

4 Compensation for wrongful convictions in Spain

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1 Origins and development of compensation for wrongful conviction

The introduction and regulation of compensation for wrongful conviction mechanisms in Spain is directly related to the constitutional dimension of fundamental rights and how to compensate interferences in the core content of them, specifically when some interferences produce damage.

The current notion of the *social rule of law* and the consequent substantial consideration of fundamental rights are the fruit of a legal tradition that assumes, broadly speaking, that a State of Law (protector of individual rights) is a social State that develops public policies for the benefit of the common good, and this requires that the individual must bear certain sacrifices in favour of that common good. The legislator may occasionally deprive individuals of some element of that original content or even all the original content of their fundamental right when there are imperative circumstances that so require. But these *legitimate sacrifices* do not prevent the State from compensating if damage has occurred.

2 Sources of law regulating compensation for wrongful conviction

The rule of law proclaimed in the Spanish Constitution¹ (CE) requires that the public authorities adapt their actions to two essential principles: the principle of legality and that of patrimonial responsibility. As stated in Article 9.3 CE,

The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities.

According to such premise, we must consider that it is the Constitution itself that recognises that the public authorities are subject to patrimonial responsibility. Specifically, it is regulated in Article 106 CE, which states the following:

1 *Constitución Española* (hereinafter, CE). *Spanish Official Journal* No. 311 29 December 1978. Permalink ELI: [https://www.boc.es/cli/es/c/1978/12/27/\(1\)/con](https://www.boc.es/cli/es/c/1978/12/27/(1)/con).

1. The Courts shall check the power to issue regulations and ensure that the rule of law prevails in administrative action, and that the latter is subordinated to the ends which justify it. 2. Private individuals shall, under the terms laid down by law, be entitled to compensation for any harm they may suffer in any of their property and rights, except in cases of force majeure, whenever such harm is the result of the operation of public services.

Therefore, what this article specifies is that if any damage to individuals occurs due to the actions of the public authorities, it must be compensated.

However, compensation in connection with actions by the administration of justice does not properly follow the rules of Article 106 CE, but the rules of Article 121 CE. The patrimonial responsibility of the State for the functioning of the administration of justice is regulated in Article 121 CE and in Articles 292 to 296 LOPJ.² Through it, compensation for damage that individuals may suffer unjustly because of actions or omissions of the courts is guaranteed. Article 121 CE states:

Damages caused by judicial error as well as those arising from irregularities (irregular functioning) in the administration of justice shall give rise to a right to compensation by the State, in accordance with the law.

The expression ‘in accordance with the law’ is interpreted as meaning that Article 121 CE enshrines a right of legal configuration: it is not a fundamental right with essential and mandatory content that must be respected by the legislator, but it is a right that must be legally developed, so that the legislator acquires the capacity to regulate and develop the corresponding content on what is declared by the constituent power in Article 121 CE. In fact, the current legislation regulates three grounds or reasons for patrimonial liability of the State: a) judicial error, b) irregular functioning of administration of justice and c) unfair detention on remand (preventive custody).

This last ground is the most frequently applied and controversial in practice, and it was introduced in the LOPJ (Article 294) without being expressly included in the Constitution. Article 121 CE is completed and developed in the law, specifically in the LOPJ (Articles 292 and following), which establish the different ways by which the patrimonial responsibility of the State for the jurisdictional activity can be compensated.

3 Grounds for compensation for wrongful conviction

3.1 Judicial error [error judicial] (Art. 292 LOPJ)

The first ground of patrimonial liability of the State is judicial error. As we will see, pecuniary and non-pecuniary damage occasioned by judges and magistrates in the

² Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial (Organic Law of the Judiciary. Hereinafter, LOPJ).

exercise of their duties will give rise, where applicable, to State responsibility for a judicial error or the abnormal functioning of the administration of justice. However, under no circumstances may the injured parties bring actions against them directly.

The constitutional design of the State liability for errors of the public administration (and the administration of justice is part of the public administration) must be interpreted as what it is: a responsibility of the State and not a responsibility of the specific judge or magistrate causing the damage. This point is extremely important: anyone who considers that he/she has suffered damage caused by judges and magistrates in the exercise of their jurisdictional performance, far from lacking the means to obtain compensation, can stake their claim against the State.

The entry into force of the CE 1978, with its new guarantee of State liability for damage caused by judicial error or abnormal functioning of the administration of justice, did not mean the disappearance of the direct civil liability of the judge or magistrate, legally provided for in the legislation of 1870. This continued to exist – at least theoretically – in the Spanish system because the original version of the LOPJ of 1985 maintained this possibility in its Articles 411 to 413, conditioning it on the existence of ‘intent or fault’ of the judge or magistrate, but its application in practice was non-existent. The delivery of justice is the responsibility of the State, and therefore it is necessary to claim against the State and not against the judges. The LOPJ was amended in 2015 and the legislator repealed Articles 411 to 413 LOPJ, thus eliminating the direct civil liability of judges and magistrates.

The concept of ‘judicial error’ is very restrictive. In general terms, this must be a manifest, self-evident or stark mistake on the part of the judicial body. The Supreme Court has consistently and repeatedly held that the process for the recognition of a judicial error regulated in Article 293 LOPJ, as a result of the mandate contained in Article 121 CE, is not a third instance or a cassation ‘in which the appellant may insist, before another Court, once again, on the criterion and position that was already rejected and rejected previously’, but that this can only be successfully urged when the judicial body has made a mistake ‘manifest and clear in the fixing of the facts or in the interpretation or application of the Law’.³

Not every possible mistake can be conceptualised as a *judicial error*. This classification must be reserved for qualified and special cases in which a ‘patent’, ‘indubitable’, ‘incontestable’, ‘flagrant’ error is noted in the judicial decision, which has provoked ‘illogical, irrational, grotesque or absurd factual or legal conclusions’. It also applies when the judicial body proceeds to interpret or apply the law and acts openly outside the legal channels, making an application of the law based on non-existent norms or understood out of all sense (manifestly illegal). In contrast, there is no judicial error ‘when the Court maintains a rational and explainable criterion within the rules of legal hermeneutics’, ‘nor in the case of interpretations of the rule that, rightly or wrongly, obey a logical process’. In other words, this exceptional procedure cannot attack ‘conclusions that are not

3 Supreme Court Judgment (Administrative Bench) 15 October 2021 Cassation No. 36/2020.

illogical or irrational', given that 'the declaration of judicial error does not try to correct a mistake, but the gross negligence of the judge'.⁴

According to Article 296.2 LOPJ, if the damage is the result of wilful misconduct or gross negligence on the part of the judge or magistrate, the State may compensate the injured party and, after that, it may demand, via administrative channels (administrative proceedings), that the responsible judge or magistrate reimburse the payment that was made, notwithstanding any disciplinary responsibility that might have been incurred, in accordance with the stipulations of this law.

Article 36 Law on the Legal Regime of the Public Sector (hereinafter, LRJSP)⁵ determines the responsibility of the authorities and personnel for the service of the public administrations. Individuals shall directly require the public administration to pay compensation for the damage caused by the authorities and personnel of the service of the public authorities. And the administration concerned, where it has indemnified the injured, shall require its service or organ to be responsible for the liability of the injured party, or for negligence or serious negligence, prior to the corresponding procedure.

The administration concerned is the General Council of the Judiciary.⁶ And the procedure for the requirement of liability of judges and magistrates, due to wilful misconduct or gross negligence, is ruled under the general provisions of the Law on the Common Administrative Procedure of the Public Administrations.⁷

Article 36 LRJSP also says that:

For the requirement of such liability and, where appropriate, for quantification, the following criteria shall be weighted among others: the harmful outcome produced, the degree of culpability, the professional responsibility of the staff at the service of public administrations and their relationship with the production of the harmful outcome.

4 Supreme Court Judgments (Administrative Bench) 27 March 2006 Cassation No. 6/2004; 20 June 2006 Cassation No. 13/2004; 15 January 2007 Cassation No. 17/2004; 12 March 2007 Cassation No. 18/2004; 30 April 2008 Cassation No. 7/2006; 9 July 2008 Cassation No. 6/2007.

5 *Ley 40/2015, de 1 de octubre, del régimen legal del sector público* (Law on the Legal Regime of the Public Sector (hereinafter, LRJSP)). *Spanish Official Journal* (BOE) No. 236, 2 October 2015. Permalink ELI: <https://www.boe.es/eli/es/l/2015/10/01/40/con>.

6 The General Council of the Judiciary is a constitutional organ (ruled under the CE and LOPJ) with the role of governing the judiciary: the formation, modus operandi and governance of the courts and tribunals, the legal statute for tenured judges and magistrates and for the personnel in the employ of the judicial administration, the system of incompatibilities governing members of the General Council of the Judiciary and their functions, particularly with regard to appointments, promotions, inspections and the disciplinary system.

7 *Ley 39/2015, de 1 de octubre, del procedimiento administrativo común de las Administraciones Públicas* (Law on the Common Administrative Procedure of the Public Administrations (hereinafter, LPAC)). *Spanish Official Journal* (BOE) No. 236, 2 October 2015. Permalink ELI: <https://www.boe.es/eli/es/l/2015/10/01/39/con>.

And Article 296.2 LOPJ also specifies the following criteria: ‘The detrimental result occasioned and the existence or otherwise of intent.’

3.2 *Irregular functioning of administration of justice [funcionamiento anormal de la administración de justicia] (Art. 292 LOPJ)*

The other legal ground for claiming compensation from the public administration for damage caused by the administration of justice is the irregular functioning of the legal services included in the structure of the administration of justice. Unlike these manifest and self-evident errors of the court (judging staff like judges and magistrates), the responsibility of the State for the irregular functioning of the administration of justice is the usual way to claim for compensation when, for example, there are undue delays in the procedure, loss or damage to goods in the custody of judicial bodies, suicide of a prisoner within a penitentiary institution, etc.

The main difference between the first ground (judicial error) and this second is that the concept of ‘irregular functioning of the administration of justice’ usually refers to the activity or omissions and failures of the judicial system in general, and not exclusively of judges and magistrates.⁸

In general, ‘irregular functioning’ is understood as any defect in the performance of the courts or tribunals, conceived as an organic complex in which different people, services, means and activities are integrated. The elements that must be given in order to be able to assess the patrimonial responsibility of the State, when the title of imputation is the irregular functioning of the administration of justice, are the following:

- a The existence of effective, individualised and economically assessable damage.
- b The existence of an irregular functioning of the administration of justice.
- c The concurrence of the appropriate causal relationship between the operation or omission of the administration of justice and the damage caused in such a way that it appears as a consequence of it and therefore is attributable to the administration.
- d The exercise of the claim action within a period of one year from the date of the production of the damage.

The purpose of this second legal ground is to give full effect to the right to equality in the provision of public services that falls within the competence of the public administration, since if a particular citizen is damaged by the provision of a public service, he/she must be compensated for the sacrifice that is caused to him.

In any case, the damage must be unlawful, in the sense that the citizen does not have the duty to bear it. The patrimonial liability for the functioning of the

8 Supreme Court Judgment (Civil Bench) 19 April 2022 Cassation No. 14/2021: ‘only a judicial decision may be the subject of the procedure for declaring a judicial error. The erroneous actions and decisions of the court clerks may be included in the abnormal functioning of the administration of justice, in order to demand compensation for the damages suffered, but they cannot be classified as a judicial error insofar as they do not respond to the exercise of jurisdictional activity’.

administration of justice is not an objective liability defined exclusively by the wrongfulness of the damage. An irregularity is required in its functioning differentiated from the exercise of judicial power.⁹

Finally, the LOPJ remarks in both cases (judicial error or irregular functioning) that

under no circumstances compensation will be awarded when the legal error or the irregular functioning of the justice was caused by wilful or unlawful conduct by the affected party (Art. 295 LOPJ) and that revocation or annulment of judicial decisions does not entail per se a right to compensation.

(Art. 292.3 LOPJ)

3.3 *Unfair detention on remand [prisión provisional indebida]* (Art. 294 LOPJ)

This is the most controversial and criticised case for compensation. It applies to those who have been placed in detention on remand and then been acquitted or exonerated as not guilty, but in these concrete situations:

- Non-existence of the facts (also called ‘objective non-existence’). This includes both absence of the facts or the absence of criminal dimension of the facts (the act does not constitute a crime).
- A non-suit writ or acquittal (*sobreseimiento*, withdrawal of the case) due to a lack of evidence against the defendant.

Compensation for unfair detention on remand is considered a special case of the patrimonial responsibility of the State regarding the administration of justice. In the case of judicial error, the claim must be preceded by a specific judicial decision that expressly recognises the error (Art. 293.1 LOPJ). However, in the case of unfair detention on remand, the injured party can directly address his compensation request to the Ministry of Justice so that the claim is processed through administrative channels (Art. 294.2 LOPJ), without the need for a judicial decision expressly declaring the existence of such an error. It is enough to have a judicial decision from which the inadmissibility of that precautionary measure is clearly deduced (not necessarily due to the non-existence of the imputed facts) since it is understood that the criminal process itself has evidenced the existence of the judicial error, so that another declaration to that effect is no longer necessary.

In this third case of patrimonial liability of administration, Spanish jurisprudence has played a very important role.¹⁰ Until 2010, the courts had interpreted Article

9 Supreme Court Judgment (Administrative Bench) 28 September 2020 Cassation No. 123/2020.

10 Lucía Domínguez Ruiz, ‘Indemnización por prisión preventiva injusta: evolución del artículo 294.1 de la LOPJ a la luz de la jurisprudencia nacional y europea’ (2020) 2 *Justicia: Revista de Derecho Procesal*, 309–341.

294 LOPJ fairly broadly and considered that this provision protected the case of the so-called ‘subjective non-existence’ (the proof of non-participation in the facts of the person who has suffered the detention on remand), since it showed the lack of relationship of the subject with the imputed fact from which the adoption of the provisional detention measure derives. Nevertheless, the jurisprudence excluded from the application of Article 294 LOPJ the case of acquittal for lack of evidence of the participation of the subject in the commission of the criminal act.

However, and after two important judgments of the European Court of Human Rights (ECtHR)¹¹ in which the European court questioned whether the Spanish judicial authorities made a double and different interpretation of the same legal precept, the Supreme Court abandoned this extensive interpretation of Article 294 LOPJ and changed to a narrow and strict interpretation of it, in the literal sense of its terms, limiting its scope to the cases of claims of patrimonial responsibility with support in acquittal or final judgment for non-existence of the imputed fact. After the ECtHR *Tendam v. Spain* of 13 July 2010, the Supreme Court jurisprudence changed to a very narrow interpretation and declared that Article 294 LOPJ provides for compensation to those who have been remanded in custody and finally acquitted *only in the case of* non-existence of the facts he/she was charged with or when the judicial sentence declared that the defendant was not the perpetrator. That is, when it has been proved that someone else was the perpetrator or participated in the criminal action in another way,¹² but Article 294 LOPJ would not apply when the defendant was acquitted or declared innocent due to lack of evidence.

Fortunately, this rigorous and literal interpretation of Article 294 LOPJ has been modified based on a new doctrine of the Spanish Constitutional Court, which in 2019 declared the partial unconstitutionality of the literal wording of said Article 294 LOPJ. In its Judgment No. 8/2017, of 19 January 2017,¹³ the Constitutional Court declared that the refusal to compensate when the accused had been acquitted by application of the principle *in dubio pro reo* violates the right to the presumption of innocence, since it emits suspicions about the guilt of the appellant and uses the reference to said right as an integrating element of the relationship of chance of the damage produced in the field of patrimonial responsibility, which is considered inappropriate, since in order to determine whether or not it concurs with the responsibility of the administration of justice for detention on remand, it cannot use arguments that directly or indirectly affect the presumption of innocence.

But it was not until Judgment No. 85/2019, of 19 June 2019,¹⁴ that it expressly declared the unconstitutionality of two expressions of Article 294 LOPJ

11 *Puig Panella v. Spain* App no 1483/02 (ECtHR 25 April 2006) and *Tendam v. Spain* App no 25720/05 (ECtHR 13 July 2010).

12 Lorena Bachmaier Winter, Antonio del Moral García, *Criminal Law in Spain* (2nd edn, Wolters Kluwer, 2012) 273.

13 Constitutional Court Judgment 8/2017 of 19 January 2017 Appeal (*Amparo*) No. 2341–2012. *Spanish Official Journal* (BOE) No. 46, 23 January 2017.

14 Constitutional Court Judgment 85/2019 of 19 June 2019 Appeal (*Amparo*) No. 4314–2018. *Spanish Official Journal* (BOE) No. 177, 25 July 2019.

that should be eliminated: ‘for non-existence of the imputed fact’ and ‘for this same cause’ of Article 294.1 LOPJ.

The nullity of these two expressions has forced the Spanish courts to eliminate the differentiation between acquittal for objective non-existence and for subjective non-existence. Since this judgment of the Constitutional Court, any case of preventive detention followed by acquittal, including acquittal for lack of evidence or *in dubio pro reo*, must be considered as a case of compensation covered by Article 294 LOPJ.

The Supreme Court changed its jurisprudence and, at end of 2019, expressly applied the new doctrine of the Constitutional Court ‘in a framework of congruence with the general theory of civil liability and with the warnings of material and temporal content contained in the last two paragraphs of the Constitutional Court Judgment 85/2019, as well as in those that have followed’.¹⁵

4 Procedure for claiming compensation

4.1 Administrative procedure

To claim compensation for any of the three cases established in the LOPJ, an application must be submitted by the affected person to the Ministry of Justice, through an administrative procedure in accordance with the Law on the Common Administrative Procedure of the Public Administrations (LPAC).

The procedure is not initiated *ex officio*, so it is required at the request of the interested party. The administrative procedure formalities shall be in accordance with the regulations for State patrimonial liability (Articles 66 and following LPAC). According to Article 66.1 LPAC, the application must contain:

- a Name and surnames of the interested party and, if applicable, of the person who represents him.
- b Identification of the electronic means, or in its absence physical place in which it wishes that the notification is practiced. In addition, interested parties may provide their email address and/or electronic device for the public administrations to notify them of the sending or making available of the notification.
- c Facts, reasons and petition claims in which the request is clearly specified. Moreover, the application must be accompanied by all allegations, documents and information deemed appropriate or any other means of proof, to certify the right to compensation and the causal relationship between the damage and the functioning of the public service.
- d Place and date.
- e Signature of the applicant or accreditation of the authenticity of his will expressed by any means.
- f Organ, centre or administrative unit to which it is addressed and its corresponding identification code.

¹⁵ See Supreme Court Judgments (Administrative Bench) No. 1348/2019, of 10 October 2019, and No. 1883/2019, of 20 December 2019.

In any case, the right to claim compensation expires one year from the date on which it could have been exercised; that is, from when the event that gave rise to the compensation occurred or the damaging effect was apparent. In the case of judicial error, the period shall begin from the date on which the error was declared by a specific judicial judgment; in the case of irregular functioning of the administration of justice, it begins from the time the damage claimed took place; and in the case of unfair detention on remand, from the date of the final acquittal or dismissal.

The administrative procedure includes the hearing of the interested party, but it can be waived if the applicant expresses his decision not to make claims or to provide new documents or justifications (Art. 82 LPAC). According to Article 91 LPAC, the resolution in the procedures in matters of patrimonial liability must declare the existence or otherwise of the causal link between the operation of the public service and the injury and, where appropriate, the assessment of the damage caused, the amount and the manner of the compensation, where appropriate, in accordance with the criteria to be calculated and paid out in accordance with Article 34 LRJSP.¹⁶

The resolution passed in the procedure at the Ministry ends the administrative process. If the express resolution has not been passed six months after the start of the procedure, the silence of the administration is considered negative: the request for compensation is rejected (Art. 91.3 LPAC). The party may, thus, appeal at the administrative bench of the jurisdiction – concretely, at the administrative chamber of the National Court.¹⁷

The applicant must also calculate the amount of compensation with a concrete economic assessment of the liability, and he/she is bound by the request made administratively. Nevertheless, the applicant can modify the amount made in his/her initial administrative request and add new and supervening circumstances that aggravate the harmful consequences (for instance, worsening of an illness contracted in prison). In any case, the passing of time is not a reason to request an increase in the sum.

16 Article 34.2 LRJSP says: ‘Compensation shall be calculated on the basis of the assessment criteria laid down in the tax legislation, the compulsory expropriation and other applicable rules, with the prevailing market valuations being weighted, where appropriate. In cases of death or bodily injury, the assessment included in the scales of the existing rules on compulsory insurance and social security may be taken as a reference.’ The legal criteria in the case of ‘bodily injury’ have been applied to State liability for wrongful conviction as ‘non-pecuniary loss’. So, public administrations and courts of justice use the criteria and amounts ruled under Law 35/2015, of 22 September, Reforming the System for the Assessment of Damages Caused to People in Traffic Accidents. *Ley 35/2015, de 22 de septiembre, de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación*. Spanish Official Journal «BOE» No. 228, 23 September 2015. Permalink ELI: <https://www.boe.es/eli/es/l/2015/09/22/35>. See Section 6.

17 The National Court (Audiencia Nacional) is not the Supreme Court. It is a court with three chambers (Criminal, Administrative and Labour). The administrative chamber competences are ruled by Article 66 LOPJ (for instance, administrative appeals against legal provisions and acts by ministers and state secretaries).

4.2 Specialities of the procedure for claiming compensation in case of judicial error

Firstly, and before requesting the compensation in the administrative process, the applicant needs a specific judicial decision (*title*) that expressly recognises the existence of the error. If the decision that is considered a judicial error is not final (*res judicata*), the affected party must use the legal remedies. A declaration of judicial error will not be possible against a judgment which is still subject to further appeals or remedies according to the legal system (Art. 293.1.f LOPJ). Once a judicial decision is final (*last instance* judicial decision), when no appeal or other remedy can be filed, it becomes *res judicata*, and it cannot be overruled. Then, the applicant can request the declaration of the judicial error from the Supreme Court Bench (Chamber) corresponding to the same jurisdiction as the body to which the error is attributed, using the *revision* remedy.

In criminal matters (wrongful conviction), the *revision* remedy is the mechanism established in Articles 954 and following of the Criminal Procedure Law¹⁸ (LECrim). Article 954 LECrim establishes the following cases in which the revision of a criminal sentence with the effect of *res judicata* is appropriate:

- a Where a person has been convicted by a final prison sentence which gave value to a document or testimony as evidence which was later declared to be false, the forced confession of the accused by violence or coercion or any other punishable act carried out by a third party, as long as these events are declared in a final decision in the criminal proceedings held for that purpose.
- b Where a final criminal conviction sentencing one of the intervening magistrates or judges for the offence of malfeasance by virtue of a decision passed in the proceedings where the judgment was made whose review is claimed, without the ruling having been different.
- c Where two final judgments have been passed on the same crime and accused.
- d Where, after judgment, facts or evidence become known which, if they had been provided, would have determined acquittal or a less severe sentence.
- e Where, after a pre-trial matter having been resolved by the criminal court, a final judgment is later passed by the non-criminal court competent to decide on the matter which is contradictory to the criminal judgment.

Once the criminal conviction has been annulled via Article 954 LECrim, the affected person can trigger the administrative procedure before the Ministry of Justice to claim for compensation. The decision of the revision remedy is the title to initiate the administrative proceedings.

Secondly, it must be pointed out that the judicial action for recognising the error must be requested, without fail, within three months of the date from which

18 The Spanish Criminal Procedure Code is the *Ley de Enjuiciamiento Criminal* (hereinafter, LECrim). Real Decreto de 14 de septiembre de 1882. *Spanish Official Journal* (Gaceta Oficial) No. 260, 17 September 1882. Permalink ELI: [https://www.boe.es/eli/es/rd/1882/09/14/\(1\)/con](https://www.boe.es/eli/es/rd/1882/09/14/(1)/con).

the right could be exercised. No declaration of error may be made against a judicial decision until all appeals or legal remedies have been exhausted. Once the judicial error has been recognised by a judgment, the applicant may request compensation from the Ministry of Justice.

5 Legal aid

Article 119 of the Spanish Constitution grants legal aid to those who can demonstrate lack of sufficient financial means. That constitutional right is ruled under the Legal Aid Law (LAJG),¹⁹ which regulates its procedure, amounts, etc. Legal aid can be claimed by Spanish citizens, nationals of other Member States of the European Union and any other foreign national with the right to legal aid in Spain if they can demonstrate insufficient means for litigation, and provided they are resident in Spain.²⁰

Regardless of the existence of sufficient financial means or the nationality or residency status of the applicant, legal aid in Spain is automatically granted to:

- Victims of gender or domestic violence, human trafficking or terrorism, in any prosecutions linked to, arising from or being the consequence of their status as a victim.
- Children and adults incapacitated due to intellectual disabilities or mental health, when they have been victims of abuse or neglect.
- Any person in employment or in receipt of Spanish social security benefits pursuing or involved in employment proceedings.

Legal aid may cover the following legal costs: pre-trial legal advice, lawyer fees, court fees, costs of publishing announcements in official journals, deposits required for lodging certain appeals, experts' fees, affidavits, an 80 per cent reduction in the fees for notarial deeds and certificates from the land registry and translation and interpretation services.

In criminal matters, legal aid is available for all cases for all citizens, even foreigners, who can demonstrate insufficient means for litigation. It covers all proceedings. It includes appeals and enforcement of judgments, so it also includes the following administrative proceeding for claims of compensation for wrongful conviction.

19 *Ley 1/1996, de 10 de enero, de asistencia jurídica gratuita* (hereinafter, LAJG). Legal Aid Law 1/1996, of 10 January 1996. *Spanish Official Journal* (BOE) No. 11, 12 January. Permalink ELI: <https://www.boe.es/eli/es/l/1996/01/10/1/con>. Its implementing regulation is the Royal Decree 141/2021, of 9 March (*Real Decreto 141/2021, de 9 de marzo, por el que se aprueba el Reglamento de asistencia jurídica gratuita*). *Spanish Official Journal* (BOE) No. 59, of 10 March. Permalink ELI: <http://s://www.boe.es/eli/es/rd/2021/03/09/141>.

20 In immigration matters, all foreign citizens who can certify insufficient means for litigation, even if they do not reside legally in Spain, are entitled to free legal assistance in all proceedings relative to their application for asylum and the Foreigners Immigration Law, including preliminary administrative proceedings.

In order to verify that the applicant has insufficient means for litigation, the law regulates maximum incomes according to the IPREM (the Multi-Purpose Public Income Index – IPREM, as per its Spanish initials – which is established annually in the State Budget Act. In 2022, the IPREM was €579,02 per month or €8,106.28 per year in 14 payments. According to this, the maximum income of the applicant cannot exceed two and a half times the IPREM if the applicant is part of a family unit (less than four members) and three times the IPREM if the family unit comprises four or more people.

The proceeding and the application form for legal aid is processed by the legal guidance departments (*Servicio de orientación jurídica*) of the local bar association in the place where the court responsible for trying the main issue is located, or with the court of the place of residence of the applicant. People can check if they meet the requirements with an online tool at the webpage of the General Council of Spanish Bar Associations.²¹

6 Calculating the amount of compensation

On the one hand, and in the case of unfair detention on remand, Article 294.2 LOPJ says that ‘*Compensation will be determined considering the time they were remanded in custody and in view of the personal and family consequences.*’ This is the only reference in Spanish legislation to how the authorities should calculate compensation in the case of wrongful deprivation of liberty, so one of the harshest criticisms is, indeed, the lack of an adequate legal basis for calculating the amount of compensation for the responsibility of the State.

Furthermore, the two legal criteria ‘time’ (period of deprivation of liberty) and ‘personal and family consequences’ (circumstances) are very broad and indeterminate criteria that have not been legally developed, nor are there objective tables or scales that quantify the damage. Therefore, the calculated amount differs widely from one case to another, since the authorities take refuge in the idea of the exceptionality and speciality of each specific case and so the amounts of compensation vary hugely.

For that reason, the Constitutional Court, in the aforementioned judgment No. 85/2019, of 19 June 2019,²² has demanded the requirements and scope of compensation to be limited through the legislative intervention and, in its absence, through interpretations consistent with its purpose and the general theory of civil liability carried out by the administration and, finally, the judicial bodies.

On the other hand, and in cases of judicial error or irregular functioning of the administration of justice, Article 91 LPAC requires the administrative organ (Ministry of Justice) to assess the claim and fix the amount and the manner of the

21 See also the General Council of Spanish Lawyers website for further information (English translation available). The tool is available at: <https://www.abogacia.es/en/servicios/ciudadanos/servicios-de-orientacion-juridica-gratuita>.

22 Constitutional Court Judgment 85/2019, of 19 June 2019 Appeal (*Amparo*) No. 4314–2018. Spanish Official Journal (BOE») No. 177, 25 July 2019.

compensation, where appropriate, in accordance with the criteria of Article 34 LRJSP. As this article refers to provisions laid down, among others, ‘in the scales of the existing rules on compulsory insurance and social security’, administrative authorities and courts of justice have taken into account the criteria and amounts related to damages caused in traffic accidents.²³

Nevertheless, those criteria and amounts are fixed for bodily or physical injuries and not for non-pecuniary damage. Therefore, compensation for damage caused by wrongful convictions follows the two criteria of Article 294.2 LOPJ.

As both criteria have wide margins of interpretation, the Supreme Court has been offering the lower courts, in its case law, a series of *guidelines* (standards or patterns) to take into consideration when calculating the amount of compensation. Despite the ‘highly subjective component’ of non-pecuniary damage, repeatedly recalled by jurisprudence, the Supreme Court has been setting certain patterns to guide the achievement of equitable treatment in each case and, at the same time, to avoid inequalities in the compensation of non-pecuniary damage.

For example, the Supreme Court has pointed out that it is necessary to consider the wages that have not been received, the period of imprisonment, the importance and significance of the harm both in the pure personal and professional order and the non-pecuniary damage suffered as a result of all this. Other relevant circumstances or guidelines are the age, health, civic conduct, imputed facts, criminal or prison records, rehabilitation of lost honourability, the social discredit and the greater or lesser probability of reaching the social oblivion of the fact, as well as the mark that the prison may have left on the personality or conduct of the one who has suffered it.

Irrespective, damage to someone’s personality is something hardly quantifiable or measurable with a minimum of objectivity. How does one determine the anguish, anxiety, insecurity, restlessness, frustration, annoyance, irritation or fear that the environment in a prison usually entails?

It is true that administrative decisions of the Ministry of Justice in matters of State liability for wrongful conviction have considered those guidelines but when attending to specific circumstances, the daily amount differs a lot. Moreover, correction factors to such daily amounts are sometimes applied to fix the compensation, depending on the number of days spent in prison. The Supreme Court has ruled that ‘moral damage cannot be assessed daily, but from a global perspective,

23 The sources of law related to compensation for traffic accidents are: the *Real Decreto Legislativo 8/2004, de 29 de octubre, por el que se aprueba el texto refundido de la Ley sobre responsabilidad civil y seguro en la circulación de vehículos a motor* (Royal Decree 8/2004, of 29 October, which approved the rewritten text of the Motor Vehicles Public Liability and Insurance Act). *Spanish Official Journal* (BOE) No. 267, 5 November. Permalink ELI: <https://www.boe.es/eli/es/rdlg/2004/10/29/8>, and the *Ley 35/2015, de 22 de septiembre, de reforma del sistema para la valoración de los daños y perjuicios causados a las personas en accidentes de circulación* (Law 35/2015, of 22 September, Reforming the System for the Assessment of Damages Caused to People in Traffic Accidents). *Spanish Official Journal* (BOE) No. 228, 23 September 2015. Permalink ELI: <https://www.boe.es/eli/es/l/2015/09/22/35>.

which, we add, must be done considering the allegations and justifications provided'.²⁴

Since the undue prolongation of the stay in prison gradually aggravates the non-pecuniary damage, the compensation is progressive, so that a correction factor is introduced with which the daily base is increased each time a certain period elapses. But authorities decide almost discretionarily if the amount is based on a fortnightly, monthly or annual basis. There is no assessed rule.²⁵

As an example, a person who has been in prison for around two years usually receives compensation of between €12,000 and €36,000. There is, therefore, no single and objective formula. Although a 'scale or schedule' for undue imprisonment is commonly spoken of (see below), there is substantial judicial discretion in the determination of compensation. In fact, the jurisprudence of the Third Chamber has gradually expanded the content of non-pecuniary damage: first, only the negative effect that the entry and stay in prison had on the *psyche* of the individual and that was concretised in the suffering of anguish, fear, insecurity, frustration or anxiety was considered compensable; later, from 1999, the Supreme Court was adding to the above the social discredit and the rupture with the environment of the individual.

As we can see, and despite the objectivity of the calculation rule, the analysed judgments of the Supreme Court included in the table do not show any uniform criteria in the determination of compensation, since they apply disparate daily bases and correction factors depending on the particular case.

For instance, in a recent case in Spain resolved by the Judgment of the Supreme Court (Administrative Chamber) of 22 September 2021, the applicant claimed

Table 4.1 Supreme Court case compensation

<i>High Court judgment</i>	<i>Correction factor (monthly)</i>	<i>Daily rate (base, €)</i>	<i>Number of days of imprisonment</i>	<i>Daily rate of compensation (€)</i>
30.6.1999	25%	24.04	234	61.15
13.11.2000	125%	60.10	28	74.04
20.1.2003	10%	12.02	946	70.76
26.1.2005	25%	36.06	237	88.32
21.3.2006	—	60.06	151	60.06

Source: Luna Yerga et al.²⁶

24 Supreme Court Judgment (Administrative Bench) 20 December 2019 Cassation No. 3847/2018.

25 Supreme Court Judgment (Administrative Bench) 10 October 2019 Cassation No. 339/2019.

26 Montserrat De Hoyos Sancho, 'La indemnización de la prisión provisional tras sentencia absolutoria o auto de sobreseimiento libre: situación actual y propuestas' (2020) 1 *Revista de la asociación de profesores de derecho procesal de las universidades españolas*, 126–174.

compensation in the amount of €333,397.70 for the 326 days of detention on remand suffered. To arrive at this figure, the applicant quantified the damage as €200 per day, progressively increased to the sum of €1,862,53 per day, in addition to the damage suffered as a result of the prosecution. However, the Supreme Court declared that, according to the duration of the deprivation of liberty (10 months and 22 days), it considers it appropriate to set the compensation at the amount of €12,000, for all concepts of Article 294 LOPJ.

7 Evaluation of the national mechanism of the compensation for wrongful convictions

The obligation to compensate the innocent adequately for the harm resulting from imprisonment dissuades the State from keeping in prison or agreeing to restrictive measures against the freedom of persons without sufficient evidence. But the mechanism legally established in Spain to grant compensation for wrongful convictions (in all the three cases ruled under Articles 292–296 LOPJ) has been the subject of several criticisms due to the wide discretion of the authorities when fixing the amounts of compensation, the almost derisory nature of the amounts granted (sometimes, the daily compensation has been less than the national minimum wage) and the strict criteria for the handling of administrative procedures.

Similarly, and until the ruling of the Constitutional Court of 2019, not all people who have been acquitted or who have benefitted from the dismissal of the criminal procedure were compensated for the damage suffered by the detention on remand, but only those whose innocence had been sufficiently demonstrated. That is, those who had been released after suffering preventive detention were only entitled to compensation when the acquittal or dismissal had taken place due to the objective non-existence of the fact. Therefore, the cases of subjective non-existence had been left out of the scope of application of Article 294.1 LOPJ, not only in cases of lack of evidence, but also when the lack of participation had been proven.

However, the Constitutional Court has warned that not every case of detention on remand followed by acquittal will lead to compensation automatically, since everything will depend on how Article 294 LOPJ is legally configured, something that the legislator has not yet decided to improve. And when this happens, the Constitutional Court has also anticipated that

the doctrine of this judgment not only respects the wide margins of legislative configuration or judicial interpretation in what affects the quantum compensation, but also does not prevent rejecting that there is in the specific case a right to compensation by virtue of the application of criteria of the general law of damages (such as the ‘*compensatio lucri cum damno*’ or the relevance of the victim’s own conduct).²⁷

27 Constitutional Court Judgment 41/2021, of 3 March. Appeal (Amparo) No. 1128-2018.

The doctrine has condemned all this confusion derived from the deficits of compensation for wrongful imprisonment and has advocated the need for an adequate regulatory framework to ensure effective compensation. Some scholars have also demanded a legal improvement of other cases in which acquitted citizens should also be compensated for the damage that could have been caused by other precautionary measures and investigating powers adopted throughout the course of the case. A revision of the legal system of procedural costs has also been demanded, since it is not fair to declare the costs *ex officio* (each party pays its fees) when the accused is finally acquitted and these are not imposed on the private prosecution. Although this is the system traditionally used in Spain, it does not seem in accordance with the necessary effects *ad extra* of the presumption of innocence that if a person is acquitted of the accusations that weighed on him he must assume the expenses incurred by his necessary participation, defence and representation in the case.²⁸

Finally, it is important to note that the new Draft of Criminal Procedure Law of 2020²⁹ incorporates important changes that affect the compensation for wrongful conviction. In the new text, the compensation for sacrificial damage arising from unfair detention on remand is recognised in terms of a subjective right, also providing for the compensation regime that governs these cases, that is, the compensable cases and the criteria for fixing the quantum compensation. As the criteria and proceedings to claim for damage caused by wrongful convictions would follow the criteria for compensating unfair detention on remand (criteria of Article 294.2 LOPJ), this new text would be the main source of law to calculate and claim the compensation.

In addition, it is intended to introduce a special procedure for obtaining compensation for unfair detention on remand in the Code of Criminal Procedure itself: the ‘special procedure for compensation for detention on remand followed by acquittal’ – Articles 868 to 872 – where the admissibility and determination of the compensation for detention on remand will be decided by the criminal courts and will be governed by the criteria of the general theory of civil liability and the law of damages. The indemnifiable cases are those in which, after the detention on remand, there is a final acquittal or order of dismissal, without differentiating the reasons, and in addition, the damage to be compensated will be that actually suffered and provided that it did not result immediately or primarily from the conduct of the person under investigation.³⁰

28 Montserrat De Hoyos Sancho, ‘La indemnización de la prisión provisional tras sentencia absolutoria o auto de sobreseimiento libre: situación actual y propuestas’ (2020) 1 *Revista de la asociación de profesores de derecho procesal de las universidades españolas*, 126–174.

29 The initial version of the Draft of Criminal Procedure Law of 2020 is available (only in Spanish) at: <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf>.

30 In greater detail, the novelties of the Draft of Criminal Procedure Law are described in Marien Aguilera Morales, ‘La prisión provisional en el nuevo Anteproyecto de Ley de Enjuiciamiento Criminal’ (2021) 3 *Revista de la asociación de profesores de derecho procesal de las universidades españolas*, 399–438.

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