 months after the final decision of an domestic court becomes known. This term expires on the last day of the six months, even it is a Sunday or holiday. The six-month period is interrupted when a complete application meeting the requirements of section 47 of the Court Regulations is sent to the Court.⁵⁸

Exhaustion of internal remedies: All possibilities of internal appeal must have been exhausted or such internal remedies must have been inefficient or unreasonably prolonged. This requirement includes the highest jurisdictional instance of the country, such as the Constitutional Court. Nonetheless, the exhaustion of internal remedies does not mean that you have to make use of remedies which are discretionary, ineffective or outside the normal appeal procedures.⁵⁹

Existence of serious damage: The criteria used by the ECHR to verify whether the violation of a right has reached the minimum threshold of seriousness are:

- the nature of the right allegedly violated,
- the seriousness of the incidence of the alleged violation in the exercise of a right, and

58 The term for submission will be reduced to 4 months when Protocol 15 comes into force. For this to happen, all States Parties must ratify Protocol 15. At the moment of drawing up this guide Italy and Bosnia and Herzegovina have not done it yet. See: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/213/signatures?p_auth=Y2XgJ7GK

59 European Court of Human Rights. How to complete the application form, I. What you need to know before completing the application form. Page 1. [Available at: https://www.echr.coe.int/Documents/Application_Notes_SPA.pdf]

- the possible consequences of the violation for the personal situation of the applicant.

To determine this criterion, the ECHR examines in particular the substance of the national procedure and its outcome.⁶⁰ Remember that in the case *Trabajo Rueda v. Spain* the Court considered that imprisonment was a serious damage.

Non-abusive application: The application must not be poorly justified or abusive, misleading, negligent or contain improper language.⁶¹ According to the jurisprudence, “any conduct of an applicant that is manifestly contrary to the purpose of the right of individual application as provided for in the Convention and impedes the proper functioning of the Court or the proper conduct of the proceedings before it constitutes an abuse of the right of application.”⁶²

Non bis in idem: It is very important to know that application will be admitted if it was already examined by another international instance and does **not contain new facts**.⁶³ The Court will not examine any application that is being analyzed by another international body. For example, if you have filed an application with the UN Human Rights Committee, you can only turn to the ECHR when new substantive facts occur.

Legal bases accepted: The application must refer to a right contained in the Convention. According to articles 34 and 35.3 of the Convention, the application will be admissible only if a right protected by the Convention or its protocols is invoked. The guaranteed rights are enumerated in the Convention and its Protocols no. 1, 4, 6, 7, 12 and 13. In particular, it should be remembered that since Protocol no. 12 (2005) came into force the ECHR can consider applications based on discrimination in the domestic legal system.

60 ECHR judgement *Giustiv. Italy* no. 13175/03 of 18 October 2011. [Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22giusti%22%22%22documentcollectionid%22:%5B%22GRAND-CHAMBER%22%22CHAMBER%22%22%22itemid%22:%5B%22001-107042%22%22%7D>]

61 European Court of Human Rights, European Convention on Human Rights of 1 June 2010, art. 35(3).

62 ECHR judgement *Mirulubovs and others v. Latvia*, no. 798/05 of 15 September 2009, para. 62 and 65.

63 European Court of Human Rights, European Convention on Human Rights of 1 June 2010, art. 35(2).

Not all the States have ratified all Protocols, so it must be checked previously.

Territorial and temporary: The application must be directed against a State which has ratified the Convention and the violation must have occurred in the jurisdiction (generally the territory)⁶⁴ of a State Party. Moreover, the violation must have occurred after the ratification of the Convention, although the ECHR has competence also on violations that occurred before the entry into force of the Convention if they involve a situation of continuing violation.

> In *Annexe II – Useful Links* you will find links to extensive guides published by the Court, where more information is available.

How to do it?

A mandatory application form exists. The form must be completed in its entirety and must be submitted together with all relevant supporting documents in order to be examined.

The form is available online and may be completed on the website, although a written version can be requested from the Court.

While completing the form it is important not to forget to:⁶⁵

- **Use the most recent form.** It is important to highlight that the latest form should be used since the forms prior to 2014 are not admitted.
- **Include in the application a summary of the facts.** That corresponds to sections E, F and G of the form. It is also important to remember that a succinct statement of the alleged violations and facts must be included. They must be clearly specified, without the need for the Court to consult

64 See above 35.

65 European Court of Human Rights. Recurring errors in completing a form, 2019. [Available at: https://www.echr.coe.int/Documents/Applicant_common_mistakes_SPA.pdf]

other documents to understand the object of the application.⁶⁶ Additional information cannot exceed 20 pages and is not mandatory.

- **Attach a copy of the decisions or documents which set out the provisions necessary for the case.** If the applicant does not provide documentary evidence to support the allegations, the application may be declared inadmissible due to lack of foundation.⁶⁷
- **Provide the resolutions or documents which show that internal remedies have been exhausted.** It is especially important to prove that the internal channels have been exhausted and provide the decisions of the courts, except in the case of inefficient or unreasonably prolonged procedures. **It is better to provide copies and not originals because if the application is not admitted, the documents will not be returned and no records will be kept.**

Do not forget to fill in section G, indicating the dates of the last judgement so that the ECHR can determine whether the six-month period has expired. It is necessary to mention the jurisdiction which issued the judgement, the date and a concise description of the adopted resolution.

- **The application form must bear the original signature on the last page.**

The ECHR application forms must bear the original signature of the applicant or applicant's legal representative.

If the applicant is a society or organization, it is important not to forget to identify its official representative.

- **Duly expose the violations.** It is essential to indicate the article of the Convention and briefly state in what way it was violated.
- **Clearly indicate the State against which the complaint is filed.**

66 European Court of Human Rights, ECHR Rules of Procedure of 1 August 2018, art. 47 (Content of an individual application)

67 European Court of Human Rights, ECHR Rules of Procedure of 1 August 2018, art. 47 (Content of an individual application) and art. 44c (Lack of effective collaboration).

- **Include a list of the attached documents in the form.** The Court establishes the obligation to classify the documents by date and by procedure, number the pages correlatively and not to staple, glue or join the documents.

At the time of filing the application no legal representation is necessary. The Court will notify the person concerned when the procedure reaches a stage when legal representation is required.⁶⁸ Anyway, if you come with legal representation from the beginning, you have to complete the part of the form where the legal representative is identified. It will be necessary to sign a power of attorney and send it together with the application.⁶⁹ **That is also required when a person acts as the official representative of an organization.**

Article 34 of the ECHR Rules establishes that English and French are the official languages. In the initial stage of the procedure you can write to the Secretariat in the language of one of the States which have ratified the Convention, but in later stages you have to limit yourself to using English and French. The President of the Chamber may exceptionally authorize the use of the official language of one Contracting Party.

- > **The link to the form is available in *Annexe II – Useful Links*, and it includes a series of recommendations to avoid making frequent errors.**

The applications should be sent to:

The Registrar
European Court of Human Rights
Council of Europe
F-67075 Strasbourg cedex

⁶⁸ European Court of Human Rights. How to complete the application form, I. What you need to know before completing the application form. Page 5.

⁶⁹ Otherwise the application may be rejected, in accordance with art. 47 ECHR.

If you also want to request interim measures, they can be requested only in case of imminent danger or serious threat to health or physical integrity.

The Court emphasizes in all its official sources that it only adopts interim measures in clearly defined circumstances, when there is a risk that serious violations of human rights occur. Requests for interim measures must be written as completely and concisely as possible.

Interim measures can be requested in the same application to the ECHR or separately, and must meet the same requirements as the main application.

If they are requested separately:

The Court should be contacted directly by telephone, fax or letter. The Court has a fax number for sending requests for interim measures: +33 (0)3 88 41 39 00 / +33 (0)3 90 21 43 50

It is recommended to use the telephone or to attach the request to the application, since if you request provisional measures by fax or letter, there is a risk of a delay in the handling of the request, especially if it is received after 16:00 or during the weekend.

What to expect?

The substantiation of any application before the ECHR takes place in two stages: one of admissibility and another of examination of the merits.

Upon receipt of the application form, the Secretariat of the Court will verify whether it contains all required information and documents. If it does not contain all required details, the Secretariat will contact you to notify you that article 47 of the ECHR regulations has not been fully complied with and, therefore, no file has been opened. If this is the case, a complete form can be resubmitted within the above mentioned term of 6 months. **For this reason it is important to send copies and not the originals of the evidence, because if the form is rejected, no document is retained.**

If the application is complete, a file will be opened containing the letters and the documents sent. The Secretariat will contact you and will send you a set of labels with a barcode which should be used to reference all correspondence

with the Court from that moment forward. Should the Secretariat require from you any data or specific information, it is important to respond as soon as possible, since files are destroyed after six months of inactivity.⁷⁰

Once the application has been verified by the Secretariat, the first decision is made regarding the admissibility requirements.⁷¹ **The Court's inadmissibility decisions are final and there is no appeal against them.**⁷²

If the application is considered admissible, the procedure will continue. A chamber of three judges will analyze the merits on cases concerning issues already decided by the Court. A chamber of seven judges will hear the case when it is not repetitive. This court will rule again on the admissibility and will proceed to study the merits of the matter.⁷³

The Grand Chamber of 17 judges meets only as a result of the inhibition in its favour of a Chamber or by referral (appeal) at a later stage of the procedure. In particular, when it is a matter of serious concern or if there is risk of contradiction in the jurisprudence.⁷⁴

The duration of the procedure is variable, since the Court takes into account the importance and urgency of the issues raised in the applications when deciding how to handle the case. The judgement is final after 3 months of being issued. During these three months, the case can be referred to the Grand Chamber at the request of one of the parties.

Once the judgement becomes final, the Court transfers the file to the Committee of Ministers of the Council of Europe, which is the body responsible for the supervision of the enforcement of the judgement.

70 European Court of Human Rights. How to complete the application form, I. What you need to know before completing the application form. Page 12.

71 See section *European Court of Human Rights – Under what conditions?* See also European Court of Human Rights. Practical guide on admissibility. Page 9. [Available at: https://www.echr.coe.int/Documents/Admissibility_guide_SPA.pdf]

72 European Court of Human Rights. How to complete the application form, I. What you need to know before completing the application form. Page 8.

73 European Court of Human Rights. My application to the ECHR: How to submit it and the development of the procedure. Page 6. [Available at: https://www.echr.coe.int/Documents/Your_Application_SPA.pdf]

74 European Court of Human Rights. My application to the ECHR: How to submit it and the development of the procedure. Page 7.

Is it binding on the State?

The States are legally bound to enforce the ECHR's decisions, although the mechanisms for this to happen are exclusively in the hands of the States.

The decisions of the ECHR include the declaration that a certain right has been violated and the obligation of the State to restore the situation prior to this violation, and may also rule on the economic compensation requested. The Court may also indicate to the State the need to modify or approve legislation and, in exceptional cases, set out a timeline for this to happen. The ECHR cannot annul the judgements issued by judicial bodies of the member States.

They have the effect of *res judicata* with respect to the State. This means that the ECHR judgements are final, without being able to be judged again by any national or international instance. Moreover, the judgement has the effect of interpreted matter with *erga omnes* effects with regard to the Convention. In other words, the explanation given in a judgement serves to interpret or clarify the Convention, and all States Parties must act in the light of this interpretation, even though they were not party in the specific case.

The competence to supervise the enforcement of the judgements corresponds to the Committee of Ministers of the Council of Europe.⁷⁵ If a State fails to enforce the Court's judgement, the applicants can contact directly the Committee of Ministers of the Council of Europe,⁷⁶ which will officially demand the State to comply with the content of the judgement. If the request is not fulfilled, the Committee may ask the ECHR – by a two-thirds majority – to rule that the State has refused to enforce the ECHR judgement. In particularly serious cases, the Committee may suspend a State in its representation in the Council of Europe or may invite the State to withdraw.⁷⁷

Most States have complementary mechanisms to expedite action and ensure that the rulings of the Court are enforced.

⁷⁵ European Court of Human Rights, European Convention on Human Rights of 1 June 2010, art. 46.2.

⁷⁶ Contact details available at: <https://www.coe.int/en/web/execution/contact-us>

⁷⁷ Functions of the Committee of Ministers [Available at: <https://www.coe.int/en/web/tirana/committee-of-ministers>]

In Spain, for example, the Constitutional Tribunal judgement 303/1993 considered that “the jurisprudence of the European Court of Human Rights (...), should not only serve as an interpretative criterion in the application of the constitutional provisions protecting fundamental rights”, but also is of “immediate application in our system” (FJ 8).

Additionally, article 5bis of the Organic Law of the Judiciary, in its new wording, establishes that “An **appeal for review** can be lodged before the Supreme Court against a final judicial ruling, in accordance with the procedural regulations of each judicial sphere, where the European Court of Human Rights has affirmed that the ruling in question violates any of the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, providing that the violation, in view of its nature and gravity, gives rise to effects that persist and cannot be eradicated by any other means, apart from such review”.

B. Court of Justice of the European Union – Preliminary ruling

What is it?

The Court of Justice of the European Union (CJEU) is the jurisdictional institution of the European Union, responsible for guaranteeing that the EU legislation is interpreted and applied in a uniform manner in all member countries.

Today, the role of the CJEU remains very limited for the purposes of our guide, mainly for two reasons. Firstly, the Court only intervenes when the problem affects a matter of European Union law and does not admit cases based *exclusively* on the Charter of Fundamental Rights of the European Union.

Secondly, a person cannot communicate directly with the Court, unlike in the case of the ECHR. **It must be done through national courts through the recourse called “preliminary ruling”.** Alternatively, the European Commission can be called upon to initiate an infringement procedure, which could be concluded before the CJEU. We will analyze this last scenario later as an advocacy mechanism.

However, the CJEU is the most effective mechanism to change the actions of the State, since if a norm or act is declared invalid, the national judicial instances must automatically stop applying it in all their resolutions.

It is worth highlighting what has already been indicated above, and namely that the directives, regulations and decisions of European institutions are proliferating beyond the strict interpretation of competences prevalent until now. The construction of a common political project extends the use of the legislative faculty beyond what is merely economic and the regulations increasingly concern, albeit tangentially, public rights and freedoms. Moreover, new forms of legal reasoning allow the Court to rule on the Charter of Fundamental Rights and on its application, by referring to the protection of a norm or a pillar of the EU.⁷⁸

⁷⁸ See section III. *European protection, guarantee and advocacy mechanisms – Legal and institutional framework.*

Paradigmatic case:

In 2008, the German authorities banned the Mesopotamia and Roj TV channels – a Danish and Kurdish company respectively – from broadcasting programmes in German territory, for violating the “principles of international understanding” applicable in accordance with the German constitution. The ban was based on the fact that the programmes in question proposed resolving the conflict between Kurds and Turks with violent means, also in German territory, and supported the Kurdish Workers Party (PKK) in its recruitment of young people.

The Federal Administrative Court of Germany requested a preliminary ruling to the CJEU, asking whether the concept of “incitement to hatred based on race, sex, religion and nationality” could also include the violation of the “principles of international understanding” of the German constitution. The Federal Administrative Court based the preliminary ruling request on the need to clarify the application of the directive popularly known as “television without frontiers directive.”⁷⁹

The Court decided in 2011 that the behaviour of the Mesopotamia and Roj TV channels was framed in the context of “hate speech” in accordance with German law, thus interpreting a precept directly related to freedom of expression. However, it ruled that only Denmark was competent to restrict the retransmission of the programmes, since according to the said directive the member States are not authorized to limit in their territory programmes broadcast from another member State.⁸⁰

79 Directive 89/559/EEC of the Council of 3 October 1989 on the coordination of certain legal, regulatory and administrative provisions of the Member States relating to the exercise of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council of 30 June 1997.

80 Decision of the Court of Justice of the European Union, cumulative cases C-224/10 and C-245/10

Who can use the mechanism?

Any person who is entitled to file a lawsuit before the national courts can ask the national judge, in the course of an internal procedure, to bring the matter to the Court of Justice of the European Union. Also a judge or court can do it on their own initiative. Therefore, the applicant's right to take legal action (locus standi) is defined by the domestic procedural rules.

If the request is denied, the interested party may appeal. The court of last instance (Supreme Court or equivalent) is constrained to present the prejudicial question for a preliminary ruling, for the sake of the right to effective judicial protection and the effective judicial process, protected by Article 6 of the European Convention on Human Rights. However, the Court of last instance is **not** obliged to refer the matter to the CJEU if the same issue has been previously resolved by the CJEU or is not necessary to resolve the pending case.⁸¹

Under what conditions?

The most important condition is that, in the specific case, the application of national law reveals a violation of European Union law. Although the case is effectively raised to the CJEU, both this Court and the European Commission have maintained that they can declare the claim inadmissible if the application of any precept of community law is not at stake. As we have mentioned before, it is not uncommon that the CJEU decides on the EU Charter of Fundamental Rights, but this can never be the only legal basis raised. It is necessary to justify the demand under a regulation or pillar of the European Union.

The following can be reasonings of interest:

- Rules regarding hate speech and non-discrimination,
- Rules concerning anti-terrorism or security measures,
- Directives on copyright and protection of business secrets,

⁸¹ Decision of the Court of Justice of the European Union, case 283/81, CILFIT, [1982], para. 14-15.

- Privacy directives,
- The principles of the European Union of Article 2 of the Treaty on European Union (human dignity, freedom, democracy, equality, rule of law and respect for human rights), or
- The pillars of the European Union (for example, the five economic freedoms of the EU).

There are other substantial conditions:

- The procedure must be pending. The referral cannot be made if the proceedings before the national court have ended.
- In domestic dispute, a rule of community law or a national standard derived from community law must be applied.
- The referral must concern EU law, in particular:
 - the request for interpretation of the European standard, treaty, directive or regulation;
 - the validity of an act of the institutions derived from community law.
- The required clarification must be necessary for the national court to make a decision on the case. In this sense, it is not necessary if the problem is hypothetical or the resolution of the CJEU does not affect the decision of the case.
- The question will be inadmissible if the article is clear and there is no interpretation whatsoever, or if the application of European law is so obvious that it leaves no room for any reasonable doubt about how the question should be resolved.⁸²

⁸² Decision of the Court of Justice of the European Union, case 283/81 CILFIT [1982] E.C.R. 3481, para. 16.

How to do it?

As indicated above, the petition is not submitted directly to the CJEU but, in the course of a national proceeding, the judge is requested to submit the matter to the European Union Court. The decision, therefore, does not rest with the plaintiff, but with the national court. The manner of filing the petition with the national judge depends on the procedural codes of the country where the case is being processed.

The consultation should be carried out as soon as it becomes clear that the decision of the CJEU is necessary for a national court to pass a judgment and following the national procedural rules approved for this purpose. The most common practice is that the question referred to the CJEU is made by judicial order once the positions of the parties have been established, that is, once the claim has been filed and the answer to the complaint has been filed, and the evidence has been provided.⁸³ This has a pragmatic sense, and in order to raise the issue it is necessary that the legal and factual context of the case and the legal issues it raises can be defined in sufficient detail.⁸⁴

What to expect?

The national procedure must be suspended until the CJEU has issued its ruling.

The parties to the main proceedings are authorized to submit observations before the Court of Justice of the European Union and may be called to the hearing.⁸⁵ Representatives of the Government, of the European Commission and, if applicable, of other governments of the Governments of the member states that express their interest may also participate in the hearing.⁸⁶

83 General Council of the Judiciary. Network of Experts in Law of the European Union. Advice on Submitting Prejudicial Questions to the Court of Justice of the European Union, 2012.

84 Eur-Lex. Preliminary ruling proceedings — recommendations to national courts [Available at: <https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=LEGISSUM%3A14552>]

85 Rules of the European Court of Justice, art. 96.

86 Op. cit. 83.

The average time to get an answer to a reference for a preliminary ruling is 15 months. However, an expedited procedure and an urgent procedure exist for cases that cannot wait all this time.

If the procedure is considered urgent, the average time is reduced to approximately 2 months. The procedure is considered urgent at the request of national judicial operators, if it affects the “area of freedom, security and justice.” For example, when it deals with matters of border control, immigration, judicial and police cooperation or intra-community family law. In addition, it is considered of particular urgency if the detention of the accused person or the integrity of the paternal-filial relationship depends on the court’s response.

If the procedure is considered expedited, the waiting time is reduced below 6 months. The conditions of application of this modality are more open. An analysis of the conditions of the case and the nature of the matter at stake is required.

Is it binding on the State?

The Court of Justice of the European Union is the body that has the greatest capacity to intervene in the national system.

Interpretive judgments bind the judge who raised the issue and all jurisdictional bodies of the member States. In the context of a reference for a preliminary ruling concerning validity the Court may declare invalid national laws that contravene community law, and may establish compensation for the affected parties. The judgments are directly enforceable before the national courts, whose judges must stop applying the specific rule immediately.

C. European Ombudsman

What is it?

The institution of the European Ombudsman⁸⁷ investigates complaints about maladministration by the EU institutions and bodies. For example, administrative negligence or deficiency, administrative irregularities, injustice, discrimination, abuse of power, lack of response, denial of information or undue delay.

It should be borne in mind that this institution cannot deal with claims concerning the national, regional or local administrations of the member States. Such claims are managed by the members of the European Network of Ombudsmen.

In the annex you will find the link to the interactive guide of the Ombudsman, which will help you to know which is the most appropriate body to solve your situation.

Paradigmatic case:

In 2013, the Ombudsman issued a ruling in relation to the request of a Hungarian citizen, who considered that the European Commission had no right to host at its headquarters a photographic exhibition concerning same-sex couples, under the title "*Different families – same love.*" The applicant considered that the Commission had exceeded its powers and embezzled European Union funds since it had no competence in this matter, nor was there consensus on the part of the member States. The applicant also claimed that the Commission had discriminated against and insulted those European citizens who disagree with the exhibition. The then Ombudsman, Nikiforos Diamandouros, considered that there was no discrimination nor offensive language was used, but he advised the Commission to point out in future exhibitions that it does not necessarily

87 As of the moment of writing of this guide, the position is occupied by Emily O'Reilly.

support the message of the events hosted in its building. He also considered that the Commission should encourage debate around its activities, without necessarily promoting a specific position.⁸⁸

Who can use the mechanism?

Any citizen or resident of a member State of the Union can file a complaint. The legal persons who reside or have their registered office in the territory of a member State of the Union (NGOs, associations, companies, universities and other groups affected by the action of the European Union) also can file a complaint.

The fact that only violations committed by the EU Administration can be presented restricts the usefulness of this mechanism in relation to the right to protest. There is no doubt that the EU Administration through its different bodies can limit the right to freedom of expression and information. However, the exercise of the right to peaceful assembly is closely related to national authorities, since they are responsible for authorizing or limiting the exercise of this right and for controlling the development of peaceful assemblies.

Under what conditions?

Any claim must be filed within two years from the date of the reported events. For the claim to be admitted:

- it must refer to an institution, body or agency of the European Union;
- there must have been a previous attempt to solve the problem directly with the institution of the Union involved; and

⁸⁸ Decision of the European Ombudsman on application 1640/2011/MMN against the European Commission of 8 July 2013. [Available at: <https://www.ombudsman.europa.eu/mt/decision/en/50803>]

- the institution does not intervene in matters that are already being processed before the courts or on which a judgment has already been issued.

The complainant may address the institution in any language of the Treaty and in relation to any matter included in its field of competence. The answer will be received in the same language.⁸⁹

How to do it?

Complaints submitted in writing are accepted. There are two main ways: by pre-established form or by letter. In any case, all the details of the claim must be presented and it is necessary to specify what information should be treated as confidential.⁹⁰

1. By using the pre-established form.

Online: The electronic complaint form can be completed online. It is available at: <https://www.ombudsman.europa.eu/en/complaint-process-guide>

Or you can download the form and send it by:

Fax: (33)-388179062

Email: euro-ombudsman@europarl.europa.eu

Mail:

European Ombudsman

1, Avenue du Président Rober Schuman CS 30 403 FR- 67001
Strasbourg (France)

⁸⁹ European Ombudsman. Decision of the European Ombudsman by which implementing provisions are adopted, Article 13. [Available at: <https://www.ombudsman.europa.eu/es/legal-basis/implementing-provisions/es>]

⁹⁰ European Ombudsman. Decision of the European Ombudsman by which implementing provisions are adopted, Article 2.

2. A letter can also be sent to the above postal address. It must clearly specify:
 - the identity of the claimant,
 - the reason for the complaint, and
 - the institution against which the complaint was originally directed.

What to expect?

The institution acknowledges receipt of the claim within a week, decides whether or not to initiate an investigation within a month and in a year must complete the proceedings.⁹¹ In 2017, the average duration of investigations was 9 months.⁹²

If the Ombudsman decides to open an investigation, the Ombudsman will contact the defendant administration to request more information and can also organize visits, inspections and organize meetings. The Ombudsman can also get back in touch with the complainant to request more details.⁹³ From here, there are two ways to resolve the complaint:

- If it can be resolved amicably, the Ombudsman will propose a mediated solution. If the defendant administration accepts, the case will be considered resolved.
- If it is considered that there has been bad management on the part of the Administration, the defendant institution will have to give its opinion in three months, and the complainants may send their comments.

Finally, the final conclusions will be written. They should include the recommendations of the Ombudsman if the problem has been resolved and the

91 European Ombudsman. Complaint processing guide. [Available at: <https://www.ombudsman.europa.eu/es/complaint-process-guide>]

92 European Ombudsman. Duration of the investigations in the cases concluded in 2017. [Available at: <https://www.ombudsman.europa.eu/es/multimedia/infographics/es/70>]

93 European Ombudsman. Decision of the European Ombudsman by which implementing provisions are adopted, Article 4 (Collection of information during investigations) and Article 9 (Procedural issues). [Available at: <https://www.ombudsman.europa.eu/es/legal-basis/implementing-provisions/es>]

measures taken by the applicant institution to prevent the situation from happening again.⁹⁴

Any claimant has the right to request the revision of a decision adopted, as well as any conclusion that closes an investigation. It is not possible to request the revision of those decisions that conclude that there has been maladministration.⁹⁵ Requests for review must be made within a period of two months from the date of the decision taken.⁹⁶

Is it binding on the State?

The final recommendations are not binding and there are no mechanisms to ensure enforcement. The main instruments are persuasion and publicity. However, high compliance is reported. According to the annual report, in 2016 85% of the proposals made by the European Ombudsman were fulfilled.⁹⁷

94 European Ombudsman. Complaint processing guide.

95 European Ombudsman. Decision of the European Ombudsman by which implementing provisions are adopted, Article 10 (Review requests).

96 European Ombudsman. Decision of the European Ombudsman by which implementing provisions are adopted, Article 10 (Review requests).

97 European Ombudsman. Annual Report 2016. [Available at: <https://www.ombudsman.europa.eu/es/annual/es/79333>] and Compliance with the European Ombudsman's proposals in 2016. [Available at: <https://www.ombudsman.europa.eu/es/multimedia/infographics/es/71>]

Advocacy mechanisms

D. Commissioner for Human Rights of the Council of Europe

What is it?

Although the name of the institution may create confusion, the Commissioner for Human Rights⁹⁸ is not a body dependent on the European Commission, nor does it have any relationship with the United Nations High Commissioner for Human Rights. The Commissioner for Human rights is an independent and impartial institution established by the Council of Europe to promote respect for human rights and their knowledge in the 47 countries of the Council of Europe.⁹⁹

While the European Court of Human Rights is the judicial instance established by the Council of Europe, the Commissioner for Human Rights is a parallel instrument that moves in the political aspect.

It is important to mention that the Commissioner cannot decide on specific cases, but can make recommendations, reports and opinions on broader trends that are occurring in a territory or region. In fact, this is the element that makes it an institution of interest, since violations of the right to protest normally fall within a wider environment of repression of the exercise of freedom of expression.

The Commissioner can also make visits in the specific country and establish a direct dialogue with the institutions.¹⁰⁰

98 As of the date of writing of this text, the position is occupied by Ms. Dunja Mijatovic.

99 European Commission of Human Rights. Resolution (99) 50. [Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e305a]

100 European Commission of Human Rights. Mandate. [Available at: <https://www.coe.int/en/web/commissioner/mandate>]

Paradigmatic case:

The previous Commissioner for Human Rights, Nils Muižnieks, actively intervened in the events that happened in Turkey after the failed coup d'état of July 2016. Following the declaration of the state of emergency by the Prime Minister, the Commissioner made an official visit to Turkey and published a report on the state of human rights. In this report, he denounced "the repression and denigration of legitimate criticism of the Government" and documented a large number of attacks on the media, as well as judicial prosecution of opponents of the regime.¹⁰¹

The Commissioner also intervened before the European Court of Human Rights and presented his observations in the case of 22 Turkish journalists who had been arrested. The Commissioner defended before the judges the position that the detention of journalists was another proof of the "broad pattern of repression against those who express disagreement or criticism against the authorities."¹⁰²

Who can use the mechanism?

Any natural person, legal person or group, in relation to violations of fundamental rights that have occurred in one of the 47 member countries of the Council of Europe.

101 Commissioner for Human Rights of the Council of Europe. Memorandum on freedom of expression and freedom of the press in Turkey, February 2017. [Available at: [https://rm.coe.int/ref/CommDH\(2017\)5](https://rm.coe.int/ref/CommDH(2017)5)]

102 Observations available at: <https://rm.coe.int/third-party-intervention-10-cases-v-turkey-on-freedom-of-expression-an/168075f48f>

Under what conditions?

The Commissioner for Human Rights does not accept individual cases. The Commissioner will only analyze individual complaints when they are used to denounce or exemplify a context of widespread or growing repression. Those seeking reparation for an individual case should go directly to the European Court of Human Rights.

How to do it?

To get the attention of the Commissioner for Human Rights, a person or group can contact the Office of the Commissioner for Human Rights in one of the ways specified below. The initial communication must include the name of the individual or organization filing the complaint, contact details for future communications and a description of the violation. Exchanges will be made in English or French.

Online: fill in the form available at the website of the Commissioner for Human Rights.

<https://www.coe.int/en/web/commissioner/contact>

By email: commissioner@coe.int

By telephone: +33 (0)3 88 41 34 21

By fax: +33 (0)3 90 21 50 53

By mail:

Office of the Commissioner for Human Rights

67075 Strasbourg Cedex (France)

What to expect?

The Commissioner works with the States to improve the protection of human rights internally. It is a political institution, so it cannot resolve specific cases and does not issue mandatory judgments as a court. However, the Commissioner can reach conclusions and make recommendations to the States.

The Commissioner can also carry out initiatives of various types to encourage states to reform their internal policies. In particular:

- Country visits and dialogue with national authorities and civil society,
- Collection of information and publication of recommendations for the successful implementation of a framework that promotes human rights,
- Awareness-raising activities.¹⁰³

Is it binding on the State?

The recommendations and opinions of the Commissioner for Human Rights are not binding on the States. This means that the authorities have no obligation to adapt their actions to the recommendations.

However, the Commissioner's statements do have an interesting political value, since they put a country in the public focus and can contribute to increasing international pressure on the State to fulfil its obligations under the European Convention on Human Rights.

The Commissioner can also intervene directly before the European Court of Human Rights, making written observations in specific cases of human rights violations.

¹⁰³ European Commission of Human Rights. Mandate.

E. Complaint to the European Commission

What is it?

The Commission is the institution of the European Union competent to monitor compliance with community regulations, and may open infringement procedures against EU member states. The Commission may attempt to resolve the violation by its own means, or refer the case to the Court of Justice of the European Union. In this sense, the use of the complaints system can create a bridge between an individual and the Court of Justice of the European Union, although the Commission can also initiate infringement procedures on its own initiative.

The European Commission has a complaint form for breach of community law, so that anyone can file a complaint with the Commission when the person considers that a measure adopted by a member State – whether legislative, administrative or regulatory – is contrary to a provision or principle of community law. A complaint can also be directed against a practice or lack of action of a European Union country that is considered contrary to the law of the Union.

In this regard, the European Commission has argued that it will only initiate an infringement procedure against a State Party in relation to violations of the Charter of Fundamental Rights of the European Union when it can establish that the link with European regulations is strong enough. See the section *Court of Justice of the European Union – Preliminary Ruling* for a more detailed explanation of the use of this type of legal argument.

Paradigmatic case:

Paradigmatic case: The Commission has initiated an infringement procedure against Hungary before the Court of Justice of the European Union on the grounds of a new rule that stigmatizes NGOs receiving foreign funds and significantly limits access to donations from foreign organizations. This rule was fundamentally approved with the idea of

eliminating independent NGOs that promote an ideological programme other than the one supported by the Hungarian Government.¹⁰⁴

The European Commission initiated an infringement procedure in July 2017, on the grounds that this rule was against the free movement of capital, a basic pillar of the European Union. The European Commission also noted that the legislation violated the freedom of association, “in conjunction with the Treaty on European Union and its provisions in relation to the free movement of capital.”¹⁰⁵

Who can use the mechanism?

Natural or legal persons, citizens or residents of one of the member States of the European Union, Iceland, Liechtenstein or Norway of the European Union, Island, Liechtenstein or Norway.

Under what conditions?

The European Commission can only admit to processing complaints of violations of European Union law committed by the Administrations of the countries of the European Union. A complaint cannot be filed for actions by private individuals or organizations, unless it can be demonstrated that a national Administration is involved in any way.

In addition, this violation of the fundamental right must occur in application of the European Union Law. If the States were acting on the basis of their national legislation, the Commission cannot intervene. In countries with effective

104 Monitor Civicus. European Commission takes Hungarian Government to Court over NGO Law, December 2017. [Available at: <https://monitor.civicus.org/newsfeed/2017/12/18/european-commission-takes-hungarian-government-to-court-ngo-law/>]

105 European Commission. Press release: Infringements – European Commission refers Hungary to the Court of Justice for its NGO Law, December 2017. [Available at: http://europa.eu/rapid/press-release_IP-17-5003_en.htm]

judicial protection, individual cases of incorrect application that do not raise more general issues are redirected to national mechanisms.¹⁰⁶

How to do it?

The complaint must be submitted through the standard complaint form in any official language of the European Union. The form is available at the following link: https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

If the standard complaint form is not used, the European Commission will ask you to file the complaint again.

The European Commission emphasizes the importance of not forgetting to include the following data:

- exact description of how the national Administration has violated EU legislation and what provision has allegedly been breached.
- details of any action you have already taken in this regard.¹⁰⁷

The form includes the following questions:

- national measures that may have violated Union law;
- EU regulations that are considered violated (remember that you can use *Your Europe - Advice* to answer this question);
- description of the problem:
- in case of violation of fundamental rights, explain how community law is involved and what fundamental right has been violated;
- documentary evidence (not mandatory);
- administrative or legal actions that you have carried out in your State to solve the problem; and
- if you have gone to any other institution of the European Union.

¹⁰⁶ European Commission. How to file a complaint at EU level. [Available at: https://ec.europa.eu/info/about-european-commission/contact/problems-and-complaints/complaints-about-breaches-eu-law/how-make-complaint-eu-level_es]

¹⁰⁷ European Commission. How to file a complaint at EU level.

Complaint forms can be submitted:

Online: by completing and submitting the complaint form on the European Commission website: https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

By email: SG-PLAINTES@ex.europa.eu

By fax: +32 (0) 22 96 43 35

By mail:

General Secretariat of the European Commission
B - 1049 Brussels (BELGIUM)

Or before the representation of the European Commission in your country.

What to expect?

The official information of the European Commission emphasizes the fact that complaints to the Commission are not the most effective means to resolve a personal or individual situation. In fact, the Commission is not obliged to open a formal procedure for violation of Community law even considering that this violation has happened. Thus, the Commission recommends that if the objective is to remedy an individual personal situation or to be compensated, such complaint should be presented to the aforementioned State mechanisms. Especially, it is recommended to go to the State mechanisms when the solution to the problem requires the annulment or nullity of a national decision or if economic compensation for damages is sought. Only the national courts have power in these two cases.

If the Commission decides to follow up on your complaint, its only objective will be for the State member to comply with community law and apply it properly. In this case, the procedure described in the official sources is as follows:¹⁰⁸

The European Commission will acknowledge receipt of your complaint within 15 business days. Within a period of 12 months, the European Commission will

¹⁰⁸ European Commission. How to file a complaint at EU level.

study it and decide whether to open a formal infringement procedure against the country in question. If the problem is very complex or if the European Commission must request more information, the period may be longer than 12 months. In that case you will be informed. At any time you can provide the European Commission with additional documentation about your complaint or ask to meet with representatives of the institution.

If the European Commission decides that your complaint is well founded and opens the formal infringement procedure against the EU country in question, it will inform you of this and keep you up to date on how the matter develops. If the Commission had to contact the authorities of the country against which the complaint was directed, it will not reveal your identity, unless you have given your explicit consent to do so.

If the Commission decides that there is no violation of EU legislation, before closing the file it will inform you by letter.

The Commission can refer the file to the Court of Justice of the European Union. If the Court confirms the violation, the member State must take action to remedy the existing violation.

Is it binding on the State?

No, the investigation carried out by the Commission is not binding, although it has a great impact on the policies of the States.

If the case were brought before the CJEU, its judgement will be binding on the State. For the purposes of the judgments of the Court of Justice, see section *Court of Justice of the European Union – Preliminary Ruling*.

F. Petition to the European Parliament

What is it?

The European Parliament is the assembly body of the European Union, elected by direct suffrage and with legislative, supervisory and budgetary responsibilities. Submitting a petition to the European Parliament is a right recognized in Article 227 of the Treaty on the Functioning of the European Union.

The objective of the petitions is to draw Parliament's attention to a violation of rights committed by a member State, a local authority or other institutions and create a public debate on a situation.¹⁰⁹ With a petition you can get the European Parliament to take sides in a specific matter and use its influence to pressure the State.

In this regard, it should be borne in mind that, like the Ombudsman, the European Parliament does not examine *complaints* against national, regional or local administrations of the member States. This means that if what you are looking for is that the State be forced to a certain action or omission, or financial compensation, the Parliament is not the appropriate body. Complaints must be submitted to national bodies, including national or regional ombudsmen, and where appropriate, international judicial instances.

Example:

The Permanent Committee on Petitions of the European Parliament accepted a request from the News Council of the TVE (Spanish public television), which denounced numerous cases of censorship, pressures and lack of plurality on Spanish public television.

¹⁰⁹ European Parliament. Petitions. [Available at: <http://www.europarl.europa.eu/at-your-service/es/be-heard/petitions>]

Who can use the mechanism?

Any citizen or resident, individually or in association, can file a petition about the areas of activity of the European Union that directly affect them. Companies, organizations or associations with registered offices in the European Union can also submit petitions. However, anonymity can be requested.

If the petition is signed by several natural or legal persons, a representative may be appointed, who will be considered as a petitioner. If this is not done, the European Parliament will consider the first signatory as petitioner.

Under what conditions?

The petition has to deal with one of the areas of action of the European Union. For example:

- rights of a European citizen included in the Treaties,
- protection of consumers' rights,
- free movement of people, goods and services,
- other problems related to the application of EU legislation.

Cases of maladministration should be directed to the European Ombudsman.

The petition must include a complete description and all relevant information. It must be written clearly and legibly, omitting unnecessary details, and may be accompanied by a summary. It must not contain offensive or obscene language. Petitions that are confusing or unintelligible will be declared inadmissible.

The petition may be written in any of the official languages of the Union¹¹⁰, with English or French being recommended.

The European Parliament's Permanent Committee on Petitions will not respond to requests for information or general comments about the European Union and its action.

¹¹⁰ German, Bulgarian, Czech, Croatian, Danish, Slovak, Slovenian, Spanish, Estonian, Finnish, French, Greek, Hungarian, English, Irish, Italian, Latvian, Lithuanian, Maltese, Dutch, Polish, Portuguese, Romanian and Swedish.

How to do it?

There are two ways to submit petitions.

a. Electronically, through the PETI European Petitions Portal.

A user account must be created in order to initiate and process petitions. To open an account in the PETI you must fill in the form on the website, indicating personal data and contact information. After a few minutes you will receive a confirmation email.

Once you have registered on the portal, you can fill in the specific petition, which must include a detailed description with all the information relevant to the case you want to report.

b. By mail: no special form is needed and there is no format to follow, but the following details must be indicated: name, nationality, permanent address and the petition must be signed. In the case of a collective petition, at least the information related to the representative or first signatory must be included. If you do not include this information or if it is not signed, the petition will not be processed.

You can add attachments or documentation that justify the petition.

The petition must be sent to:

President of the Committee on Petitions
European Parliament
A/A PETI Secretariat
60 rue Wiertz/Wiertzstraat 60
B-1047 Bruxelles/Brussels (Belgium)

Petitions sent by fax, email or any other means may not be processed.¹¹¹

¹¹¹ European Parliament. Petitions. Frequently asked questions. [Available at: https://peti-port.secure.europarl.europa.eu/petitions/es/faq#_Toc221454]

What to expect?

Upon receipt of the petition, the services of the European Parliament will register it and assign it a number. The Committee on Petitions will inform you about whether the petition has been processed or rejected. The Secretariat of the Committee on Petitions will analyze and evaluate it, and may request more information from the complainant.

If the petition is processed, the Committee on Petitions will decide which course of action to take: it may ask the European Commission to carry out a preliminary investigation, transmit the petition to other committees of the Parliament so that they provide information or initiate other actions, prepare and submit a report to the Parliament so that it can be voted in plenary, make a visit to the country, submit a report with observations and recommendations or take other measures deemed appropriate.¹¹²

A decision of the Committee on Petitions cannot be appealed, although if new information arises it can be referred to the Parliament and the Committee on Petitions may consider reopening the matter.¹¹³

It is important to keep in mind that once the admissibility test has been passed, the petitions become a public document, which includes a summary of the case made by the Secretariat and the identity of the petitioner. For this reason it is important not to forget to indicate in the petition that anonymity is desired when this is the case.

Is it binding on the State?

The European Parliament is not a court nor can it sanction the States; it is a political assembly that acts as a mediator for citizens.

The European Parliament cannot revoke decisions taken by the competent authorities of the member States. It is not a judicial body and does not have the power to conduct judicial investigations, issue judgments or revoke decisions of the courts of justice of the member States.

¹¹² European Parliament. Petitions. Frequently asked questions.

¹¹³ European Parliament. Petitions. Frequently asked questions.

4

OTHER

MECHANISMS

G. European Parliament – Parliamentary Questions

It is one of the ways that MEPs have to represent their voters. The MEP can submit to the European Commission a question about possible infractions that are occurring in the member State. The questions are not binding and do not open the complaint procedure. They are a good mechanism for good media coverage.¹¹⁴

The questions can be asked by any citizen of the European Union.

The question must have a maximum of 20 lines in 12-point Times New Roman font. Questions addressed by the MEPs to the Commission and the Council can:

- a) be formulated with a request for a written response and published in the Official Journal (written questions);
- b) be addressed in parliamentary sessions and published in the debates of the European Parliament (oral questions);
- c) be raised at the times reserved for such questions in each session and published in the Official Journal (questions asked in question time).¹¹⁵

They are raised through the MEP and are published on the website of the European Parliament:

www.europarl.europa.eu

The questions are usually answered within 3 months.

114 Ortiga Zarazaga, Sonia. 2012. Manual of complaint procedures before the European Union, EQUO. [Available at: <http://equosevilla.es/wp-content/uploads/2013/05/Manual-tramites-reclamacion.pdf>]

115 Ortiga Zarazaga, Sonia. Manual of complaint procedures before the European Union, EQUO

H. Venice Commission

The Venice Commission is an advisory body of the Council of Europe for constitutional issues. The role of the Venice Commission is to provide legal advice to the members of the Council of Europe and to help the States that so wish to bring their legislation and institutional structure in line with the European standards of democracy, human rights and rule of law.¹¹⁶

The Commission has 61 members: the 47 members of the Council of Europe and 17 other States, namely: Algeria, Brazil, Chile, Costa Rica, Israel, Kazakhstan, the Republic of Korea, Kosovo, Kyrgyzstan, Morocco, Mexico, Peru, Tunisia and the United States of America.

Its members are members of the academic community of specialists in public international law, judges or judges of the supreme or constitutional courts, members of parliaments and civil servants of the public sector.

The main task of the Venice Commission is to give legal advice in the form of “opinions” on the draft laws or legislation in force. It also produces studies and analyses in its field of interest, which includes the protection of democracy and the rule of law.¹¹⁷ The Venice Commission also prepares *amicus curiae* opinions for the European Court of Human Rights on comparative constitutional law and international law.

However, opinions may only be required by:

- the member States (parliaments, governments, heads of state);
- the Council of Europe (the Secretary General, the Committee of Ministers, the Parliamentary Assembly or the Congress of Local and Regional Authorities), and
- international organizations (European Union, OSCE-ODIHR, among others).

¹¹⁶ Council of Europe. Venice Commission. [Available at: https://www.venice.coe.int/WebForms/pages/?p=01_Presentation&lang=EN]

¹¹⁷ Council of Europe Venice Commission. [Available at: https://www.venice.coe.int/WebForms/pages/?p=01_activities&lang=EN]

Some examples

In 2014 the Venice Commission published together with Max Plank Institute a Comparative Study on the national legislation which regulate the right to peaceful assembly in the member States.

In 2017 it published an opinion on the freedom of the press in Turkey, focused on the emergency measures adopted after the failed coup d'état of 2016.

In 2018 the Commission published various opinions on the freedom of association in Romania, Ukraine and Hungary.

ANNEXES

Annexe I – Legal Framework

The following page presents the original text of the three international treaties we have used to define the right to protest. As you can see, the core of the three treaties is similar, but attention should be paid to the following differences of content:

- The Charter of Fundamental Rights of the European Union is limited to determining what each right protects, without discussing its possible limitations. The reason is the political character of the Charter, which with a clear objective of “guidance”, avoids entering into details about the practical exercise of the rights.
- The European Convention on Human Rights (ECHR), on the other hand, places special emphasis on the ability of States to limit or establish certain formalities in the exercise of these rights. This is because the ECHR is an agreement intended to be interpreted by a court and must necessarily include the standards for considering the case to instruct the decisions of the judges.
- Finally, the ICCPR focuses on other notably different concerns. It does not underline the ability of States to restrict such rights but rather seeks to delimit its content and make it clear that it is not an absolute or unlimited right. This is due to the historical context in which the ICCPR was born after the Second World War.

Charter of the Fundamental Rights of the European Union

Binding through the TEU¹¹⁸

Article 11 Freedom of expression and information

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.
2. The freedom and pluralism of the media shall be respected.

European Convention on Human Rights

Article 10 Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 12 Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.
2. Political parties at Union level contribute to expressing the political will of the citizens of the Union.

Article 11 Freedom of assembly and association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.
2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

¹¹⁸ Article 6.1 of the Treaty on the European Union, in its consolidated version after the modifications introduced by the Treaty of Lisbon, signed on 13 December 2007:

“1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007,

International Covenant on Civil and Political Rights

Article 19

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
 - a) For respect of the rights or reputations of others;
 - b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20

1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 22

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.
3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.

which shall have the same legal value as the Treaties. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.”

Annexe II – Useful Links

General

Europe Your Advice:

<https://europa.eu/youreurope/advice/>

Basic principles of the UN on the use of force and firearms by law enforcement employees:

<https://www.ohchr.org/sp/professionalinterest/pages/useofforceandfirearms.aspx>

Principles on Freedom of Assembly of the OSCE ODIHR Venice Commission:

[https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2010\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2010)020-e)

European Court of Human Rights

Admissibility of the complaint:

https://www.echr.coe.int/Documents/Admissibility_guide_SPA.pdf

Frequent errors in making a complaint:

<https://www.echr.coe.int/Pages/home.aspx?p=applicants/forms&c=>

Practical guide on how to make a complaint:

https://www.echr.coe.int/Documents/Your_Application_ENG.pdf

Contact to the Committee of Ministers of the Council of Europe:

<https://www.coe.int/en/web/execution/contact-us>

Court of Justice of the European Union – Preliminary Ruling

Preliminary ruling proceedings — recommendations to national courts:

<https://eur-lex.europa.eu/legal-content/ES/TXT/?uri=LEGISUM%3A114552>

European Ombudsman

Guide on how to make a complaint:

<https://www.ombudsman.europa.eu/es/checklist-for-making-a-complaint>

Interactive guide on how to identify the appropriate protection mechanism:

<https://www.ombudsman.europa.eu/es/checklist-for-making-a-complaint>

European Commission

Complaint form:

https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

European Parliament

www.europarl.europa.eu

Annexe III – Jurisprudence of the ECHR

ECHR judgement *Otegi Mondragón v. Spain* no. 2034/07 of 15 March 2011. [Available at: [https://hudoc.echr.coe.int/spa#%22itemid%22:\[%22001-187772%22\]}](https://hudoc.echr.coe.int/spa#%22itemid%22:[%22001-187772%22]})]

ECHR judgement *Prager and Oberschlick v. Austria* no. 15974/90 of 26 April 1995. Series A, number 204. [Available at: https://www.hr-dp.org/files/2013/09/09/CASE_OF_PRAGER_AND_OBERSCHLICK_v._AUSTRIA_.pdf]

ECHR judgement *Féret v. Belgium* no. 15615/07 of 16 July 2009. [Available at: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&i-d=003-2800730-3069797&filename=003-2800730-3069797.pdf>]

ECHR judgement *Lingens v. Austria* no. 9815/82 of 8 July 1986. [Available at: <https://www.legal-tools.org/en/browse/record/0e08be/>]

ECHR judgement *De Haes y Gijssels v. Belgium* no. 19983/92 of 24 February 1997, para 47. [Available at: <https://www.refworld.org/cases,ECHR,3ae6b61c8.html>]

ECHR judgement *Norwood v. United Kingdom* no. 23131/03 of 16 November 2004. [Available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-67632&filename=001-67632.pdf>]

ECHR judgement *Christians against Racism and Fascism v. Great Britain* no. 8440/78 of 16 July 1980. [Available at: [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-74286%22\]}](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-74286%22]})]

Decision on the admissibility of the ECHR *Rassemblement jurassien et Unité jurassienne v. Switzerland* no. 8191/78 of 10 October 1979. [Available at: [https://hudoc.echr.coe.int/eng#%22itemid%22:\[%22001-74721%22\]}](https://hudoc.echr.coe.int/eng#%22itemid%22:[%22001-74721%22]})]

ECHR judgement *Axel Springer AG v. Germany* no. 39954/08 of 7 February 2012. [Available at: https://www.hr-dp.org/files/2013/09/07/CASE_OF_AXEL_SPRINGER_AG_v._GERMANY_.pdf]

ECHR judgement *Renaud v. Franceno*. 13290/07 of 25 February 2010. [Available at: [https://hudoc.echr.coe.int/eng#%22appno%22:\[%2213290/07%22\],%22itemid%22:\[%22001-97515%22\]}](https://hudoc.echr.coe.int/eng#%22appno%22:[%2213290/07%22],%22itemid%22:[%22001-97515%22]})]

ECHR judgement *Pihl v. Sweden* no. 74742/14 of 7 February 2017 (decision on the admissibility). [Available at: <https://hudoc.echr.coe.int/eng#%22app-no%22:%2274742/14%22>]]

ECHR judgement *Asby Donald and others v. France* no. 36769/08 of 10 January 2013. [Available at <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-115845%22>]]

Decision on the admissibility in *Neij and Sunde Kolmisoppi v. Sweden* no. 40397/12 of 19 February 2013. [Available at: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-117513%22>]]

ECHR judgement *Magyar Tartalomzolgáltatók Egyesülete and Index.hu Zrt v. Hungary* no. 22947/13 of 2 February 2016. [Available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-160314%22>]]

ECHR judgement *Delfi AS v. Estonia* no. 64569/09 of 16 June 2015 (Grand Chamber). [Available at: <https://hudoc.echr.coe.int/eng#%22app-no%22:%2264569/09%22,%22itemid%22:%22001-155105%22>]]

ECHR judgement *Christian Democratic People's Party v. Moldova (n°2)*, case no. 28793/02, of 14 February 2006. [Available at: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-72346&filename=001-72346.pdf&TID=wrtiszxmyr>]

ECHR judgement *Sürek v. Turkey (n°1)* [GS], no. 26682/95 of 8 July 1999, para. 62. [Available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-64073%22>]];

ECHR judgement *Gündüz v. Turkey* no. 35071/97 of 14 June 2004. [Available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-61522%22>]]

ECHR judgement *Stern Taulats and Roura Capellera v. Spain* no. 51168/15 and 51186/15 of 13 March 2018. [Available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-182461%22>]]

ECHR judgement *Patyi and Others v. Hungary* no. 5529/05 of 7 January 2009. [Available at: <https://hudoc.echr.coe.int/eng#%22fulltext%22:%22%20CASE%20OF%20PATYI%20v.%20HUNGARY%22,%22documentcollectionid%22:%22GRANDCHAMBER%22,%22CHAMBER%22,%22itemid%22:-%22001-88748%22>]]

ECHR judgement *Sergey Kuznetsov v. Russia* no. 25691/04 of 23 January 2009. [Available at: <https://hudoc.echr.coe.int/eng#%7B%22app-no%22:%5B%2210877%2F04%22%5D,%22itemid%22:%5B%22001-89066%22%5D%7D>];

Bukta and Others v. Hungary no. 25691/04 of 17 October 2017. [Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-81728%22%5D%7D>]

ECHR judgement *Alekseyev v. Russia* no. 4916/07, 25924/08 and 14599/09 of 21 October 2010. [Available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-101257%22%5D%7D>]

ECHR judgement *Galstyan v. Armenia*, no. 26986/03 of 15 November 2007. [Available at: <https://hudoc.echr.coe.int/eng#%7B%22app-no%22:%5B%2226986%2F03%22%5D,%22itemid%22:%5B%22001-83297%22%5D%7D>]

ECHR judgement *Giusti v. Italy* no.13175/03 of 18 October 2011. [Available at: <https://hudoc.echr.coe.int/eng#%7B%22fulltext%22:%5B%22giusti%22%5D,%22documentcollectionid%22:%5B%22GRANDCHAMBER%22,%22CHAMBER%22%5D,%22itemid%22:%5B%22001-107042%22%5D%7D>]

ECHR judgement *Mirolubovs and others v. Latvia* no. 798/05 of 15 September 2009.



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