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Disclaimer: On behalf of UNIBO, the present deliverable has been drafted by Ana-María Neira-Pena, PhD in Law from the University of A Coruña. **For the purposes of this report, national case law has been included, in first instance, only if issued after the approval of the procedural Directive it refers to**.

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3 Main findings/Executive summary

Directive 2010/64/EU was correctly transposed at the legislative level into the Spanish legal system, incorporating the rights of translation and interpretation as basic rights of defendants and detainees, together with the rights of defense and legal aid. These new rights are regulated in Arts. 123-127 of the Criminal Procedural Act. At the legislative level, the major shortcoming of the transposition is surely the absence of a public register of translators and interpreters, who are required to undergo regulated training to guarantee the quality of the service. At the jurisprudential and practical level, however, there are many shortcomings in the implementation of these rights. Certainly, the most worrying ones have to do, on the one hand, with the confusion of the Courts between the rights of translation and interpretation, considering that when the defendant is assisted by an interpreter, the written translation of certain essential documents is dispensable. On the other hand, in the absence of translation booths and adequate technical means at the disposal of the Courts to use the technique of simultaneous translation, the sub-technique of "whispered translation" is usually used, consisting in the interpreter translating the oral proceedings in a low voice into the ear of the defendant successively to the interventions of the different parties involved in the proceedings. In this context, it is impossible to record the translations that have been whispered into the defendant's ear and this makes it extremely difficult to successfully challenge errors in the interpretation or insufficient quality of the interpretation.

Directive 2012/13/EU on the right of access to information is related to the fundamental right to be informed of the accusation, which, in turn, is a condition for the effectiveness of the defendant's right to defense. This Directive was transposed into Spanish law with some delay, although adequately in general terms, distinguishing the right of the investigated and the detainee, with special attention to the right of access to the materials of the case in order to challenge his/her deprivation of liberty. Prior to the transposition of the Directive, the Constitutional Court anticipated its transposition and clarified certain points. In this regard, the Constitutional Court stated that, since the transposition deadline had expired, the Spanish judicial bodies were obliged to interpret their domestic law in light of the Directive (Judgment of the Constitutional Court No. 13/2017, of January 20). For its part, the Judgment of the Constitutional Court No. 21/2018, of March 5, also establishes relevant doctrine on the right of access to the file that corresponds to the detainee. The resolution is very interesting because, beyond resolving the matter in question, it delimits and configures the scope and content of this new right of access to the materials of the case, including the following considerations:

relationship with other rights, form of access, timing access, content requirements, determination of accessible documents and possibilities to challenge the police decision before the Courts.

Directive 2013/48/EU on the right of access to a lawyer and to have third party informed was easily transposed into the Spanish legal system, since the starting point was a fairly safeguarding level of protection. In Spain, legal assistance is mandatory, with very few exceptions, and the accused may freely choose a lawyer s/he trusts. Despite this, some necessary modifications were introduced. Specifically, the double defense for arrested person on the basis of a European arrest warrant was regulated. Likewise, the possibility of the detainee to have a private interview with his/her lawyer before being questioned was introduced, an aspect that was not present in the Spanish legislation prior to transposition. The transposition was also used to improve other issues such as the regime of incommunicado detention specifying the grounds for incommunicado detention and the manner in which the detainee's or prisoner's rights of communication may be restricted.

Regarding the incommunicado detention regime[1], Spanish legislation is more safeguading than European legislation in certain aspects. For example, according to Spanish legislation the right to have access to a lawyer is never suspended, not even for the incommunicado detainee, who is only deprived of the right to freely choose his/her lawyer, assigning him/her one from the public defender's office. The incommunicado detainee may also be deprived of the right to communicate with all or some of the persons with whom s/he has the right to do so, except with the judicial authority, the Public Prosecutor's Office and the Forensic Doctor. S/he may be prevented from having a confidential interview with his/her lawyer and from having access to the materials of the case, except with regard to the essential elements of the case to be able to challenge the legality of the detention. However, according to Spanish regulation, the incommunicado detainee shall always retain the right to have the fact and place of his/her arrest communicated to certain people, even when s/he is not allowed to communicate with them. This avoids something that is not clearly prohibited in the Directive 2013/48/EU: secret arrests. For its part, the jurisprudence on the right to legal defense emphasizes that such defense must be effective and must be respected in the different phases of the procedure, resulting null and void any action in which the detainee collaborates with the investigation (for example, consenting to the entry and search of his/her home or giving indubitable biological remains for DNA testing) without the presence of his lawyer. Special emphasis is placed on the fact that the consent of the detainee, in order to be valid, must be given with legal assistance, since the coercion implicit in the detention invalidates the consent or statements given without the advice of a lawyer.

Directive (EU) 2016/800 on juvenile defendants has not been transposed into Spanish law, despite the need for its transposition detected by legal scholars in order to regulate certain aspects detailed in

[1] This is the regime to which a detainee or remand prisoner is subjected in certain cases, in order to avoid contact with the persons with whom he/she would ordinarily be entitled to communicate during detention.

the European standard, such as the individual assessment of minors subject to periodic review; the right of minors to be fully informed of all the rights to which they are entitled, as well as the right of the holder of parental responsibility to receive the same information; the system of substitution of the holder of parental responsibility by another adult of the minor's choice; periodic review of detention as a precautionary measure depriving of liberty. Despite the lack of express transposition of the Directive, the Organic Law 5/2000, of January 12, regulating the criminal liability of minors, complemented by the provisions of the Criminal Procedural Act (applicable in all matters not expressly regulated for minors), is generally respectful of the provisions of the Directive, without any relevant contradictions being detected. Spanish legislation and case law is generally protectionist, limiting punitive measures (especially custodial measures) via the principle of proportionality and adapting the measures to the particular needs of the minor. However, the detailed and meticulous nature with which the Directive (EU) 2016/800 regulates certain aspects requires certain legal adjustments for a complete adaptation. It is striking that, despite the expiration of the deadline for transposition of the Directive, it has gone rather unnoticed, not only by the legislator, but also by the Courts, where there are not many mentions of it.

Directive 2016/1919/EU on legal aid was introduced quickly and easily into the Spanish legal system. The starting point of the Spanish legal system was highly protective, since our system of legal aid is based on a level of protection higher than that of the Directive. The Spanish Constitution guarantees legal aid for anyone who proves insufficient resources to litigate (Art. 119 Spanish Constitution), regardless of the type of process involved, even if the assistance of a lawyer is optional. Neither are tests related to the merits of the case applied (Arts. 4.2 and 4.4 Directive) nor is it analyzed whether or not the interests of justice require the recognition of the right in question (Art. 4.1 Directive 2016/1919/EU). It is sufficient to prove that the family income limits are met for the right to be recognized. Despite this, the Law 1/1996, of January 10, on legal aid was modified in order to transpose the Directive 2016/1919/EU on time with certain specific legal adjustments (e.g. express reference to vulnerable persons, although without specifying how the vulnerability will influence the assessment; possibilities to change the appointed lawyer). The transposition was also reflected in Art. 39.4 of Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union, as amended by Law 3/2018, of June 11, which expressly mentions the right to legal aid of the person requested by Spain who wants to appoint a lawyer in Spain, to advise his/her lawyer in the executing state.

Directive 2016/343/UE on presumption of innocence and right to be present at trial has not been expressly transposed into the Spanish legal system. It is possible that the lack of transposition is due to the fact that it is considered unnecessary because the Directive is not very detailed in terms of its regulation, being limited on occasions to the inclusion of general principles, such as the *in dubio pro reo*, or fundamental rights already included in the Spanish Constitution, such as the presumption of

innocence. Some of the aspects included in Directive 2016/343/UE lack detailed regulation in Spain (e.g. the presumption of innocence and the right against self-incrimination are stated in the law, but without specifying their specific content; the principle of *in dubio pro reo* is not even expressly stated in the law). However, case law on these aspects is very abundant and not always in accordance with the content of Directive 2016/343/UE. In this regard, legal scholars believe it necessary to adapt case-law regarding the interrelation between the presumption of innocence and the *in dubio pro reo* principle or the consequences of exercising the right to silence. It could also be useful to transpose aspects of the Directive such as the content and limits of the right not to incriminate oneself or the time frame of application of the presumption of innocence. Likewise, there is a lack of legal regulation concerning the presumption of innocence as a rule of treatment (e.g. use of handcuffs) and in its extra-procedural dimension (e.g. public references to the guilt of the accused by certain public authorities).

As for the right to be present at trial, Spanish law understands attendance at trial not only as a right of the accused, but also as an obligation of the State, and is particularly protective in this area, with very limited cases in which it is possible to prosecute *in absentia*. On this point, therefore, there is no need for transposition.

4 Introduction

The key provision of the Spanish Constitution with regard to procedural rights is Art. 24, which states the following: "*1.- Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may s/he go undefended. 2.- Likewise, all persons have the right of access to the ordinary judge predetermined by law; to the defense and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent. The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences*".

The above precept sets forth in general terms the main fundamental rights of the accused person. In particular, the right to effective judicial protection, the right to defense, including the right of access to a lawyer and the right to be informed of the accusation, the presumption of innocence and the right against self-incrimination. The aforementioned constitutional provision is completed with the recognition of the right to legal aid for all those who do not have sufficient resources to litigate, instrumental to the right to effective judicial protection and legal assistance. In this regard, Art. 119 Spanish Constitution states that: "*Justice shall remain free when thus provided by law, and shall in any case be so in respect to those who have insufficient means to litigate*".

All the aforementioned rights are fundamental rights, which means that they must be regulated by organic law, and i.e. a qualified majority in Parliament is required to approve their regulation (Art. 81 Spanish Constitution). On the other hand, their nature as fundamental rights means that their violation opens the way to an *amparo* remedy for protection before the Constitutional Court after having exhausted the ordinary means of appeal before the ordinary Courts (Art. 53.2 Spanish Constitution).

In Spanish criminal proceedings, both the investigation phase and the oral trial phase are under the jurisdiction of independent judicial authorities. In this sense, there is the figure of the Examining Judge, who is in charge of the criminal investigation. For the trial phase, depending on the nature and the seriousness of the offense jurisdiction is divided between unipersonal bodies (Criminal Courts) and collegiate bodies (such as the Provincial High Courts, the High Superior Courts of Justice, the National High Court or the Supreme Court). For certain crimes, the Jury Court is also provided for.

In the investigation phase of the crimes, together with the Examining Judge, the Public Prosecutor's Office and the Judicial Police intervene. The latter is composed of police agents specialized in the investigation of crimes, which functionally depend on the Prosecutor's Office and the Judges; while

organically they depend on the Ministry of the Interior. The mission of the Public Prosecutor's Office, without prejudice to the functions entrusted to other bodies, is to promote the action of justice in defense of legality, the rights of citizens and the public interest protected by law, *ex officio* or at the request of the interested parties, as well as to ensure the independence of the Courts and to seek before them the satisfaction of the social interest (Art. 124.1 Spanish Constitution).

The Prosecutor's Office in Spain is not independent, since the Attorney General is discretionally appointed by the Government. In addition, internally the Prosecutor's Office functions are subject to the principles of unity of action and hierarchical dependence (Art.124.2 Spanish Constitution). This implies that the hierarchical superiors of the Prosecutor's Office can give binding orders and instructions to their subordinates. However, prosecutors must act subject to the principles of impartiality and legality (Art.124.2 Spanish Constitution). Therefore, it is assumed that prosecutors, unlike judges, are not independent at the institutional level. But they must act with objectivity and subject to the law.

Neither the Public Prosecutors nor the Police can carry out investigative actions involving the restriction of fundamental rights without the authorization of the Examining Judge. At the same time, only the Examining Judge is competent to grant precautionary measures restricting fundamental rights, with the exception of preventive detention, which can be adopted in certain cases by the Police or the Prosecutor's Office, although always subject to judicial control through the *habeas corpus* procedure.

The state of adaptation of the Spanish legal system to the various Directives is uneven, despite the fact that the deadline for transposition has expired for all of them. Moreover, it is striking the fact that not all of them have received equal attention by legal scholars and case-law[2]. In fact, some of them, such as, for example, the Directive on the presumption of innocence, has gone practically unnoticed, especially with regard to the need for its transposition into our domestic legal system[3]. However, it is

[2] It must be noted that, in general, no difficulties have been encountered in accessing legal acts and case law. Access to the case law of the Supreme Court and the Constitutional Court, which is open access, is particularly easy. The Westlaw Aranzadi database was used to search for lower court case law.

[3] The following doctrinal contributions can be seen, among others: Miguel Rodríguez-Piñero y Bravo-Ferrer, "La Directiva (UE) 2016/343 y el derecho a la presunción de inocencia" [2016] 8750, Diario La Ley; Alicia González Monge, "La presunción de inocencia en la Unión Europea: Directiva 2016/343 del Parlamento Europeo y del consejo de 9 de marzo de 2016 por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia y el derecho a estar presente en el juicio" [2016] 39 Revista General de Derecho Europeo; María Luisa Villamarín López, "La Directiva Europea 2016/343, de 9 de marzo, sobre presunción de inocencia y el derecho a estar presente en el juicio", [2017], 3, InDret, 1, 39; Pablo García Molina, "La transposición de la Directiva (UE) 2016/343 en lo que respecta al reforzamiento en el proceso penal de determinados aspectos extraprocesales de la presunción de inocencia", [2018] 9300, Diario La Ley, 1, 13; Salvador Guerrero Palomares, 'Algunas cuestiones y propuestas sobre la construcción teórica del

possible to find numerous references to this Directive (EU) 2016/343 in judgments relating to the presumption of innocence, the *in dubio pro reo* principle or the right against self-incrimination.

In relation to the Directive (EU) 2016/800, on procedural safeguards for juvenile defendants, in addition to not having been transposed -as it should have been through the amendment of the Organic Law 5/2000, of January 12, 2000, regulating the criminal liability of minors-, it is difficult to find references to the Directive in case law. Therefore, this Directive, perhaps because it is the most recent, has so far gone unnoticed not only in legislation, but also in case law.

The first three Directives (2010/64/EU; 2012/13/EU; 2013/48/EU) have been transposed into our legal system, although not without some delay and with certain shortcomings and deficiencies, which will be fully explained in the following sections. The last of the approved European rules, Directive (EU) 2016/1919 on legal aid, has also been transposed. This regulation was incorporated into our legal system in 2018, before the deadline for its transposition expired, probably because it was easy to incorporate into our legal system, which already enshrined a high level of protection of the right to legal aid, higher than that provided for in the Directive (EU) 2016/1919.

The four Directives referred to have been transposed through the amendment of three preexisting domestic laws: Criminal Procedural Act of 1882; Law 1/1996, of January 10, on legal aid and Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union. The transposing laws are as follows: 1) Law 5/2015, of April 27, amending the Criminal Procedure Act and Organic Law 6/1985, of July 1, 1985, of the Judiciary, to transpose Directive 2010/64/EU, of October 20, 2010, on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU, of May 22, 2012, on the right to information in criminal proceedings; 2) Organic Law 13/2015, of October 5, amending the Criminal Procedure Law for the strengthening of procedural safeguards and the regulation of technological investigation measures; 3) Law 3/2018, of June 11, amending Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order.

However, Directive (EU) 2016/343 on the presumption of innocence and the right to be present at trial, whose transposition deadline expired on April 1, 2018, and Directive (EU) 2016/800, of May 11, on procedural safeguards for juvenile defendants, whose transposition deadline expired on June

derecho a la presunción de inocencia a la luz de la Directiva 2016/343, de 9 de marzo, del Parlamento europeo y del Consejo, por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia y el derecho a estar presente en el juicio', in Coral Arangüena Fanego; Montserrat De Hoyos Sancho (Eds.) Begoña Vidal Fernández (Coord.), *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea* (Tirant lo Blanch 2018), 143-175; Salvador Guerrero Palomares "¿Es necesaria la transposición de la Directiva 343/2016, de 9 marzo, en materia de presunción de inocencia?" [2019] 1, Revista de Estudios Europeos, 164, 183.

11, 2019, have not been transposed yet. Moreover, there are no legislative proposals for its incorporation into the Spanish legal system so far. According to legal scholars, the Directive on presumption of innocence should be reflected in Spanish case law, which is not always respectful of its content, as well as lead to certain legal modifications on certain aspects that are not currently regulated in detail in the Spanish legal system. On the other hand, the Directive on juvenile defendants, although it does not find relevant contradictions in the current Spanish legislation nor in case law, should lead to certain legal adjustments for a complete adaptation of the Spanish legal system to the European standard.

5 Directive 2010/64/EU: Right to interpretation and translation in criminal proceedings

5.1 Legislation

Directive 2010/64/EU was implemented by Organic Law 5/2015, of April 27, which amended the Spanish Criminal Procedural Act, approved by Royal Decree of September 14, 1882[4].

Most of the provisions of the Directive have been explicitly transposed through different amendments to the Criminal Procedural Act. Specifically, through the referred transposition law, a Chapter II (On the right to translation and interpretation) is introduced in the criminal Procedural Act, within the Title V (On the right to defense, to legal aid and to translation and interpretation in criminal trials). This new Chapter includes five new Articles: from 123 to 127 of the Criminal Procedural Act.

The essential content of the rights of translation and interpretation is regulated in Art. 123.1 Criminal Procedural Act[5]. This precept also establishes the preference for simultaneous translation over consecutive translation (Art. 123.2 Criminal Procedural Act[6]) and the exceptional

[4] Latest consolidated version available here: https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036. The full title of the transposition law is Organic Law 5/2015, of April 27, amending the Criminal Procedural Act and Organic Law 6/1985, of July 1, 1985, of the Judiciary, to transpose Directive 2010/64/EU, of October 20, 2010, on the right to interpretation and translation in criminal proceedings and Directive 2012/13/EU, of May 22, 2012, on the right to information in criminal proceedings. This law was published in the Spanish Official State Gazette on April 28, 2015 and, as far as the right to translation and interpretation is concerned, came into force one month later (final provision 4ª. section 1)

[5] "*Defendants or accused persons who do not speak or understand Spanish or the official language in which the proceedings are taking place shall have the following rights: (a) The right to be assisted by an interpreter who uses a language he or she understands during all proceedings in which his or her presence is required, including police or prosecutorial questioning and all court hearings (b) The right to use an interpreter for conversations with their lawyer which are directly related to their subsequent interrogation or statement-taking, or which are necessary for the filing of an appeal or other procedural requests (c) The right to interpretation of all proceedings in the trial. (d) the right to written translation of documents which are essential for the exercise of the rights of the defence. In any event, the decisions ordering the detention of the accused, the indictment and the judgment must be translated. (e) The right to submit a reasoned request for a document to be considered essential. Translation and interpretation expenses arising from the exercise of these rights shall be paid by the Administration, regardless of the outcome of the process*".

[6] "*In the event that simultaneous interpretation is not available, the interpretation of the proceedings of the oral*

possibility that the written translation of documents is replaced by an oral summary of the content of the document (Art. 123.3 Criminal Procedural Act[7]). The problem is that, in practice, simultaneous translation is the exception since there are no translation booths at the Courthouse; and substitution of written translation of documents for an oral summary of their content is the rule. This is mainly due to lack of economic and technical means.

However, there are some articles of the Directive 2010/64/EU that have not been expressly transposed into Spanish law. These are: Art. 1.2 (there is no express determination in the law of the procedural moment up to which translation and interpretation rights are to be recognized, including sentencing and appeals); Art. 2.7 (the Law on Mutual Recognition of Criminal Judgments was not amended to expressly recognize the right to have an interpreter for those detainees on basis of a European arrest warrant); Art. 3. 6 (the duty of the executing State to translate the European arrest warrant in writing as an essential document is not expressly regulated); Art. 3.9 (no express requirements are established regarding the quality of the translation of essential documents, so as to ensure that the accused is aware of the incriminating elements of the case and to guarantee his/her right of defense); Art. 5 (one of the main problems with the translation and interpretation in Spanish criminal proceedings has to do with the quality of the services. Specifically, it should be noted that, despite the requirement contained in Art. 5.2 of the Directive 2010/64/EU, there is no official register of duly qualified translators and interpreters in Spain); and Art. 6 (there is no rule providing for specific training plans regarding communication with the assistance of an interpreter).

The lack of transposition of some of the aforementioned precepts is solved by a joint and systematic interpretation of the regulations. However, other gaps require the intervention of the legislator to be corrected.

Although the application of the right to the sentencing and appeal phases is not expressly

trial referred to in point c) of the previous paragraph shall be carried out by means of consecutive interpretation in such a way that the defence of the accused is sufficiently guaranteed".

[7] "*In the case of paragraph 1(d), the translation of passages of essential documents which, in the opinion of the Judge, Court or competent official, are not necessary for the knowledge of the facts by the accused or defendant may be dispensed with. Exceptionally, a written translation of documents may be replaced by an oral summary of their contents in a language which he or she understands, where this will also sufficiently ensure the defence of the accused*". As for the way in which the service is provided, the law also provides for the possibility of videoconferencing stating that "*The assistance of the interpreter may be provided by videoconference or any other means of telecommunication, unless the Court or the Judge or the Public Prosecutor, on their own initiative or at the request of the interested party or his or her defence, agrees to the physical presence of the interpreter in order to safeguard the rights of the accused*" (Art. 123.5 Criminal Procedural Act)

provided for in the terms of Art. 1.2 of the Directive 2010/64/EU, the right to an interpreter includes the filing of appeals as well as, in general, other procedural requests (Art. 123.1 b) Criminal Procedural Act). On the other hand, the fact that one of the documents to be translated is the final judgment (Art. 123. 1 d) Criminal Procedural Act), leads to the conclusion that the right is recognized throughout the proceedings, until a final decision is issued. Neither doctrine nor case law disputes this temporal extension of the right. In addition, what Spanish law does expressly establish is that the translation shall be completed within a reasonable time and any applicable procedural deadlines shall be suspended in the meantime (Art. 123.4 Criminal Procedural Act)

On the other hand, despite the absence of express transposition of the Art. 2.7 of the Directive 2010/64/EU, the right to interpretation is recognized also in proceedings for the execution of a European arrest warrant, when the person subject to such proceedings does not speak or understand the language in which the procedure is taking place. The reason is that the provisions of the Criminal Procedural Act for the investigated or accused person in criminal proceedings are applicable to the detainee under a European arrest warrant. In this sense, according to Art. 51.1 of Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union, the hearing of the person arrested in execution of a European arrest warrant shall be held with the assistance of an interpreter when appropriate in accordance with the provisions of the Criminal Procedural Act. For its part, the Criminal Procedural Act provides that the Judge, of his/her own motion or at the request of the defendants's lawyer, shall ascertain whether the accused has sufficient knowledge and understanding of the official language in which the proceedings are taking place and, if necessary, shall order the appointment of an interpreter or translator (Art. 125.1).

As mentioned above, there is also no express transposition of Art. 3.9 of the Directive 2010/64/EU, since the Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union was not modified on the occasion of the transposition of the Directive. However, a systematic and teleological interpretation of Art. 123.1 d) Criminal Procedural Act, according to which the content of the right to translation includes "*the written translation of the documents that are essential to guarantee the exercise of the right to defense*" leads to include among such documents the content of the European arrest warrant.

Despite the fact that Art. 5.2 establishes the obligation of Member States to have a register of independent translators and interpreters appropriately qualified which must be made available to legal counsel and relevant authorities, to date Spain still does not have an official register of translators and interpreters. The creation of this register is provided for in Final Provision 1ª of Organic Law 5/2015, of April 27, according to which "*The Government shall submit, within a maximum period of one year from the publication of this Law, a Draft for the creation of an*

Official Register of Court Translators and Interpreters for the registration of all those professionals who have the due authorization and qualifications, in order to draw up the lists of translators and interpreters referred to in Article 124 of the Criminal Procedure Act"[8]. The inscription in this Official Registry will be a necessary requirement for the performance of these professionals by appointment of the Judge or the Court Clerk before the Administration of Justice and in the police proceedings in which their presence is necessary, without prejudice to the exceptions that may be established. In order to register in this Official Registry, the Ministry of Justice may request the fulfillment of other requirements different from the training or qualification established by regulation according to the language in question. These requirements must be proportionate and non-discriminatory and may be based on the experience of the professional, on additional knowledge of procedural or legal matters, and on the fulfillment of deontological duties provided by law. However, after the deadline to comply with this mandate has passed, such a register has still not been created, nor have the training requirements for translators and interpreters been determined by regulation.

Article 6 of the Directive has not been expressly transposed either, since there are no specific training plans for judges, prosecutors or judicial staff regarding communication with the assistance of an interpreter. Specific training is only foreseen for the communication of the Administration of Justice with deaf, hearing impaired and deaf-blind persons[9].

As an overall analysis, it can be stated that the transposition of this Directive is, in general, satisfactory. Even in relation to some of the provisions that have not been expressly transposed, it can be understood that the Spanish legal system as a whole is respectful of them. This is the case with Arts. 1.2, 2.7 y 3.9 of the Directive 2010/64/EU as explained above. However, some provisions would still require legislative intervention for the complete adaptation of the Spanish

[8] Current Spanish legislation provides that: "*The court translator or interpreter shall be appointed from among those included in the lists drawn up by the competent Administration. Exceptionally, in those cases that require the urgent presence of a translator or interpreter, and the intervention of a court translator or interpreter registered on the lists drawn up by the Administration is not possible, in accordance with the provisions of section 5 of the previous Article, another person with knowledge of the language used who is considered qualified to carry out the assignment may be appointed. 2. The interpreter or translator appointed shall respect the confidential nature of the service provided. 3. When the Court, the Judge or the Public Prosecutor's Office, on its own initiative or at the request of a party, finds that the translation or interpretation does not offer sufficient guarantees of accuracy, it may order the necessary checks to be carried out and, where appropriate, order the appointment of a new translator or interpreter. In this regard, deaf or hearing-impaired persons who find that the interpretation does not offer sufficient guarantees of accuracy may request the appointment of a new interpreter*" (Art. 124. 1 Criminal Procedural Act).

[9] Art. 21 of the Law 27/2007, of October 23, which recognizes the languages of Spanish signs and regulates the means of support for oral communication of deaf people, hearing impaired and deafblind.

legal system. Specifically, provisions regarding the creation of a register of independent translators and interpreters and other guarantees related to the quality of the services and the training of judicial staff in relation to communications with the assistance of an interpreter**.**

There are several problems related to the quality of translation and interpretation services which, in practice, does not appear to be sufficiently guaranteed. First of all, the aforementioned lack of an official register of translators and interpreters. The required register has been replaced, provisionally at least, by the legal provision of lists drawn up by the competent Administration (Art. 124.1 Criminal Procedural Act). However, it is not determined either by law or regulation what qualification or training is required for access to such lists, nor the way in which they will be drawn up or the way in which such professionals will be designated to act in each specific case where their intervention is necessary. Therefore, implementation is not satisfactory on this point[10].

Moreover, Art. 124.1 of the Criminal Procedural Act provides that, "exceptionally, in those cases that require the urgent presence of a translator or interpreter, and the intervention of translator or interpreter registered on the lists drawn up by the Administration is not possible (...) another person with knowledge of the corresponding language who is considered qualified to perform this task may be authorized as a temporary court interpreter or translator". This provision is open to criticism. Firstly, because it establishes a system of appointment that does not offer sufficient guarantees of quality, since it allows the appointment of individuals with no official qualification. And, secondly, because it does not define what is understood by reasons of urgency, thus running the risk that this system, in principle, foreseen for exceptional reasons, becomes a general rule.

Furthermore, with regard to the *ex post* challenge of problems in the quality of the interpretation or translation, the Criminal Procedural Act merely provides that if the Court, the Judge or the Public Prosecutor's Office, *ex officio* or at the request of a party, considers that the translation or interpretation does not offer sufficient guarantees of accuracy, it may order the necessary checks to be carried out and, if necessary, order the appointment of a new translator or interpreter (Art. 124.3 Criminal Procedural Act). The problem is that the technique usually used for the translation of oral proceedings makes this *a posteriori* control very difficult. In this sense, despite the fact that Art. 123.2 of the Criminal Procedural Act states that the general rule must be the simultaneous interpretation of the proceedings, in practice, in the absence of simultaneous translation booths, the technique of "whispered interpretation" is usually used. This technique implies that the interpreter translates the oral proceedings in a low voice into the ear of the

[10] This deficiency is generally noted by legal scholars: Among others, see Coral Arangüena Fanego, "Las Directivas europeas de armonización de garantías procesales de investigados y acusados. Su implementación en el Derecho español", [2019], 1, Revista de Estudios europeos*,* 5*,* 11.

accused. In this context, and in spite of technological advances, it seems complicated to have a reliable record of a conversation that the interpreter has been whispering in the ear of the accused[11]. And this despite the fact that the law does provide for audio-visual or, alternatively, written documentation of the interpretation of oral proceedings[12].

The law provides for the possibility of challenging, not only the denial of the right by the Judge, but also the rejection of the complaints of the defense regarding the quality of services (Art. 125.2 Criminal Procedural Act[13]). However, once again, the whispered modality usually used for the interpretation of oral proceedings makes it quite difficult to document such deficiencies in quality and, therefore, their effective challenge.

At the legislative level, it is also criticized that, despite being a right free of charge for any defendant, and that the State should be the one to cover the costs derived from the translation and interpretation services, the transposition law expressly provides that the incorporation of this right cannot lead to an increase in staffing, remuneration or other personnel costs (Additional Provision 1ª of Organic Law 5/2015, of April 27). This could also have a negative impact on the quality of translation and interpretation services[14].

Likewise, there is a lack of specific training actions, aimed at Judges, Prosecutors and auxiliary personnel of the Administration of Justice, in relation to the particularities of communication assisted by an interpreter. And this circumstance, together with the lack of technological means to carry out a simultaneous translation that can be recorded and subsequently reviewed as to its quality, again may affect the quality of the translation and interpretation services.

[11] Clara Fernández Carron, *El derecho a interpretación y a traducción en los procesos penales* (Tirant Lo Blanch 2017) 86-88.

[12] "*Oral or sign language interpretations, other than those provided for in paragraph 1(b), may be documented by an audio-visual recording of the original event and the interpretation. In cases of oral or sign language translation of the content of a document, a copy of the translated document and the audio-visual recording of the translation shall be attached to the minutes. If recording equipment is not available, or is not deemed appropriate or necessary, the translation or interpretation and, where appropriate, the original statement shall be documented in writing*" (Art. 123.6 Criminal Procedural Act)

[13] "*The decision of the Judge or Tribunal denying the right to interpretation or translation of any document or passage thereof that the defense considers essential, or rejecting the defense's complaints regarding the lack of quality of the interpretation or translation, shall be documented in writing. If the decision was taken during the oral proceedings, the defence may record its protest in the minutes. An appeal may be lodged against these court decisions in accordance with the provisions of this Act*".

[14] In this sense, Arangüena Fanego (n 10) 34, 35, criticizes the fact that the Spanish legislator, in recent years, has tried to carry out reforms "at zero cost", without keeping the minimum balance with the increase in the workload and the new responsibilities and tasks that fall on certain legal operators.

5.2 Case-law

There are many judgments that have been handed down in relation to the right of translation and interpretation. In all of them a similar position is maintained regarding the consideration of the right from the perspective of material defenselessness, the possibility of substituting the written translation of documents for oral summaries made by the interpreter or the burden of proving the lack of knowledge of the language by the accused. All of these issues will be critically analyzed in this section.

To give an example of one of the paradigmatic decisions on this matter, the doctrine of the Spanish Supreme Court contained in Judgment No. 70/2019, of 7 February, is summarized here, after presenting the main facts.

With regard to the facts, it should be noted that it is about a jury trial for a crime of murder and another crime of injuries. The defendant, later convicted, appealed the sentence alleging, among other issues, lack of translation of certain parts of the trial, errors in the translation, lack of understanding and comprehension of the questions asked in Spanish by the Spanish-Chinese-Spanish interpreter who presented difficulties when it comes to understanding the Spanish language, which according to the appellant has affected the proper functioning of the process and consequently has influenced the deliberation and decision of the juries, damaging the right of defense of the accused.

In the defense opinion, the following deficiencies have occurred: - Lack of knowledge by the interpreter of the way to proceed within the hearing (where to sit, way to proceed with the translation) - Interpreter with clear difficulties to understand the Spanish language - Interpreter with serious difficulties speaking the Spanish language. –Difficulties in the understanding by the members of the Jury, the Judge and the parties when the translator expressed the responses of the accused and the witnesses in Spanish - Translations of questions made in the opposite direction to which they were formulated. - Errors in the translation of sentences. - Trial paralyzed by the interpreter because she did not know the meaning of words in Spanish. - Difficulty for the interpreter to translate the answers of the accused and witnesses into Spanish. - Lack of translation of witnesses' statements to the accused.

As to the legal grounds, the Supreme Court asserts that, even though the new provisions on translation and interpretation resulting from the transposition of the Directive 2010/64/EU are not applicable to the case at hand because it had been initiated prior to its entry into force, its provisions constitute a highly valuable interpretative guide for the resolution of the case.

According to the Supreme Court's opinion, the assistance of an interpreter implies that the designated interpreter adequately fulfills his/her assignment and that his/her performance serves so that the interested party, who cannot express himself/herself or understand Spanish, can testify without problems of expression and can, at the same time, understand the statements of the rest of people who intervene within the procedure, gaining a full knowledge of the development of the trial as a whole. Taking into consideration this starting point, the Supreme Court rejects the defendant's appeal arguing that: 1) There is no record that the defense was interested in the appointment of a new interpreter, nor that it protested about the technical skills or the way in which she was carrying out her interpreting functions; 2) Although there were certainly some deficiencies in the interpretation, these were specific, not generalized, and were corrected as they were manifested, through the reiteration of questions, clarifications or explanations. Although the intervention of the interpreter posed some additional problems in the performance of the trial, a situation that is usually common according to the Court, it cannot be said that the accused was not aware of how the trial was held, nor that he gave his statement in conditions of misunderstanding or language difficulties that prevented him from knowing what was being asked and give his version of the facts in great detail or that he did not know in substance what the other witnesses declared - despite the fact that it is recognized that some of witnesses' statements were not fully translated. In short, without prejudice to the fact that there were difficulties in translation at times, which were solved as they arose, the accused was able to express himself in his language, he understood what the other participants said and had a thorough knowledge of the content, development and incidents of the trial.

Analyzing the case law as a whole, it must be noted that, beyond the deficiencies that the legal transposition presents, there are certain problems related to the application of the right to interpretation and translation in criminal proceedings by the Spanish Courts. In this sense, I agree with CAMPANER MUÑOZ when he states that there is still a long way to go before respect for the right to translation and interpretation becomes a reality and perhaps it would not be out of place for the Supreme Court to remind the criminal law Judges and Courts that only by scrupulously respecting Art. 123 of the Criminal Procedural Code it is possible to guarantee the protection of the fundamental rights of the accused[15].

If the case law of the Supreme Court on the right to translation and interpretation is analyzed, the first thing that can be observed is that the distinction between formal and material defenselessness is a constant criterion to decide whether the right has been violated. According to the doctrine of the

[15] Jaime Campaner Muñoz, 'Problemas derivados de la transposición de la Directiva 2010/64/UE sobre traducción e interpretación' in Coral Arangüena Fanego; De Hoyos Sancho (Eds.) Begoña Vidal Fernández (Coord.) *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea* (Tirant Lo Blanch, 2018), 87, 103.

Spanish Constitutional Court, material defenselessness implies real deprivation of the essential possibilities to defend oneself, when, in addition, it is established that the situation of defenselessness denounced has been relevant for the sense of the final judgment[16]. In this sense, according to the position held by the Supreme Court, the insufficient quality of the interpretation will not be decisive for the violation of the right to a fair trial, merely because of some imprecision or generic errors in the translation process, a circumstance assumed to be frequent and unavoidable. On the contrary, for translation problems to constitute a violation of rights and a mistrial, the appellant must prove that the translation error was relevant to the judgment because it undermined the possibilities of action of the accused person and misled the Court, or because it prevented the accused person from properly presenting his/her version of the facts or correctly developing his/her defense[17]. In cases of specific - not generalized - deficiencies in the translation, they must be corrected by repeating the questions.

The same logic of the distinction between formal irregularities and material defenselessness applies to the translation of essential documents. This is despite the fact that certain documents are considered *ex lege* as "essential", which must therefore be translated in any case, when the investigated or

[16] According to the Spanish Constitutional Court, the lack of effective defense is only materially relevant when the violation of the procedural rules brings with it "practical consequences", consisting of the deprivation of the right to defense and, in addition, "in a real and effective prejudice to the interests of the affected party" (Judgments No. 48/1986, of April 23, 1st Legal Basis; No. 28/1981, of July 23; No. 118/1983, of December 13; No. 89/1986, of July 1; No. 102/1987, of June 17, among others). Therefore, it must be borne in mind that "not every infringement of procedural rules becomes in itself a legal-constitutional defenselessness and therefore a violation of the provisions of art. 24 of the Constitution" (Judgment No. 48/1984, of April 4, 1st Legal Basis).

[17] Judgment of the Supreme Court No. 18/2016, of January 26; In the same vein, Judgment of the Supreme Court No. 70/2019, of February 7, refers to material defenselessness as a standard to assess the violation of fair process, emphasizing that it is up to the defense to highlight, where appropriate, the lack of quality of the translation, so that it can be remedied in a timely manner in the procedural act in which the interpreter intervenes. In addition, the Supreme Court reminds that the nullity of a procedural act due to violation of the law that regulates it, only affects the right to effective judicial protection and produces nullity if it has caused effective or material defenselessness to the interested party, by having prevented him from making claims and defend yourself or exercise your right of contradiction in the process. Now, it must be taken into account that, as stated by María José Fernández-Fígares Morales, 'Las implicaciones procesales de la participación del traductor e intérprete en el juicio oral penal' in María Jesús Ariza Colmenarejo (edt.) *Traducción, interpretación e información para la tutela judicial efectiva en el proceso penal* (Tirant Lo Blanch 2018) 91, 101-102, the right to a trial with all guarantees includes the right to a reliable interpretation of sufficient quality, not only so that the accused can be understood, but also to that s/he can understand the process. Therefore, the right is actively infringed when his/her version of the facts is not faithfully translated, and this conditions the ruling; but it is also infringed, passively, when what happens in the process is not translated into their language or when biases or communication mistakes are introduced in the interpretation.

accused person does not understand the language in which the process takes place (Arts. 3.2 Directive 2010/64/EU and Art. 123.1. d) Criminal Procedural Act). These essential documents are the decisions ordering the detention of the accused, the indictment and the judgment as well as any other documents essential for the exercise of the right of defense. Despite the clarity of the rule, the Supreme Court has declared that the lack of translation of an essential document, such as the indictment, does not violate the right to translation, when it has not caused material defenselessness to the appellant[18]. On this point, I agree with VIDAL FERNÁNDEZ that this type of judicial decisions weakens the imperative force of the Directive, which makes it clear that the indictment must always be considered an essential document[19], therefore, without further considerations as to its influence on the development of the process or on the defense strategy of the defendant.

The situation described above is aggravated by the confusion that, *de facto*, occurs between the rights of interpretation and translation, despite the fact that both, Directive 2010/64/EU and Spanish Criminal Procedural Act, clearly distinguish between them. In this sense, there is an inadmissible jurisprudential practice consisting of admitting tacit waivers of the right to translation for the

[18] In the judgment of the Supreme Court No. 489/2017, of June 29, it is recounted how a Russian citizen, accused of robbery with force, is notified in Spanish of both the order to open the oral trial and *the indictment*, reason for which filed a cassation appeal against the conviction sentence. The defendant had testified before the Investigating Judge, assisted by a lawyer and an interpreter, but had renounced the translation of the provisional arrest warrant, stating that he understood the Spanish language "a little" and that he was also assisted by the interpreter. In view of the development of the procedure, the Supreme Court affirms that the initial requirement to recognize the right is lacking, that is, the defendant's ignorance of the Spanish language, a statement supported by the fact that the accused person had stated that he understood "a little" the Spanish language in a previous act, without alleging ignorance of the Spanish language, something that, on the other hand, according to the Supreme Court, would be logical considering that the accused had been in Spain for several years, where he had been detained several times and even condemned. It is concluded, therefore, that, even if a formal defenselessness is admitted, the inexistence of any material defenselessness is evident, so the appeal must be dismissed. To the above, it is added that in order for a defenselessness with constitutional relevance to be considered, which places the interested party outside any possibility of alleging and defending their rights in the process, a merely formal violation is not enough, but it is necessary that of that formal infringement is derived a material effect of defenselessness, with real impairment of the right of defense and with the consequent real and effective damage to the interests of the affected (Judgments of the Constitutional Court No. 185/2003, of October 27 and 164/2005, of June 20). Consequently, the denounced omission would only be relevant if the non-translated document were really important for the ruling, in such a way that its translation could lead to an acquittal or, at least, a more favorable ruling for the appellant, which would not happen in this case. given that the accused was informed of the facts attributed to him by the interpreter, before making his statement before the Investigating Judge.

[19] Begoña Vidal Fernández, "Interpretación y aplicación del derecho a la traducción de documentos esenciales por los Tribunales penales en España", [2019] 1, *Revista de Estudios Europeos,* 76, 89.

investigated person who is assisted by an interpreter and does not make an express request or protest against the lack of translation of certain documents considered essential. This way of proceeding is, in my opinion, directly contrary to the provisions of Directive 2010/64/EU, which only admits the unequivocal and voluntary waiver of the translation of documents (Art. 3.8), as well as to the provisions of the Spanish Criminal Procedural Act, which requires an express and free waiver of the right to translation[20], always excluding such a possibility in relation to the right of interpretation, which is configured as unwaivable (Art. 126 Criminal Procedural Act[21]).

It can be seen, therefore, that the Spanish Courts are not upright when it comes to ensuring the translation of essential documents, often configuring the right of translation as an alternative to the right of interpretation, when in fact both should be understood as complementary. With regard to the right to written translation of certain documents, it is also unacceptable how broadly the possibility is applied, as provided for exceptionally both in Directive 2010/64/EU (Art. 3.7) and in the Criminal Procedure Act (Art. 123.3), to replace the translation of documents with an oral summary of their content[22].

Another problematic issue regarding the jurisprudential application of these rights has to do with the burden of proving ignorance of the language in which the proceedings take place. The key element

[20] In this sense, as Vidal Fernández (n 19) 93, warns, the Supreme Court is not restricted to either the literality or the spirit of the Directive, since it considers that, if the translation is not expressly requested at the beginning of the trial, this amounts to a kind of tacit resignation. According to the author, this interpretation of the guarantee established in Art. 3 of the Directive, in relation to the waiver of the right to translation, deserves to be classified as a denial of a trial with all guarantees.

[21] Renunciation of the rights referred to in Art. 123 must be express and free, and shall be valid only if it occurs after the accused or defendant has received sufficient and accessible legal advice to enable him to become aware of the consequences of his renunciation. In any event, the rights referred to in Art. 123(1)(a) and (c) may not be waived. Art. 123 (1) (a) refers to the right to be assisted by an interpreter who uses a language he or she understands during all proceedings in which his or her presence is required, including police or prosecutorial questioning and all court hearings and letter; and (c) to the right to interpretation of all proceedings in the trial.

[22] This way of proceeding is validated and endorsed in the Judgment of the Provincial High Court of Madrid No. 750/2016, of December 13 (in relation to the indictment) and in the Judgment of the Provincial High Court of Barcelona No. 283/2017, of March 24, in relation to the sentence, despite being, like the indictment, a document considered essential *ex lege*. Thus the worst omens of Fernández Carron (n 11) 104-105, are fulfilled. According to this author, the provision according to which the written translation of certain documents can be replaced by an oral summary of their content would open a gap in the right of translation, which would not be able to establish itself as a true autonomous and independent right to the right of interpretation. In this sense, the intention of not delaying further criminal proceedings, which are already excessive in length, would lead to making the exceptional provision of substituting the translation for an oral summary of the content of the document a general rule.

in determining the status of beneficiary of translation and/or interpretation rights is that the suspected or investigated person does not speak or understand the language used in the proceedings[23]. The aforementioned interpretation of the Spanish Courts is consistent with the Directive 2010/64/EU. The problem appears to be linked to the absence of an effective form of *ex officio* evaluation of the understanding of the language by the accused, which means that, in practice, the burden of alleging and proving this lack of understanding is reversed, falling on the accused person and his/her lawyer. In this sense, and despite the fact that the law allows the judge to act *ex officio* (Art. 125.1 Criminal Procedural Act[24]), the case law generally interprets that only if the investigated or accused person requests, through his/her lawyer, the assistance of an interpreter or the translation of a document, can s/he then successfully appeal the denial, and consequent violation of the right to translation and interpretation, which implies a clear inversion of the burden of determining the understanding of the language, which instead of falling on the judicial bodies[25], falls exclusively on the accused[26].

In short, many of the problems posed by the application of these regulations in case law have to do with the passivity with which the judges evaluate the level of understanding of the language in which

[23] In this sense, since the Judgment of the Constitutional Court No. 181/1994, of June 20, 1994, Tribunals have clearly stated that the mere fact of being a foreigner does not imply the need for interpretation if the accused understands and speaks our language with more than sufficient fluency and fluency (2nd Legal Basis).

[24] Spanish law provides that "*When circumstances arise which may necessitate the assistance of an interpreter or translator, the President of the Court or the Judge, of his/her own motion or at the request of the counsel for the accused, shall ascertain whether the accused has sufficient knowledge and understanding of the official language in which the proceedings are taking place and, if necessary, shall order the appointment of an interpreter or translator in accordance with the provisions of the preceding Article and shall determine which documents must be translated*".

[25] As indicated by Manuel López Jara, "La modificación de la Ley de Enjuiciamiento Criminal en materia de derechos y garantías procesales: los derechos a la traducción e interpretación y a la información en el proceso penal", [2015] 8540 *Diario La Ley,* 1, 5, the determination about the lack of knowledge of the language should correspond to the authorities involved in each moment of the process -Police, Public Prosecutor or Judge, if applicable- and, furthermore, doubts regarding this point should be resolved in favor of the appointment interpreter or translator

[26] In this regard, see the Judgment of the Provincial High Court of Barcelona of November 13, 2000 and the Judgment of the Provincial High Court of Segovia of November 9, 2011. Likewise, the Judgment of the Provincial High Court of Barcelona No. 471/2017, of June 7, addresses a case of theft of jewelry in an inhabited house, in which the appellants, Italian-speakers, request the nullity of the sentence alleging that the essential documents were not translated: pre-trial detention order, indictment and sentence. The appeal is dismissed because it is recorded in the proceedings that one of the defendants, from the first moment of her arrest, requested the assistance of an interpreter and was assisted by an interpreter at all times, the other having waived this right. In addition, the decision emphasizes that there is no record that at any later time the appellant had expressly requested the translation of the referred documents up to the present time in which it is invoked as an alleged ground for nullity.

the proceedings are taking place on the part of the defendant, as well as their inaction in remedying problems related to the insufficient quality of the translation and interpretation services. Both in the initial evaluation and in the assessment of deficiencies in quality or inaccuracies, the burden of pleading and proving the impairment of the right falls almost exclusively on the parties to the proceedings.

6 Directive 2012/13/EU: Right to information in criminal proceedings

6.1 Legislation

This Directive has been transposed in a staggered manner, through three different laws[27] which have amended the Criminal Procedural Act (specifically, Arts. 118, 302, 505, 520, 520 ter, 527 and 775) approved by Royal Decree of September 14, 1882[28] and a second law which has amended the Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union (specifically, Art. 50)[29]. This staggered transposition through several rules has been rightly criticized, from a legislative technique point of view[30].

[27] The full title of the laws of transposition is: 1) Organic Law 5/2015, of April 27, amending the Criminal Procedural Law and Organic Law 6/1985, of July 1, of the Judiciary, to transpose Directive 2010/64/ EU, of 20 of October 2010, regarding the right to interpretation and translation in criminal proceedings and Directive 2012/13/ EU, of May 22, 2012, concerning the right to information in criminal proceedings. This law was published in the Spanish Official State Gazette on April 28, 2015 and, as far as the right to information in criminal proceedings is concerned, came into force six months later (final provision 4ª. Section; 2) Organic Law 13/2015, of October 5, amending the Criminal Procedure Law for the strengthening of procedural safeguards and the regulation of technological investigation measures. This law was published in the Spanish Official State Gazette on October 6, 2015 and entered into force two months after its publication. The transposition law contains a single transitory provision according to which: "*This Law shall apply to criminal proceedings initiated after its entry into force". However, in order to ensure that the guarantees provided for, relating to the status of the investigated and detained person, are immediately operative in the proceedings in progress, it is provided that such guarantees also preside over the police and prosecutorial proceedings, resolutions and judicial actions that are agreed upon after its entry into force. This will in no way imply that the validity of the resolutions adopted or actions carried out previously and in accordance with the law in force at the time can be questioned. In this sense, the legal Act provides that "the Law shall also apply to police and prosecutorial proceedings, resolutions and judicial actions initiated after its entry into force in relation to those criminal proceedings in progress at the time of its entry into force*"; 3) Law 3/2018, of June 11, amending Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order. This law was published in the Spanish Official State Gazette on June 12, 2018 and entered into force twenty days after its publication.

[28] *Latest consolidated version available here:* https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036

[29] *Latest consolidated version available here:* https://www.boe.es/buscar/act.php?id=BOE-A-2014-12029

[30] Sonia Calaza López, "Fortalecimiento de las garantías procesales y agilización de la Justicia" [2017] 41 *Revista General de Derecho Procesal*, 47-48.

The first modification of the Criminal Procedural Act was operated by the aforementioned Organic Law 5/2015, of 27 April, which gave new wording to Arts.118, 302, 505, 520 and 775. Months later, Law 13/2015, of 5 October amended again Arts.118 and 520, giving new wording to some of its sections, introduced a new Art. 520 ter on detainees in marine spaces and amended Art. 527 to strengthen the guarantees of the incommunicado detainee or remand prisoner. Later on, the transposition was completed regarding the information of rights to be provided to the requested person under a European arrest warrant by Law 3/2018, of June 11, amending Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union.

The Criminal Procedural Act, in line with the provisions of Directive 2012/13/EU, exhaustively lists all the rights of which the person to whom a punishable act is attributed (Art. 118.1 Criminal Procedural Act) and the person who is detained (Art. 520.2 Criminal Procedural Act) must be informed.

The amendments introduced in the Criminal Procedural Act are intended to facilitate the application of the right to information of detainees and defendants in criminal proceedings, guaranteeing the right to liberty and the right to a fair trial. To this end, Art. 118 of the Criminal Procedural Act was amended. This legal provision regulates the rights that correspond to the defendant, of which s/he must be informed. Specifically, it refers to the following rights: the right of defense, clearly and precisely stating that any person charged with a punishable act shall have the right to be informed of the facts with which s/he is charged, as well as of any relevant change in the object of the investigation and in the facts charged (Art. 775. 2 of the Criminal Procedure Act); the right to examine the proceedings in due time to safeguard the right of defense; the right to freely appoint a lawyer; the right to request legal aid, the procedure for doing so and the conditions for obtaining it; the right to free translation and interpretation; the right to remain silent and not to make a statement if s/he does not wish to do so and the right not to testify against himself/herself and not to plead guilty.

The right of detainees or prisoners to information is regulated in Art. 520 of the Criminal Procedural Act. This provision, before the transposition of Directive 2012/13/EU, already included most of the rights provided for in the Directive. However, it was necessary to complete the catalog of rights to adapt it to the postulates of the European regulation, making express mention, among others, of the right of access to the elements of the proceedings that are essential to challenge the legality of the detention or deprivation of liberty, and the right to be assisted free of charge by an interpreter, as well as to information on the maximum legal period of detention until the person is brought before the judicial authority and the procedure by means of which s/he can challenge the legality of his or her detention.

Special mention should be made of the right of access to the materials of the case. In the case of

suspects or accused persons, it has been considered appropriate to incorporate it in Art. 118 of the Criminal Procedural Act. For its part, Art. 302 of the Criminal Procedural Act regulates certain exceptions to this right in the event that the secrecy of summary proceedings has been declared in order to avoid a serious risk to the life, liberty or physical integrity of another person; or to prevent a situation that could seriously compromise the investigation or the trial. On the other hand, in the case of detainees or persons deprived of liberty, the right of access has been included in Art. 520 of the Criminal Procedural Act and its scope is limited, as required by Directive 2012/13/EU, to those elements of the proceedings that are essential to challenge the legality of the detention or deprivation of liberty.

Beyond expanding the catalog of rights of which the person under investigation must be informed and specifying their content, the transposition of Directive 2012/13/EU brought a strengthening of the guarantees with regard to the formal and temporal requirements that must be respected when providing the information related to the rights, on the one hand, and to the facts, on the other hand[31].

As for the form in which the information must be provided, it is required to be delivered in an accessible language, adapted to the age, degree of maturity, disability or any other personal circumstance of the accused or detainee (Arts. 118.1 *in fine* and 520.2 bis of the Criminal Procedural Act). In addition, in the case of detainees or prisoners, the information on their rights and the reasons justifying the detention must always be provided in writing (Art. 520.2 of the Criminal Procedural Act).

The moment at which the information must be provided is also expressly regulated, which constitutes a mechanism for guaranteeing the aforementioned rights. Thus, the accused must receive it without undue delay (Art. 118.1 of the Criminal Procedure Code) and, in case of detainees or prisoners, the information must be provided immediately after the deprivation of liberty (Art. 520.2 of the Criminal Procedure Code).

Although in general terms the transposition of the Directive 2012/13/EU can be considered satisfactory, there are some precepts that have not been expressly transposed into Spanish law.

[31] In this sense, as Arangüena Fanego (n 10) 13-14, indicates, one of the strong points of the Directive is precisely the introduction of temporal and formal requirements as to how to provide such information: promptly (at the latest, before the first official interrogation of the suspect or accused person) and in a simple, accessible language (in terms adapted to the age and degree of maturity of the recipient) and in a language that the subject understands. In addition, and in the case of the detainee, it requires the provision of a written statement of rights (as a general rule) and, in order to facilitate its transposition by the Member States, it incorporates, in two annexes, optional models of a Letter of Rights for the detainee in a national process or on the basis of an EAW.

This is the case, for example, of Art. 6.3 of the Directive 2012/13/EU, according to which "*Member States shall ensure that, at the latest on submission of the merits of the accusation to a court, detailed information must be provided on the accusation, including the nature and legal classification of the criminal offence, as well as the nature of participation by the accused person*". There are two shortcomings in relation to the transposition of this provision. The first is the absence of specific legal references to the nature and legal classification of the crime, as well as the nature of participation of the accused in the information to be provided[32]. Secondly, a problem arises in relation to a specific procedure ("process by acceptance of decree", introduced in our system by Law 41/2015, of October 5). In this special procedure, the Prosecutor may refer a sentencing decree to the Examining Judge at any time after the initiation of investigative proceedings and until the end of the investigation phase, "even if the investigated person has not been called to testify", provided that certain requirements are met (Art. 803 bis of the Criminal Procedural Act). In this context, it is possible that the investigated person does not have knowledge of the proceedings until s/he receives the notification of the order of the Examining Judge authorizing the Decree of the Prosecutor.

Therefore, in the procedure by acceptance of decree, the proposal of the Prosecutor, containing the identification of the investigated person, the description of the punishable act and the legal classification of the offense is first submitted to the consideration of the Judge and, only once authorized by him/her, notified to the accused person, an aspect that could be in contradiction with Art. 6.3 of the Directive 2012/13/EU. However, according to the Spanish Attorney General's Office, the right of information of the investigated person would be satisfied provided that, prior to the holding of the hearing before the Examining Judge, the defendant is allowed access to the proceedings[33]. Additionally, it must be taken into account that the accused person must attend the hearing before the Judge, assisted by his/her lawyer, and expressly accept the decree proposed by the Prosecutor in order for it to become a conviction[34.] Otherwise, the case will continue through

[32] In this sense, Art. 118.1 a) Criminal Procedural Act simply refers to the right of the accussed person to be informed of the facts attributed to him/her, *as well as of any relevant changes in the object of the investigation and of the alleged facts*, specifying that *this information will be provided with sufficient detail to allow the effective exercise of the right of defence*.

[33] State Attorney General's Office, Circular 3/2018, on the right to information of those investigated in criminal proceedings [2018], 49 and 51.

[34] A similar matter was resolved in the same sense by the Court of Justice of the European Union, Case C 216-/14, Gavril Covaci [2015] ECLI:EU:C:2015:686. The European Court of Justice argued that "*While it is true that, because of the summary and simplified nature of the proceedings at issue, the service of a penalty order such as that at issue in the main proceedings is effected only after the court has ruled on the merits of the accusation, the fact remains that, in that order, the court rules only provisionally and that the service of that order represents the first opportunity for the accused person to be informed of the accusation against him. That is confirmed, moreover, by the fact that that person is entitled to bring not an appeal against that*

the ordinary procedure.

As a result of the transposition of the Directive 2012/13/EU, no specific mechanism has been established to challenge the breach of the rights of access to information. However, the Criminal Procedural Act allows an appeal whenever in the framework of the judicial procedure or in the sentence the rules or procedural guarantees have been violated, if such violation has caused defenselessness (Art. 846 bis c) Criminal Procedural Act). This possibility of appeal seems to satisfy *de facto* the requirement of Art. 8.2 of the Directive 2012/13/EU. Additionally, when the Police infringes the right of access to the file, despite the fact that the Criminal Procedural Act does not regulate the possibility of challenging police decisions before judges, the Constitutional Court has interpreted that the detainee could resort to the *habeas corpus* procedure. Thus, the competent judge may rule on the legality of the detention, which requires access to the file insofar as it is necessary to challenge the provisional deprivation of liberty[35].

The Spanish transposition has omitted any reference to the fact that access to the materials in the case must be free of charge in the terms provided for in Art. 7.5 of the Directive 2012/13/EU. On this issue, as indicated by the State Attorney General's Office, both the Spanish Criminal Procedural Act and the Directive 2012/13/EU recognize a right of access or examination of the materials of the case, but not a right to obtain a copy of them[36]. The right to obtain copies of the materials of the case is recognized in our legal system by Art. 234.2 Organic Law 6/1985, of July 1, on the Judicial Power, although conditioned to the form provided by procedural laws and by the Law 18/2011, of July 5, regulating the use of information and communication technologies in the Administration of Justice. For its part, Art. 140.1 of the Spanish Civil Procedural Act (2000) states that the parties may request, at their own expense, to obtain simple copies of writings and documents that appear in the records. In view of this regulation, two cases must be distinguished. First, the case of electronic documents that are part of an electronic judicial file in the terms regulated in the Arts. 26 and following of the aforementioned Law 18/2011, in which case the delivery of copies must be made free of charge. Second, on the contrary, the case in which the required documents, due to their format or for any other circumstance, are not incorporated into the electronic judicial file. In the latter case, the interested party may be required to pay the expenses generated by their obtaining. This is, for example, the case of digital media containing

order before another court, but an objection making him eligible, before the same court, for the ordinary inter partes procedure, in which he can fully exercise his rights of defence, before that court rules again on the merits of the accusation against him. Consequently, in accordance with Article 6 of Directive 2012/13, the service of a penalty order must be considered to be a form of communication of the accusation against the person concerned, with the result that it must comply with the requirements set out in that article".

[35] Judgment of the Spanish Constitutional Court No. 21/2018, of March 5.

[36] State Attorney General's Office, Circular 3/2018, on the right to information of those investigated in criminal proceedings, pp. 33-34.

a copy of the telephone conversations of the accused intercepted within the judicial investigation[37].

6.2 Case-law

In relation to the content of right of access to the materials of the case, the case law of the Supreme Court has pointed out on several occasions that it is necessary to distinguish between the material evidence and the police investigation, since only the former must be made available to the investigated in order to allow the effective exercise of his/her right of defense. In this sense, the Supreme Court maintains that the right of access to the file of Art. 7 of Directive 2012/13/EU is projected on the totality of the material evidence, but does not include the sources or origin of the strictly police investigation, so it does not include access to the databases used by police investigators and analysts[38].

In relation to the right of access to the file by the detainee, there are two particularly relevant judgments of the Spanish Constitutional Court, which complement national legislation by interpreting it in accordance with the wording and spirit of Directive 2012/13/EU. These are the Judgments No. 13/2017, of January 20, and No. 21/2018, of March 5, which have dealt extensively

[37] Supreme Court, Judgment No. 165/2013, of March 26, denied one of the parties to deliver the copies of the supports in which the telephone interventions used as evidence in the trial were contained because the interested party had not provided the necessary material for their copy, indicating that no violation of the right to effective judicial protection and the right of defense can be derived from the fact that the copies of the recordings were not provided free of charge The Supreme Court considers that the Court's response to the lack of means is sensible and reasonable.

[38] In this sense, Supreme Court, Judgment No. 4961/2014, of November 20, argues that, in the preliminary phase of investigations, the Police uses multiple sources of information: citizen collaboration, its own investigations and, even, data provided by police collaborators or confidants. Well, this phase prior to the investigation, as long as it does not have access to the process as evidence for the prosecution and, therefore, as long as it lacks virtuality as a source of evidence, will not integrate the "file" necessary for the effective exercise of the right of defense; In the same line, pronounces the judgment of the Supreme Court no. 975/2016, of December 23, in which it is indicated that the refusal to incorporate to the file the internal notes and minutes that the officers would have provided to their superiors to prepare the police proceedings does not entail the violation of any fundamental right, pointing out, moreover, that "Directive 2012/13/EU (...) is projected on the totality of the material evidence, but does not include the sources or origin of the strictly police investigation".

with the implications of Directive 2012/13/EU on the right of access to the materials of the case that corresponds to the detainee.

The first decision was issued when the law transposing Directive 2012/13/EU had not yet entered into force. However, the Constitutional Court understood that, the transposition deadline having expired, Spanish Courts were obliged to interpret their domestic law in light of the wording and purpose of the European regulations[39], especially in relation to the unconditional and sufficiently precise provisions in which rights are provided for citizens, including those of a procedural nature that allow the essential content of fundamental rights to be integrated by way of interpretation[40]. In this case, the Constitutional Court concluded that the fact that police report had not been completed could not serve as an excuse to deny access to the file, a necessary step to allow the detainees to assess and, where appropriate, challenge their deprivation of liberty.

For its part, the Judgment of the Constitutional Court No. 21/2018, of March 5, also establishes a doctrine on the detainee's right of access to the file. In this resolution, it is indicated that the agents in charge of the custody of the detainee, in addition to informing him/her of his/her rights and the facts that justify his/her detention, must provide him with access to those documents or elements of the proceedings on which the precautionary detention decision is based.

In the specific case analyzed by the Constitutional Court, the facts could be summarized as follows. A person arrested for a crime of injury had requested access to the police report through his/her lawyer, arguing that the information provided about the reasons for his/her arrest was insufficient and violated his right of defense. The detainee, prior to his police interrogation, had only been verbally informed of the legal qualification of the crime charged, the place, date and time of its commission, and the place, date and time of his arrest. The Constitutional Court concludes that there has been a violation of the right to defense and personal liberty because there were circumstances that, being decisive in the decision to arrest the suspect, were omitted when providing him with the mandatory information, among others, the fact that he had been seen by the agents running from the place of the aggression, as well as throwing a weapon (a machete or bowie knife) compatible with the injuries under investigation.

The Constitutional Court decision is very interesting because, beyond resolving the matter in question, it delimits and configures the scope and content of this new right of access to the materials of the case, including the following considerations, in application of the national and European regulation on the matter:

[39] Constitutional Court, Judgments No 13/2017, of January 30, (c) Legal Basis.
[40] Cfr. CJEU (Grand Chamber) Case C- 212/04, Adelener and others [2006].

- Relationship with other rights: The right of access to the elements essential to challenge the legality of the detention is an instrumental guarantee of both the right to information and the effectiveness of the compulsory legal assistance that all detainees must have.
- Form of access: Once access to the file is requested, it must be produced effectively, through exhibition, delivery of a copy or any other method that, guaranteeing the integrity of the proceedings, allows the detainee to know and verify by himself/herself, or through his/her lawyer, the objective basis of his/her deprivation of liberty.
- Timing access: Information on the facts and the reasons that led to the arrest must be provided immediately, while access to the file will take place in the interval that occurs after the detainee is informed of the factual and legal reasons for the arrest and, in any case, before the first police interrogation; therefore, in any case, "before the drafting of the report has been completed, of which the suspect's statement is a nuclear element".
- Content requirements: The information on the facts and the reasons that led to the arrest must be sufficient, which implies a triple content: it must be extended to the facts, to the motivating reasons for the deprivation of liberty and to the rights that, during his/her detention, define the personal status of the detainee. The information provided must therefore be extended to the legal and factual reasons for the arrest; that is, it must not only identify and provisionally qualify the criminal offense that the detainee is suspected to have committed, as occurred in this case, but also the objective data that allows a logical connection between the detainee and the wrongful fact that justifies the arrest.
- Determination of accessible documents: the right of access to the file is not an unlimited right of full access to the content of all police or judicial actions carried out prior to, or as a consequence of, the arrest, but is limited to those essential materials needed to be able to challenge the detention and exercise the right to defence. The determination of which are these essential elements depends on the circumstances of the case. As an example, the reporting of the facts may be essential elements, when it incorporates charges from who incriminates the detainee; the documentation of incriminating testimonies, as well as the content of the scientific expert reports that establish a connection link between the investigated fact and the detainee; documents, photographs and sound or video recordings that objectively relate the suspect to the criminal offense may also be essential, as well as the minutes that record the result of the search of a property, the record of a judicial inspection, the acts that record the collection of vestiges or those that describe the result of an examination carried out by the police for the investigation of the crime. Furthermore, in determining the specific scope of the right of access to the file, the rights of victims and witnesses must be weighed.
- Possibilities to challenge the police decision: Discrepancies on the sufficiency of

information or access to the materials of the case between the detainee and those responsible for his/her police custody, may be raised immediately through the *habeas corpus* procedure before the competent judicial authority.

7 Directive 2013/48/EU: Right of access to a lawyer and to have a third party informed

7.1 Legislation

Directive 2013/48/EU has been transposed into the Spanish legal system in a staggered manner and through two different laws[41] which have amended the Criminal Procedural Act approved by Royal Decree of September 14, 1882[42] and the Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union[43].

The transposition carried out in Spain through the referred legal amendments has allowed improving the regulation of the right of defense in some specific aspects, as well as the incommunicado detention regime. However, it should be pointed out that the starting point of the

[41] The full title of the laws of transposition is: 1) Organic Law 13/2015, of October 5, amending the Criminal Procedural Act for the strengthening of procedural guarantees and the regulation of technological investigation measures. This law was published in the Spanish Official State Gazette on October 6, 2015 and entered into force two months after its publication. The transposition law contains a single transitory provision according to which: "*This Law shall apply to criminal proceedings initiated after its entry into force*". However, in order to ensure that the guarantees provided for, relating to the status of the investigated and detained person, are immediately operative in the proceedings in progress, it is provided that such guarantees also preside over the police and prosecutorial proceedings, resolutions and judicial actions that are agreed upon after its entry into force. This will in no way imply that the validity of the resolutions adopted or actions carried out previously and in accordance with the law in force at the time can be questioned. In this sense, the legal Act provides that "*the Law shall also apply to police and prosecutorial proceedings, resolutions and judicial actions initiated after its entry into force in relation to those criminal proceedings in progress at the time of its entry into force*"; 2) Law 3/2018, of June 11, amending the Law 23/2014, of November 20, on mutual recognition of criminal decisions in the European Union, to regulate the European Investigation Order. This law was published in the Spanish Official State Gazette on June 12, 2018 and entered into force twenty days after its publication.

[42] Latest consolidated version available here: https://www.boe.es/buscar/act.php?id=BOE-A-1882-6036

[43] Latest consolidated version available here: https://www.boe.es/buscar/act.php?id=BOE-A-2014-12029

Spanish legal system was already a quite acceptable regulation, among the most guaranteeing in the European Union, as the Spanish legislator has opted for a mandatory technical defense in general, also required for the detainee, and based on the possibility of making use of a lawyer of one's own choice[44].

One of the main improvements that has occurred with the transposition of the Directive 2013/48/EU has to do with the possibility of the investigated person to have a confidential interview with his/her lawyer before being interrogated by any authority, including the police (Arts. 118.2 II[45] and 520.6 d)[46] Criminal Procedural Act). In addition, the law now specifies that the lawyer must be present, not only in the questioning, but also in the identity parades, confrontations and reconstruction of facts (Arts. 118.2 II and 520.6 (b)[47] both of the Criminal Procedural Act). Furthermore, the lawyer must inform the detainee of the consequences of giving or withholding consent to the carrying out of the requested procedures, including the collection of DNA samples (Art. 520.6 c) Criminal Procedural Act)[48].

[44] Arangüena Fanego (n 10) 21; Precisely, such a high initial level of protection led us to foresee, as has finally happened, that no major changes would take place in our criminal procedural legislation (Cfr. Mar Jimeno Bulnes, "La Directiva 2013/48/UE del Parlamento europeo y del Consejo de 22 de octubre de 2013 sobre los derechos de asistencia letrada y comunicación en el proceso penal: ¿realidad al fin?" [2014] 48 *Revista de Derecho Comunitario Europeo,* 443, 487)

[45] The right of defense includes the legal assistance of a freely appointed lawyer or, failing that, of an *ex officio* lawyer, with whom the defendant may communicate and meet privately, even before being interrogated by the police, the prosecutor or the judicial authority, without prejudice to the provisions of Art. 527 and which will be present in all his/her statements as well as in identity parades, confrontations and reconstruction of the scene of crime.

[46] The lawyer's assistance will entail: (...) *d) To meet privately with the detainee, even before making statement to the police, the prosecutor or the judicial authority, without prejudice to the provisions of Art. 527 (incommunicado detention).*

[47] The lawyer's assistance will entail: (...) *b) intervining in the proceedings of questioning the detainee, in identity parades and in the reconstruction of the crime scene in which the detainee participates; d) To meet privately with the detainee, even before making statement to the police, the prosecutor or the judicial authority, without prejudice to the provisions of Art. 527* (incommunicado detention).

[48] Regarding the collection of DNA samples, Spanish case-law had already required the legal assistance of the detainee to consent to such action. In this sense, the Agreement of the Non-Jurisdictional Plenary of the 2nd Chamber of the Supreme Court of September 24, 2014 provides that valid consent for the biological taking of samples in order to perform the DNA test requires the assistance of a lawyer always that the accused is detained and, in the absence of such consent, it will be necessary to obtain judicial authorization. This agreement was applied, for the first time, in the Supreme Court Judgment No. 734/2014, of November 11 and, finally, it has been expressly reflected in Art. 520.6 c) Criminal Procedural Act, according to which: The lawyer's assistance will entail: (...) *c) Informing the detainee of the consequences of giving or withholding consent to the practice of proceedings requested*. If the detainee opposes the collection of samples by means of a buccal swab, in accordance with the provisions of Organic Law 10/2007, of October

On the occasion of the transposition of Directive 2013/48/EU, the incommunicado detention regime has been modified and ostensibly improved, by establishing that it will be the judge, in light of the principle of proportionality, who determines what specific restrictions are needed in the specific case, expressing the reasons justifying each of the adopted restrictions (Art. 527.2 Criminal Procedural Act). Before this regulation, the restrictions of the incommunicado detainee's rights, including the right to freely appoint a lawyer and the prohibition to communicate with third parties, were imposed all together, without the possibility for the judge to assess the necessity and proportionality of each of the possible limitations of rights.

The cases in which it is possible to order incommunicado detention are the same as those provided for in Art. 5.3. of Directive 2013/48/EU, therefore limited to cases in which there is an urgent need to avoid serious consequences that could endanger the life, liberty or physical integrity of a person, or to avoid seriously compromising criminal proceedings (Art. 509 Criminal Procedural Act). However, on this point, the Spanish legislation is more safeguarding than the European one, since, even in cases of incommunicado detention, the detainee is not temporarily deprived of his/her right of access to a lawyer. The only restriction imposed on the incommunicado detainee refers to the impossibility of choosing a trusted lawyer, being provided with one from the public defender's office, with the same temporary requirements as any other detainee. S/he may also be deprived of the right to meet privately with the lawyer before the interrogation, but never of the right to legal assistance during interrogation. In contrast, Directive 2013/48/EU, however, allows the interrogation without a lawyer in these exceptional cases (Art. 3.6 and Recitals 31 and 32 of Directive 2013/48/EU).

Although not directly imposed by Directive 2013/48/EU, the reform was also used to reduce the time for the appointment of a lawyer *ex officio*, reducing from eight to three hours the period of time available to the appointed lawyer to go to the detention center (Art. 520.5 Criminal Procedural Act[49]). In this way, the generic formula indicating that legal assistance must be

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8, 2007, regulating the police database on identifiers obtained from DNA, the investigating judge, at the request of the Judicial Police or the Public Prosecutor, may impose the forced execution of such diligence through the use of the minimum coercive measures necessary, which must be proportionate to the circumstances of the case and respectful of the detainee's dignity.

[49] The precept provides that: "*The authority in charge of the custody of the detainee shall immediately inform the Bar Association of the name of the lawyer appointed by the detainee to assist him/her for the purpose of locating him/her and transmitting the professional assignment or, if applicable, shall inform him/her of the request for the appointment of a public defender. If the detainee has not appointed a lawyer, or if the chosen lawyer refuses the assignment or is not found, the Bar Association shall immediately proceed to appoint a public defender. The appointed lawyer shall go to the detention center with the utmost haste, always within a maximum period of three hours from the receipt of the appointment. If he/she does not appear within said*

provided "without undue delay" becomes a specific requirement, subject to control.

Likewise, in application of the provisions relating to the waiver of the right to legal defense, and of the guarantees that must surround such waiver provided for in Art. 9 Directive 2013/48/EU, Art. 520.8 of the Criminal Procedural Act is introduced, limited to facts that can be legally classified as crimes against traffic safety[50]. Thus, although the right of defense is generally configured as unwaivable, the renounce is admitted in crimes against road safety, provided that the detainee has been provided with clear, sufficient and understandable information, allowing him/her to make an informed decision, with full knowledge of the content of the right s/he is waiving and the consequences of his/her action, being such waiver revocable at any time.

The confidentiality of any type of communication maintained between the lawyer and the accused is another of the key guarantees of Directive 2013/48/EU (Art. 4). In line with this regulation, Spanish law guarantees confidentiality (Art. 118.4 Criminal Procedural Act[51]), which is considered fundamental for the relationship of trust on which legal assistance is based[52]. Along with this general rule, certain limitations on the confidentiality of attorney-client communications are provided for:

- In the first place, restrictions to confidentiality may be justified by a situation of incommunicado detention, therefore, on the grounds set out in Art. 509 Criminal Procedural Act, when the judge deems it necessary to deprive the detainee of the right to a private and confidential interview with his or her lawyer (Art. 527.1.c) Criminal Procedural Act).

period, the Bar Association shall appoint a new public defender who shall appear as soon as possible and always within the indicated period, without prejudice to the disciplinary liability that may have been incurred by the non-appearing lawyer".

[50] The precept provides that "(...) *the detainee or prisoner may waive the mandatory assistance of counsel if his detention is for acts that can be classified exclusively as crimes against traffic safety, provided that he has been provided with clear and sufficient information in simple and understandable language on the content of this right and the consequences of the waiver. The detainee may revoke his waiver at any time*".

[51] The general rule provided for in this precept is that "*all communications between the investigated or accused person and his/her attorney shall be confidential*".

[52] In this sense, N. González-Cuéllar Serrano 'El secreto profesional del abogado' in Nicolás González-Cuéllar Serrano (Dir.); Águeda Sanz Hermida; Juan Carlos Ortiz Pradillo (Coords.) *Problemas actuales de la justicia penal. Secreto profesional, cooperación jurídica internacional, víctimas de delitos, criminalidad organizada, personas jurídicas, eficacia y licitud de la prueba y derechos fundamentales* (Colex, 2013) 9, 16-17, points out that the basis for the protection of the confidentiality of legal advice, even if not linked to an actual litigation, would be precisely the value of trust that informs the lawyer-client relationship.

- Secondly, if conversations between a lawyer and his/her client are captured during a wiretap, the general rule will be their destruction by court order, except when there is objective evidence of the lawyer's participation in the criminal facts under investigation or of his/her involvement with the defendant or accused person in the commission of another crime (Art. 118.4 III Criminal Procedural Act)[53]. In the latter cases, obviously, it will be allowed, under certain circumstances, to intercept their communications since, otherwise, immunity from prosecution for crimes committed by lawyers under the pretext of exercising their function as defense attorneys would be established.

Another novelty that has been introduced by Organic Law 13/2015, of October 5, and which is inspired by Recital 30 of Directive 2013/48/EU, is the treatment of the detainee in marine spaces. On this issue, Art. 520 ter Criminal Procedural Act was introduced, according to which "to the detainees in marine spaces (...), the rights recognized in this chapter shall be applied to them to the extent that they are compatible with the personal and material means existing on board the vessel or aircraft in which the detention is carried out, and they must be released or placed at the disposal of the competent judicial authority as soon as possible, without exceeding the maximum period of seventy-two hours. They may be placed at the disposal of the judicial authority by telematic means available on board the vessel or aircraft, when due to distance or isolation it is not possible to bring the detainees to the physical presence of the judicial authority within the aforementioned time limit".

From the aforementioned legal provision derives, in the first place, the principle of equal treatment of detainees in marine spaces, with respect to any other individual deprived of liberty. Therefore, as far as possible, the same rights and the same maximum periods of detention shall be applied to them[54]. As an instrument to recognize the procedural rights of the detainee in marine

[53] This restriction on the confidentiality of lawyer-client communications is in line with the provisions of Recital 33 of the Directive, according to which confidentiality is without prejudice to the procedures applicable to the situation in which it is suspected, on the basis of objective and factual evidence, that the lawyer is involved with the suspect or accused person in the commission of a criminal offense, since a criminal activity of the lawyer cannot be considered legitimate assistance to suspects or accused persons. In my opinion, this legal authorization to intercept lawyer-client communications has expanded the provisions of Art. 51.2 of Organic Law 1/1979, of September 26, 1979, General Penitentiary Law, which limits the possibility of intercepting communications between inmates and their lawyers to cases of terrorism. In any case, it would be advisable to adapt Spanish penitentiary legislation to harmonize both regulations or to clearly determine the scope of application of each one of them.

[54] To complete the regulation in the terms indicated in Directive 2013/48/EU, it would have been appropriate to expressly state that the competent authorities should not question the interested party or carry out any of the investigative procedures or collection of evidence established in the Directive until the detainee has had the opportunity to have a confidential interview with his or her lawyer. However, a systematic interpretation

areas, the use of telematic means is foreseen, through which, as expressly indicated in the law, the detainee must be brought before a court when it is not possible to appear physically before the judicial authority. Likewise, according to the State Attorney General's Office, such telematic means must be used to guarantee the right of the detainee at sea to access the essential elements of the proceedings in order to be able to challenge the legality of the detention, provided that the available telematic means allow the sending of documents or even their exhibition in a videoconference[55].

As for the rights of the detainee regarding communication with third parties, these are reflected in letters e), f) and g) of Art. 520.2 Criminal Procedural Act. These include the right to inform the family member or person of the detainee's choice, without unjustified delay, of his or her deprivation of liberty and the place of custody at any given moment, while foreign detainees may inform the consular office of their country in the same terms (letter e). Likewise, every detainee has the right to communicate by telephone, without undue delay, with a third party of his/her choice, in the presence of a police officer or, where appropriate, another official designated by the Judge or the Prosecutor (letter f). In the case of foreign detainees, they have the right to be visited by the consular authorities of their country, as well as to communicate orally and in writing with them (letter g).

In addition, Spanish law specifies that, in the event that the detainee has several nationalities, s/he may choose which consular authorities he/she wishes to be informed of the fact and place of his/her detention, and with which he/she wishes to maintain communication (Art. 520.3 Criminal Procedural Act). On the other hand, if the foreign detainee is a minor or a person with judicially modified capacity, the fact of the arrest will be notified *ex officio* to the Consul of his/her country (Art. 520. 4 IV Criminal Procedural Act).

Regarding the restrictions in the event that the incommunicado detention of the detainee is decreed, once again, the Spanish regulation is more safeguarding than the European one. In this sense, Spanish law, although it allows restricting the right to communicate with third parties, guarantees, in any case, the right of a third party to be informed of the fact and place of detention(Art. 520.2 e) Criminal Procedural Act[56]), without exceptions. In this way, the existence

of the Criminal Procedural Act would lead to the same result.

[55] State Attorney General's Office, Circular 3/2018, pp. 25-26.

[56] This Article includes a right - not subject to restriction in cases of incommunicado detention as provided in Art. 527.1 Criminal Procedural Act- consisting of the fact that the family member or person that the detainee wishes, without undue delay, is made aware of his deprivation of liberty and the place of custody in which s/he is at all times. Foreigners will have the right to have the above circumstances communicated to the consular office of their country.

of secret detentions is prevented, in line with the requirements of international treaties on the subject[57].

As indicated at the beginning, the transposition of the Directive 2013/48/EU was completed with Law 3/2018, of June 11, which came to incorporate into the Spanish legal system the so-called dual defense of those who are requested under a European Arrest Warrant. It offered the detainee the possibility of appointing a lawyer in the State of issuance of the European Arrest Warrant, whose function will be to provide assistance to the lawyer of the executing State. This right is recognized in Art. 50, specifically paragraphs 3 and 4 of the Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union[58].

In general, Directive 2013/48/EU has therefore been transposed into our domestic legal system in a satisfactory manner. However, some aspects indicated in the Recitals have not been incorporated. Thus, for example, there is no provision regulating the duration and frequency of meetings between the suspect or accused person and his/her counsel (Recital 22), so it can be stated that, on this point, our domestic legislation is insufficient[59].

[57] See the Joint study on global practices in relation to secret detention in the context of countering terrorism of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Martin Scheinin; the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak; the Working Group on Arbitrary Detention represented by its Vice-chair, Shaheen Sardar Ali; and the Working Group on Enforced or Involuntary Disappearances represented by its Chair, Jeremy Sarkin (A/HRC/13/42), Geneva : UN, 20 May 2010 (available https://digitallibrary.un.org/record/677500?ln=es)

[58] Art. 50 of Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union was amended to read as follows: 1.- The arrest of a person on the basis of a European arrest warrant shall be carried out in the manner and with the requirements and guarantees provided by the Criminal Procedural Act and the legislation on criminal responsibility of minors. (...) 3. Once the arrested person is placed at the disposal of the court, s/he will be informed of the existence of the European arrest warrant, of its content, of his/her right to appoint a lawyer in the issuing State whose function will be to assist the lawyer in Spain by providing information and advice, of the possibility of consenting irrevocably to the surrender to the issuing State at the hearing before the judge as well as of the rest of the rights that s/he is entitled to. In the event that he/she requests the appointment of a lawyer in the issuing State, the competent authority shall be informed immediately. 4. The detained person shall be informed in writing in a clear and sufficient manner, and in simple and understandable language, of his/her right to waive the right to counsel in the issuing State, of the content of this right and its consequences, as well as of the possibility of its subsequent revocation. Such waiver must be voluntary and unequivocal, in writing, and must state the circumstances of the waiver. The waiver of the right of access to a lawyer in the issuing State may be subsequently revoked at any time during the criminal proceedings and shall take effect from the time it is made.

[59] So appreciates Pablo García Molina, "La transposición de la Directiva 2013/48/UE en lo que respecta al derecho a la asistencia de letrado en los procesos penales a la luz del Anteproyecto de ley orgánica de

Art. 12.2 of the Directive 2013/48/EU has not been expressly transposed either. However, this mandate of fairness of the proceeding in cases where statements were obtained in violation of the right of access to a lawyer so broadly stated, seems to be sufficiently respected by the rule of evidentiary exclusion provided for in Art. 11 of the Organic Law 6/1985, of July 1, 1985, of the Judiciary, which states that "*Evidence obtained, directly or indirectly, in violation of fundamental rights or freedoms shall be ineffective*". This legal provision implies that all evidence obtained in violation of fundamental rights (e.g., statements without legal assistance or DNA samples obtained from the detainee without legal assistance) will be null and void and, therefore, cannot be taken into consideration when sentencing.

Other provisions of the Directive 2013/48/EU that have not been expressly transposed, but which are respected in practice, are those related to the interrogation of a witness who, being initially a witness, becomes a suspect during the interrogation (Art. 2.3 Directive 2013/48/EU) and the documentation of the waiver of counsel (Art. 9.2 Directive 2013/48/EU), in the very limited cases in which the Spanish legal system allows it.

Probably the most controversial aspect of the transposition is the maintenance of Art. 520 bis 2 Criminal Procedural Act, which allows incommunicado detention for crimes committed by persons integrated or related to armed gangs or terrorist or rebel individuals, regardless of the concurrence of the circumstances provided in Art. 509 Criminal Procedural Act (i.e. in cases of urgent need to avoid serious consequences that could endanger the life, liberty or physical integrity of a person, or urgent need for immediate action by the investigating judges to avoid seriously compromising the criminal process). This provision seems to be in contradiction with

modificación de la Ley de Enjuiciamiento Criminal" [2015] 35 Revista General de Derecho Europeo, 1, 12-13, indicating that there are only some references to these issues in Art. 523 Criminal Procedural Act when it states that the relationship with the defense lawyer may not be impeded to the detainee or prisoner not held incommunicado, and in arts. 51 to 53 Law 1/1979, of September 26, 1979, General Penitentiary Law and 41 to 49 Royal Decree 190/1996, of February 9, 1996, approving the Penitentiary Regulations. which regulate communications and visits of inmates in prisons. In the same sense, Arangüena Fanego (n 10) 22, 23, on the convenience of regulating the duration and frequency of the meetings between the suspect or accused and his counsel, as well as the practical conditions in which they should take place. For its part, the Edouard de Lamaze argues that national regulations should set "reasonable periods of time for the duration and frequency of the talks between lawyers and their clients, *a minima* before each hearing" ('Opinion of the European Economic and Social Committee on the 'Proposal for a Directive of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest' [2012], COM(2011) 326 final — 2011/0154 (COD), available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52011AE1856.

Art. 8.1 (c) of the Directive 2013/48/EU according to which incommunicado detention must not be based exclusively on the type or the seriousness of the alleged[60].

7.2 Case-law

In general, Spanish Courts comply with the wording and spirit of the Directive 2013/48/EU. In fact, in relation to those precepts of the Directive that have not been expressly transposed into the Spanish legal system, the judicial decisions are equally respectful of the rules of the Directive 2013/48/EU. Thus, for example, statements made by suspects or defendants without legal assistance are generally excluded as evidence (Art. 12.2 Directive 2013/48/EU), even when there is no express rule providing for such exclusion, apart from the general rule of exclusion of evidence obtained in violation of certain rights (Art. 11.1 Organic Law 6/1985, of July 1, 1985, of the Judiciary).

Some relevant rulings on the right to counsel have to do with the need for counsel to be present in order for the accused to validly consent to certain investigative procedures. Thus, for example, there is a consolidated doctrine of the Supreme Court according to which the police search of the home is void if the entry and search is practiced without the presence of the detainee assisted by his/her lawyer[61]. This is what happened in the case assessed in the sentence. However, the entry and search carried out with judicial authorization will be valid, as long as the interested party is present, even if the detainee's lawyer is not present. In this sense, it can be seen that the existence of judicial authorization allows the detainee to waive the right to legal assistance, which may be open to criticism.

However, when the person under investigation is detained, her/his consent to the entry and search of his/her home will only be valid if the detainee is assisted by a lawyer. And a similar

[60] Judicial interpretation is also not in line with the Directive 2013/48/EU on this point. In fact, in the case of terrorist offenses, given the seriousness of the offense, the Constitutional Court holds that the legislator in Art 520 bis 2 Criminal Procedural Act makes a prior weighing of the need for incommunicado detention in these cases, which exempts further reasoning about the need for the measure to achieve the purpose that legitimizes it, since it can be stated in these crimes in a generic way in terms of high probability and regardless of the circumstances of the person subjected to incommunicado detention, given the nature of the crime under investigation and the knowledge of the way terrorist organizations operate, the decision is justified (3rd Legal Basis of the Judgment of the Constitutional Court No. 127/2000 and 5th Legal Basis of the Judgment of the Constitutional Court No. 7/2004). In the same line, the Judgment of the Supreme Court No. 1665/2000, of October 26, 2000, highlights the terrorist context of the detention as a sufficient argument for the adoption of the measure of incommunicado detention (1st Legal Basis).

[61] Supreme Court, Judgment No. 547/2017, of July 12.

interpretation applies to the collection of DNA samples. In this sense, the Supreme Court[62] holds that if the taking of samples and fluids for DNA analysis requires an act of bodily intervention and, therefore, demands the collaboration of the accused, the consent of the latter will act as a source of legitimization of the state interference represented by the taking of such samples. In these cases, if the accused is in custody, such consent will require the assistance of a lawyer. This guarantee will not be required when the taking of samples is obtained, not from an act of intervention that requires the consent of the detainee, but using remains abandoned by the accused herself/himself at the crime scene.

It is important to insist on the requirement of legal assistance for the consent of the detainee in police custody to be valid, not being able to use, otherwise, the DNA evidence resulting from samples obtained from the detainee without legal assistance. This requirement is a consequence of the constitutional meaning of the right of defense and the right to a process with all the guarantees (Arts. 17.3 and 24. 2 Spanish Constitution).

In short, Spanish Criminal Courts generally maintain that, if the assistance of counsel is necessary for the statement of the detainee under investigation, it must also be considered necessary for him/her to give his/her valid consent or collaboration while in custody, justifying this doctrine on the fact that the consent given by the detainee without the assistance of a lawyer cannot be considered fully free, due to the so-called "environmental intimidation" or "coercion that the presence of the enforcement agents represents"[63].

The aforementioned rulings show something that is a constant in the case-law of the Spanish Courts: The function of the lawyer is mainly to avoid the self-incrimination of the detainee due to ignorance of the rights to which s/he is entitled[64]. However, it must be born in mind that the requirement of Arts. 17.3 and 24.2 of the Spanish Constitution on the assistance of a lawyer in police and judicial proceedings does not imply the necessary and unavoidable presence of the lawyer in each and every one of the investigative procedures, but only in those in which it is necessary to guarantee the principle of contradiction[65].

On this point, Spanish Courts go further than what is required by the Directive in Art. 3.3. (c), by requiring legal assistance for "any recognition of identity" as provided for in Art. 520. 2 (c) Criminal Procedural Act, which would include photographic recognition. In this sense, the Supreme Court holds that, although the practice of photographic or dactyloscopic diligences do

[62] Judgment No. 11/2017, of January 19.

[63] Spanish Supreme Court, Judgment No. 1187/2016, of March 17; Judgment No. 823/2015, of February; Judgment No. 5752/2014, of December 23.

[64] Spanish Supreme Court, Judgment No. 2862/2015, of July 18; Judgment No. 2370/2014, of May, 8.

[65] Javier Ángel Fernández-Gallardo, "La asistencia letrada en las diligencias de investigación" [2016] LXIX *ADPCP*, 321, 326-327.

not normally require judicial authorization due to the minor serioussness of the interference, given the regime of deprivation of liberty of detainees, legal assistance is required[66]. The validity of this reasoning is not affected by the fact that Directive 2013/48/EU limits in its Art. 3.3 (c) this requirement to the practice of identification parades, confrontations and reconstructions of the fact[67].

It is also interesting the Judgment of the Supreme Court No. 980/2016, of January 11, 2017 (ECLI: ES:TS:2017:16), which establishes the need to respect the right to legal assistance, not only in judicial investigation, but also in the pre-procedural proceedings that the Prosecutor's Office can develop before the Examining Judge formally opens the criminal process. In this case, the Supreme Court determines that the preliminary activity carried out by the Prosecutor did not duly respect the constitutional principles that must always and in any case preside over the activity of the public authorities aimed at demanding criminal liability. The Prosecutor's Office interrogated the suspect and conducted an expert handwriting diligence, for which the suspect gave an undoubted sample of his handwriting, all without legal assistance. According to the file, the accused, after being informed of his rights, "stated that he had no objection to testify without a lawyer and to carry out the handwriting sample". According to the Supreme Court, these proceedings of the Prosecutor's Office are null and void for not having observed in their development the same guarantees as in a judicial investigation, including the mandatory legal assistance of the citizen to whom a criminal act is attributed, whether s/he is detained or not.

Regarding incommunicado detention, despite the modifications to the legal regime, the most relevant rulings are prior to the transposition of the Directive 2013/48/EU and they are still in force[68]. According to the Spanish Constitutional Court, the orders adopting a measure of incommunicado detention require a special rigor in their motivation given their transcendental consequences, especially due to the limitations imposed by the right to defense, specifically to legal assistance [...]. The resolutions ordering incommunicado detention must contain the necessary elements to be able to sustain that the necessary weighing of the interests, values and rights at stake has been carried out, which the proportionality of any restrictive measure of fundamental rights requires.

However, as indicated above, with respect to terrorist crimes, given the seriousness of the offense, the Constitutional Court holds that the legislator in Art 520 bis 2 of the Criminal Procedural Act makes a prior weighing of the need for *incommunicado* detention in these cases, which exempts

[66] Spanish Supreme Court, Judgment No. 812/2015, of March, 7.
[67] Order of the Provincial High Court of Madrid, No. 453/2020 of September 15 (ECLI:ES:APM:2020:4533A)
[68] Constitutional Court, Judgment No. 127/2000, of May 16 (ECLI:ES:TC:2000:127) and Judgment No. 7/2004, of February 9 (ECLI:ES:TC:2004:7)

further judicial reasoning about the need for the measure to achieve the purpose that justifies it, since it can be stated in these crimes, in a generic way in terms of high probability and regardless of the circumstances of the person subjected to incommunicado detention, given the nature of the crime under investigation and the knowledge of the way terrorist organizations operate, the decision is justified[69]. In the same line, the Supreme Court highlights the terrorist context of the detention as a sufficient argument for the adoption of the measure of incommunicado detention[70].

8 Directive (EU) 2016/800: Procedural safeguards for juvenile defendants

8.1 Legislation

Directive (EU) 2016/800 should be reflected in Organic Law 5/2000, of January 12, 2000, regulating the criminal liability of minors (onwards, Organic Law on criminal liability of minors), which regulates the measures to be imposed on minors who commit crimes and the procedure for their prosecution. However, up to the present time, and despite the fact that the deadline for its transposition has been amply exceeded, there has been no legal amendment and there is no legislative initiative in this regard.

It is important to bear in mind that, despite the lack of express transposition of this Directive (EU) 2016/800, the Criminal Procedural Act is of supplementary application to the criminal procedure provided for minors in the Organic Law on criminal liability of minors. Therefore, and given that the Criminal Procedural Act has undergone important reforms to adapt it to the various European Directives on the defendant's procedural rights, such improvements and harmonized rights already apply to juvenile defendants and not only to adults in Spain.

The Directive (EU) 2016/800 has been transposed, only partially, through a small amendment introduced in the Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions

[69] Constitutional Court, Judgment No. 127/2000 (3rd Legal Basis) and Judgment No. 7/2004 (5th Legal Basis).
[70] Supreme Court, Judgment No. 1665/2000, of October 26 (1st Legal Basis)

in the European Union through Law 3/2018, of June 11[71]. Specifically, Art. 50 of the Law on Mutual Recognition of Criminal Decisions which regulates the arrest and bringing to court of the requested person based on a European Arrest Warrant was modified. After this amendment, Paragraph 1 of the referred precept expressly alludes to the legislation on minors for the determination of the form and guarantees that must surround the detention when the requested person is a minor (Art. 50.1). In addition, being a minor the person arrested on the occasion of a European Arrest Warrant, the ordinary term for bringing him/her before the judicial authority is reduced from the ordinary 72 hours to a term of 24 hours[72], being competent for the execution of the European Arrest Warrant, in this case, the Central Juvenile Court of the National High Court ("*Audiencia Nacional*") instead of the Central Examining Judge of the National High Court ("*Audiencia Nacional*") (Art. 50.2 Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union).

On the other hand, the Criminal Procedural Act expressly refers to the detention of minors, an aspect regulated by Law 13/2015, of October 5, amending the Criminal Procedural Act for the strengthening of procedural guarantees and the regulation of technological investigation measures through which Directive 2013/48/EU was transposed into Spanish law. Specifically, in Art. 520 of the Criminal Procedural Act, which regulates the exercise of the right of defense by the detainee, a 4th paragraph is introduced on the rights of the minor detainee. This precept provides that in the case of a minor, s/he will be placed at the disposal of the Minors Sections of the Prosecutor's Office and the fact and the place of custody will be communicated to those exercising parental responsibility, guardianship or *de facto* custody of the minor, as soon as the minor age of the detainee is known. In case of conflict of interest with those exercising parental responsibility, guardianship or *de facto* custody of the minor, a judicial public defender shall be appointed, who shall be informed of the fact and place of detention (...). If the detainee who is a minor or with judicially modified capacity is a foreigner, the fact of detention shall be notified *ex officio* to the Consul of his/her country.

The setting of the age of majority at 18 years old indicated in the Directive (EU) 2016/800 coincides with Spanish national legislation. On this point, however, a slight discordance can be appreciated as regards the burden of proving this minority of age. The Directive completes such determination with a presumption in favor of the minority of age, in case there are doubts on this point (Art. 3 in fine and Recital 13 Directive (EU) 2016/800). Spanish legislation, however, provides that in order to prove the age of the accused, documentary evidence (specifically,

[71] This law was published in the Spanish Official State Gazette on June 12, 2018 and entered into force twenty days after its publication.

[72] Thus complying with the Directive's mandate to limit the deprivation of liberty of juvenile suspects or accused persons to the shortest possible time (Art. 10.1 Directive 2016/800/EU).

certification of his/her birth registration in the Civil Registry or of her/his baptismal certificate if s/he is not registered in the Registry) will be used as a primary source of proof. Subsidiarily, in the event that it is not possible to documentarily attest the age or when a certain amount of time is required to obtain such documentation, the criminal investigation will not be suspended, and documents will be substituted by the expert opinion regarding the age of the defendant, prior to his/her physical examination (Art. 375 Criminal Procedural Act). On the other hand, Art. 520.4 of the Criminal Procedural Act already mentioned indicates that, in the case of a minor, s/he will be placed at the disposal of the Minors Sections of the Prosecutor's Office and the fact and the place of custody will be communicated to those who exercise parental responsibility, "*as soon as there is evidence of the minor's age*". A joint interpretation of these precepts seems to imply that, in case of doubt, and as long as the minor age of the person under investigation is not reliably proven, s/he will be treated as an adult. Despite this, the case law of the Supreme Court[73], in case of doubt, advocates presuming the minority of age, stating that it must be fully accredited that the subject is over the legal age to pursue the case against him/her through the criminal procedure for adults. In any case, an express legal provision in this sense would undoubtedly be convenient and would clarify the issue at hand.

If the Organic Law on criminal liability of minors is examined, it should be noted that there are no legal provisions that directly contradict the content of the Directive (EU) 2016/800. This fact could lead to the temptation to understand that the current legislation, interpreted by the judges in accordance with the wording and spirit of the Directive, would be sufficient to comply with the minimum standard imposed by the European regulations. And it is possible that this is the reason that has led the legislator not to make any concrete proposal for its transposition. However, and although in general it can be understood that the Organic Law on criminal liability of minors complies with most of the guarantees that the Directive (EU) 2016/800 recognizes for juvenile defendants, the detailed and exhaustive nature with which some of the rights included in the Directive are regulated makes certain legal adjustments necessary at the domestic level[74]. Although the principle of conforming interpretation that must guide the actions of the Courts can serve as a temporary and provisional solution until the Directive (EU) 2016/800 is transposed,

[73] Among others, Judgment No. 842/2014, of December 10

[74] Despite the legislator's inactivity, which would seem to suggest that transposition is not necessary, the scientific doctrine does not agree with this lack of need for transposition: Arangüena Fanego (n 10) 29; Jorge Jiménez Martín, 'Garantías procesales de los menores sospechosos o acusados en el proceso penal: cuestiones derivadas de la directiva 2016/800/UE, de 11 de mayo', in Coral Arangüena Fanego; De Hoyos Sancho (Eds.) Begoña Vidal Fernández (Coord.) *Garantías procesales de investigados y acusados. Situación actual en el ámbito de la Unión Europea* (Tirant Lo Blanch, 2018) 177-200; Esther Pillado González, "Implicaciones de la Directiva (UE) 2016/800, relativa a las garantías procesales de los menores sospechosos o acusados en los procesos penales, en la Ley de responsabilidad penal del menor" [2019], 48 *Revista General de Derecho europeo*, 59, 97.

case law, given its own casuistic and mutable nature, does not seem an ideal way to generate the confidence that is sought with the legislative approximation at the European Union level.

Thus, in order to adapt domestic legislation to this regulation, at least the following legal amendments should be made: establishment of certain formal, material and temporal requirements that must be observed to implement the broad right of information of minors and their representatives and determination of who will be in charge of making such right effective in the terms provided for in Arts. 4 and 5 of Directive (EU) 2016/800 ; definition of the way in which the individual assessment will be updated throughout the procedure in the terms provided for in Art. 7.8 of Directive (EU) 2016/800; and introduction of a periodic review, at reasonable intervals of time of those precautionary measures which entail deprivation of liberty, by a court, either *ex officio* or at the request of the child, of the child's lawyer, or of another judicial authority (Art. 10.2 Directive (EU) 2016/800).[75]

More specifically, as regards the right to information for minors as provided for in Art. 4 of the Directive (EU) 2016/80 , there are several shortcomings in the Spanish Organic Law on criminal liability of minors, both in terms of the form and timing of the information on rights, as well as the content of such information.

- Firstly, regarding the form in which the information has to be provided to the minor, Art. 22.1 of the Organic Law on criminal liability of minors omits any reference to the need for the information on their rights to be provided in writing and in a simple and accessible language (as stated in Art. 4 paras. 2 and 3 Directive (EU) 2016/800). Despite this legislative gap, legal scholars emphasize the importance of the comprehensibility of the information or the "readability" of the statement of rights provided to them, which must be adapted to the special circumstances of the minor[76].

- Secondly, as regards the time at which the minor must be informed of his/her rights, Directive (EU) 2016/800 provides that s/he must be informed "promptly" from the moment s/he is made aware of his/her status as a suspect or accused person (Art. 4.1). In contrast to this, the Spanish

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[75] Jiménez Martín (n 74) 177-200.

[76] Pillado González (n 74) 70; In that sense, Rights International Spain, 'Procedural Rights of Suspected or Accused Minors in the European Union. National Report I Spain' [2016], available at www.rightsinternationalspain.org, suggests that "*[i]n the elaboration of this document, the use of visual elements such as pictograms that can help its comprehension for a minor who, even, may not understand Spanish should be used*"; According to Esther Fernández Molina; Lidia Vicente Márquez; Pilar Tarancón Gómez, "Derechos procesales delos menores extranjeros: un estudio de su aplicación práctica en la justicia pena" [2017] 2 InDret, 1, 31, in practice, problems of comprehensibility of the information given orally are observed, which are evidently accentuated when dealing with foreign minors.

Organic Law on criminal liability of minors temporarily places the information to the minor about his/her rights at the moment of the formal initiation of the case (Art. 22 Organic Law regulating criminal liability of minors[77]). However, as PILLADO GONZÁLEZ points out, it is common that, before this procedural moment, certain procedures are carried out such as, for example, the statement of the minor before the Police or the Prosecutor's Office, so Art. 22 of the Organic Law on criminal liability of minors should be adapted to the provisions of Art. 118 Criminal Procedural Act, recognizing that the information on rights must be provided from the moment in which a punishable act is attributed to the minor or from the moment any procedure is carried out that has him/her as a suspect, even when s/he is not deprived of liberty[78]. Although, for reasons of clarity and legal certainty, the legal amendment would be very convenient on this point, the fact is that *de facto*, from the joint interpretation of the Organic Law regulating the criminal liability and the aforementioned Art. 118 Criminal Procedural Act, applicable supplementarily to juvenile criminal proceedings, the same result could be derived. Indeed, in practice, the right to legal assistance and information on rights are also recognized to the minor during police interrogations of non-detainee minors, even when the case has not yet been formally opened[79].

- Regarding the specific content of the information on rights to be provided to minors, Art. 4.1 of Directive (EU) 2016/800 is very detailed, specifying the successive procedural moments in which the information must be provided and referring to certain rights that are absent in Art. 22. 1 of the Spanish Organic Law on criminal liability of minors, such as the right to information to the holder of parental responsibility, the right to be accompanied by the holder of parental responsibility in the different proceedings, the right to protection of privacy, the right to medical examination, the right to an individual evaluation or the right to be present at the trial, among others. For its part, the Organic Law on criminal liability of minors establishes, generically, that the minor has the right to be informed of the rights to which s/he is entitled (Art. 22. 1 (a) Organic Law on criminal liability of minors)[80], from the moment the case is opened, by the Juvenile Judge, the Public

[77] According to this Article, the moment in which the rights of the minor are recognized is the moment of the *formal opening of the disciplinary file*. In this sense, the legal precept provides that "From the very moment of the *initiation of the proceedings*, the minor shall have the right to: (a) To be informed by the Judge, the Public Prosecutor's Office, or police officer of the rights to which he is entitled (…).

[78] Pillado González (n 74) 74.

[79] In this regard, the Spanish State Attorney General's Office, in its Consultation 4/2005, of December 7, on certain issues regarding the right to legal assistance in criminal proceedings for minors, already indicated that an interpretative line should be followed that understands that when Art. 22.1 refers to the initiation of the proceedings, it does so in a flexible and broad sense.

[80] The rights of the minor are specified in the same Art. 22 Organic Law on criminal liability of minors in the following terms: b) To appoint a lawyer to defend him or her, or to have one appointed ex officio, and to have a confidential interview with him or her, even before making a statement. c) To intervene in the proceedings carried out during the preliminary investigation and in the judicial process, and to propose and

prosecutor or the Police, making, then, express reference to certain rights such as the right to legal assistance, to intervene in the investigation proceedings, to be heard by the Judge or Court, to receive affective and psychological assistance at any stage and level of the procedure, as well as to be assisted by the technical team attached to the Juvenile Court. As PILLADO GONZÁLEZ observes, the Organic Law on criminal liability of minors is not as detailed as the Directive (EU) 2016/800, so that a "small legal adjustment" would be necessary to expand the catalog of rights of which the minor must be informed[81].

- According to Art. 5 of Directive (EU) 2016/800, the same information that is provided to the minor must be provided to the holders of parental responsibility, while in Spanish legislation, even if the Criminal Procedural Act and the 2016/800/EU are interpreted jointly, the catalog of rights of which the holder of parental responsibility must be informed is limited[82]. Thus, the information to be provided to this adult is initially limited to the fact and place of detention, to be completed, later, with specific information on the possibilities of attending the hearings, accessing the file or knowing the situation, the evolution and the rights of the juvenile detainees. This specific right of the holder of parental responsibility to be informed is therefore considerably reduced in terms of the content of the information provided, and should therefore be supplemented in the light of the wording of the Directive (EU) 2016/800.

Linked to the right to information, a legal amendment of the Organic Law on criminal liability of

request, respectively, the practice of proceedings. d) To be heard by the Judge or Court before adopting any resolution that concerns him personally. e) The affective and psychological assistance at any stage and degree of the procedure, with the presence of the parents or another person indicated by the minor, if the Judge of Minors authorizes his presence. f) The assistance of the services of the technical team assigned to the Court of Minors. This list must be completed, for the minor detainee, with Art. 17 Organic Law on criminal liability of minors, which refers to the information on the facts and reasons for the detention, as well as to those rights specifically provided for all detainees in Art. 520 Criminal Procedural Act.

[81] Pillado González (n 74) 72; Certainly, some of the rights provided for in the Directive 2016/800 do not appear in Art. 22 Organic Law on criminal liability of minors. However, they are recognized to the minor detainee in Art. 17 Organic Law on criminal liability of minors, which refers to Art. 520 Criminal Procedural Act (e.g., information to the holder of parental authority, although limited to the fact and place of detention (Art. 520. 4 Criminal Procedural Act); the right to free legal assistance, the procedure for requesting it and the conditions for obtaining it (Art. 520.2 j) Criminal Procedural Act) or the right to be examined by a doctor (Art. 520.2 i) Criminal Procedural Act), which, on the other hand, makes sense precisely only in a situation of deprivation of liberty).

[82] In the Organic Law on criminal liability of minors, the precepts that refer to the right to information of the holder of parental responsibility are scattered in various articles (Arts. 17, 35, 48.2, 50.2 and 56.2 m)), and are completed with Art. 520.4 Criminal Procedural Act, referring to the minor detainee, with respect to whom the holders of parental responsibility must be informed of the fact of the detention and the place of custody of the minor.

minors is also necessary in order to include the way in which the adult who must be informed of the situation of the minor, as well as his or her rights, will be determined in cases in which the holder of parental responsibility is unable or unsuitable to perform this function. In this sense, Directive (EU) 2016/800 establishes several circumstances (best interests of the minor, impossibility of locating the holder of parental responsibility or risks for the development of the process) in which the holder of parental responsibility will be temporarily replaced by another suitable adult who, where appropriate, is designated by the minor, either to receive the relevant information about his/her rights (Art. 5.2 Directive (EU) 2016/800), or to accompany him/her during the process (Art. 15. 2 Directive (EU) 2016/800). However, Art. 520.4 II of the Criminal Procedural Act merely provides for the replacement of the holder of parental responsibility by a judicial defender in case of conflict of interest between the minor and his/her legal representative. For its part, the Organic Law on criminal liability of minors, in the case of the minor deprived of liberty, provides for the substitution of the holder of parental responsibility by a member of the Prosecutor's Office other than the prosecutor in charge of the investigation procedure when the circumstances make it advisable[83] (Art. 17.2 Organic Law on criminal liability of minors). On the other hand, since there is no provision for the freedom of the minor to choose this adult, there is no procedure for the Judge, the Prosecutor or the Police to assess the suitability of the adult of the minor's choice. Another matter, therefore, in need of regulation.

In short, regarding the substitution of the holder of parental responsibility, in order to adapt the domestic legislation to Directive (EU) 2016/800 it would be necessary, firstly, to expand the reasons that justify the substitution of the holder of parental authority by another adult and, secondly, to give the minor the possibility of proposing the adult who will assist him/her in the process. It should be borne in mind that this individual can play an important role in the proceedings, not only in advising and safeguarding the rights of the minor, but also in supporting and accompanying him/her, since s/he will be the recipient of the information on the rights of the minor and will also accompany him/her during the various stages and hearings of the procedure[84].

[83] Pillado González (n 74) 91, footnote 44, is very critical of this solution, given that the Public Prosecutor's Office acts under the principle of unity of action, so that resorting to a member of the Public Prosecutor's Office to replace the legal representative of the minor could cause a situation of a certain “procedural schizophrenia”, insofar as two members of the same Institution would be integrating the two opposing procedural positions.

[84] The Spanish Organic Law on criminal liability of minors establishes the right of the minor to be accompanied by the holder of parental responsibility in the statements made while in custody (Art. 17.2) and at the hearing (Art. 35.1). However, a complete transposition of Directive 2016/800/EU would require establishing this right in the list of Art. 22 Organic Law on criminal liability of minors, as a general right, providing for the possibility of being present at all hearings (e.g. in the police or Prosecutor's interrogation of the non-detained minor, in the hearing to decide on precautionary measures, as well as in the trial) and in any other procedural action other than the trial, provided that the Judge considers it positive for the interest of the

Art. 7 of Directive (EU) 2016/800 includes in fairly broad terms the right to the individual assessment of the minor, indicating when it should be carried out, for what purpose, the need for its periodic updating and who should be involved in its development, among other issues. According to PILLADO GONZÁLEZ in our legal system, the regulation on the Technical Team Report contained in Arts. 7.3, 22.1 f), 27 and 37 of the Organic Law on criminal liability of minors although it generally complies with the provisions of the Directive (EU) 2016/800, does not seem sufficient in view of the degree of detail with which this right is regulated in the European regulation at hand. This right, as regulated in the Organic Law on criminal liability of minors, is generally respected with regard to the content of the report (psychological, educational, family and social situation), the time at which it is made (within 10 days, therefore, always before the oral hearing as required by Art. 7.6 of the Directive (EU) 2016/800) and also with regard to the professionals involved (specialized and multidisciplinary personnel). However, certain shortcomings are observed, such as the failure to provide for its updating in the event of changes in circumstances (Art. 7.8 Directive (EU) 2016/800) or the lack of express provision for the participation of the minor and the holder of parental responsibility in the assessment (Arts. 7.7, 5 and 15 Directive (EU) 2016/800).

Our domestic law also does not provide for the obligation to record police interrogations, especially if the minor is detained or is not assisted by a lawyer (Art. 9 Directive (EU) 2016/800). The purpose of this recording is to verify that the guarantees and rights of the minor are respected and, indeed, here there is a lack in our system. However, as pointed out by PILLADO GONZÁLEZ[85] and JIMÉNEZ MARTÍN[86], given that the legal assistance of the minor is mandatory and non-waivable in Spain[87], it happens that the lawyer will always be present in the police interrogations of the minor, being such legal assistance the best guarantee that the rights of the minor are respected[88].

minor and not prejudicial to the course of the proceedings in the terms established in Art. 15.4 Directive 2016/800/EU.

[85] Pillado González (n 74) 84.

[86] Jiménez Martín (n 74) 196.

[87] The State Attorney General's Office, in its Circular 9/2011, of November 16, on criteria for the unity of specialized action of the MF in matters of juvenile reform, rules out the possibility of waiver of the right to legal defense by the minor. In addition, our legislation does not establish such broad exceptions to this right as Directive 2016/800/EU (Art. 6.8), resulting, on this point, more protectionist domestic regulations than the European one.

[88] In this sense, as María Elena Laro González states ("Derechos y garantías del menor en el proceso penal. Armonización legislativa y necesidades procesales" [2019] 73 Diario La Ley, 1, 4) the Spanish legislator has developed a much more guaranteeing regulation on this point, since the assistance of counsel is conditio sine qua non to make a statement, which occurs not only for minors, but also for adults, so that the right to

However, under domestic law, there is one case in which a minor may be interrogated without the assistance of a lawyer. This is the case of a police interrogation carried out in relation to the commission of a misdemeanor, and provided that the minor is not deprived of liberty, in which case, if Art. 967 of the Criminal Procedural Act is considered supplementary applicable to the Organic Law on criminal liability of minors, the interrogation without a lawyer would be possible[89]. Therefore, in this case, if the lawyer is not present at the police interrogation, the mandatory audiovisual recording of the minor's statement should be established.

Regarding the limits and guarantees of the deprivation of liberty of the minor provided for in Arts. 10 to 12 of Directive (EU) 2016/800 , PILLADO GONZÁLEZ points out that it would not be superfluous to introduce a general provision in the Spanish legal system, nonexistent to date, establishing that deprivation of liberty should always be the last resort, and that it should be used for the shortest possible time, considering the age and individual situation of the minor, as well as the circumstances of the case[90]. In any case, this approach is implicit in the principle of proportionality, which must inform the imposition of measures restricting fundamental rights and which requires that deprivation of liberty, whether as a precautionary measure or as a sanction, should always be imposed as a subsidiary measure.

Another of the issues that should be completed in our national regulation is the absence of provision for a periodic review of the detention or precautionary detention of the minor, in the terms of Art. 10.2 and Recital 47 of Directive (EU) 2016/800, which should be provided for in Art. 28.3 of the Organic Law on criminal liability of minors, which is limited to setting the maximum time of preventive detention. This review should be able to be carried out *ex officio* by the Judge, or at the request of the minor, of his/her Counsel or by the Prosecutor.

The transposition of the Directive (EU) 2016/800 should also serve to eradicate certain judicial practices contrary to its wording and spirit. Thus, for example, the possibility, even endorsed by

legal assistance in interrogations is never excluded, even temporarily. In addition, in cases in which the incommunicado detention of the detainee is appropriate, this will never be adopted in relation to minors under sixteen years of age (Art. 509.4 Criminal Procedural Act), so that, in relation to this minor offender, the right to appoint a lawyer of his/her confidence or to meet with him/her in private (Art. 527.1 Criminal Procedural Act) cannot be restricted.

[89] In this sense, the State Attorney General's Office, in Consultation 4/2005 cited above, provides that, once the case has been opened, the legal assistance of the minor becomes mandatory, even in misdemeanors or minor offenses, with the exception of this right only in these less serious offeneses for statements made before the Police/Prosecutor's Office without the minor being detained and without the case having been opened.

[90] Pillado González (n 74) 87, 88.

the Constitutional Court[91], of exempting the minor investigated from being present at the trial, a position that, in addition to being incompatible with the rights of information and defense of the minor, would clash with the need to carry out an individual assessment of the minor at the earliest possible stage of the proceedings (Art. 7.5 Directive (EU) 2016/800)[92].

8.2 Case-law

In addition to the lack of express transposition of the Directive (EU) 2016/800, there is not much case law relating to its content. However, it is fair to acknowledge that, in general, legal scholars do not criticize the application that the Courts and Tribunals have been making of the European regulation on criminal proceedings for juvenile defendants.

It should be noted that, in Spain, the possibility of prosecuting the minor *in absentia*, therefore, without being present at the trial, is a controversial issue. Part of the case law understands that Art. 786 of the Criminal Procedural Act applies in a supplementary manner, so that, if the requirements for adults are met, minors can be tried in absentia[93]. However, another sector of jurisprudence understands that Art. 35.1 of the Organic Law on criminal liability of minors prevents prosecution in the absence of the minor, as it expressly regulates the issue, requiring the presence of the minor[94]. According to this second line of interpretation, although the Directive (EU) 2016/800 allows prosecution *in absentia* of minors in certain cases, the non-regression

[91] Judgment of the Constitutional Court No. 146/2012, of July 5 (8th Legal Basis)

[92] Arangüena Fanego (n 10) 9.

[93] The State Attorney General's Office (Circular 1/2007, of November 23, on interpretative criteria following the reform of the Criminal Legislation on Minors of 2006) and part of the case law (see, for example, Judgment of the Provincial High Court of Alicante, of May 13, 2014 (JUR 2014/73368)) are of this opinion, and are therefore in favor of the possibility of holding the trial of the minor in absentia. In favor of this position, it is stated that the Organic Law on criminal liability of minors does not regulate the issue, so that the Criminal Procedural Act is applicable in a supplementary manner. In addition, it is argued that, precisely in order to protect the best interests of the minor, it should be admissible to hold the trial *in absentia* in order to avoid undue delays and delays in the beginning of the educational and socializing treatment of the offender, to dispense in some cases with the adoption of precautionary measures, to neutralize the revictimization of the offended parties generated by continuous suspensions, and to avoid the damage to Justice derived from the possible loss of sources of evidence.

[94] This line of jurisprudence understands that the attendance of the minor is always mandatory, arguing, moreover, that this presence constitutes in itself an educational response and that the absence of the minor at trial could lead to nullity (Judgments of the Provincial High Court of Barcelona, No. 40/2010, of January 4; Provincial High Court of Guipúzcoa, No. 254/2014, of October 17, among others)

clause (Art. 23 Directive (EU) 2016/800) would prevent using the transposition to introduce the possibility of trials *in absentia* against juvenile offenders[95]. Contrary to this opinion, there are some legal scholars who understand that the legislator may freely choose to determine whether or not to admit trials *in absentia* of minors, as long as the minimum content of Directives (EU) 2016/800 and 2016/343/EU is respected[96]. The lack of clarity of the Spanish law on this point, together with the existing controversy in the case law, is highlighted in the recent decision of the Provincial High Court of Valladolid, No. 128/2020, of September 14, which criticizes the lack of intervention by the legislator in the successive reforms of the Organic Law on criminal responsibility of minors, despite the warning of the Public Prosecutor's Council on the urgent need to legislatively address this issue, in view of the division of criteria generated by an unclear legal provision and the absence of uniform case-law. In this resolution, the exceptional possibility of holding the oral hearing without the presence of the minor was admitted, provided that the requirements set forth in Art. 786 of the Criminal Procedural Act for trials in the absence of adults were met.

In general, the flexibility and socio-educational orientation of Spanish case law regarding the criminal prosecution of juveniles is consistent with the spirit of the Directive. As indicated by the Provincial High Court of Madrid[97], the legal consequences of the infringement of the criminal law that can be imposed on juvenile defendants present differentiated features in their basis from those of the criminal law of adults. The peculiarities affect both the precautionary and the substantive aspect. This is expressed in the Explanatory Memorandum to Organic Law 5/2000, of January 12, on the criminal liability of minors, when it states that the criminal liability of juvenile defendants must be based on principles oriented towards the re-education of juvenile offenders, based on his/her personal, family and social circumstances. This liability system presents, compared to that of adults, a primordial character of educational intervention that must be present in all aspects of the legal regulation and that determines considerable differences between the sense and the procedure of sanctions in both fields of criminality, without prejudice to the guarantees common to all defendants. In fact, the sanctions for minors are measures that fundamentally cannot be repressive, but rather preventive-special, oriented towards the effective reintegration and the best interests of the minor, evaluated according to criteria that must be

[95] Arangüena Fanego (n 10) 29-30.

[96] Mercedes Serrano Masip, "Garantías procesales penales específicas reconocidas a menores sospechosos o acusados", in Mar Jimeno Bulnes (Dir.) *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar* (Boch 2016), 209, 258-259; For her part, Pillado González (n 74) 94, points out that both interpretations (preceptivity of the attendance of the minor at the hearing and possibility of prosecution in absentia) would be respectful of Art. 16 of Directive 2016/800/EU, noting that an express regulation of the issue would be advisable, without appreciating problems with the principle of non-regression.

[97] Order No. 67/2019, of January 28 (ROJ: AAP M 1348/2019)

sought primarily in the field of non-legal sciences. This is why criteria of flexibility are followed in the adoption and execution of the measures required by the circumstances of the specific case.

On the other hand, it should be noted that, although there is no express rule establishing, as does Art. 10 of the Directive (EU) 2016/800 , that deprivation of liberty is the last resort, it is a constant in domestic case law to analyze the imposition of custodial measures, either as precautionary measures or as sanctions, from the perspective of the proportionality and exceptionality of such measures[98]. As indicated in the Directive (EU) 2016/800, Spanish case law takes into account the particular circumstances of the case (e.g. risk of reoffending, seriousness of the conduct) and the personal circumstances of the minor (e.g. family and social environment) to decide on the corresponding measure.

9 Directive (EU) 2016/1919: Legal aid

9.1 Legislation

The transposition of Directive 2016/1919/EU has been carried out through Law 3/2018, of June 11[99], which has amended the Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union, as well as the Law 1/1996, of January 10, on Legal aid. Surely due to the high level of protection from which Spain started out with regard to this right, much more generous than the minimums established in the Directive 2016/1919, its incorporation has been quite rapid, anticipating the expiration of the transposition deadline, and also quite simple.

It should be borne in mind that in Spain there is a system of mandatory and non-waivable legal assistance, which is complemented by the constitutional guarantee of legal aid for all those who prove insufficient resources to litigate (Art. 119 Spanish Constitution), without making distinctions as to the type of procedure and regardless of criteria based on the merit of the case. In criminal proceedings, the only case in which legal assistance is optional - and not mandatory - is for minor offenses punishable by a fine of less than six months.

A particularly safeguarding starting regulation, together with the fact that Directive

[98] Order of the Provincial High Court of Barcelona (3rd Section) No. 639/2019, of 26 August and Order of the Provincial High Court of Burgos (1st Section) No. 380/2019, of 17 May, among many others.

[99] This law was published in the Spanish Official State Gazette on June 12, 2018 and entered into force twenty days after its publication.

2016/1919/EU does not contain particularly strict or detailed requirements, has made the task of adapting the domestic legal system much easier, so that the amendment of three legal precepts has been sufficient to comply with the transposition commitment.

Firstly, Art. 1 Law 1/1996, of January 10, on Legal aid has been amended[100]in order to introduce an express reference to vulnerable persons, in line with the provisions of Art. 9 of Directive 2016/1919/EU. In this sense, a general clause was introduced in the aforementioned Law on Legal Aid stating that: in the application of this Law the specific needs of persons who are in a situation of vulnerability shall be taken into consideration. However, this provision was introduced without, at the same time, specifying how such specific needs will be taken into consideration when deciding on the recognition of the right or when providing the service.

The transposition has also meant the extension of the cases in which, despite the fact that legal assistance is not mandatory, legal aid is guaranteed free of charge for those who can prove insufficient resources. In this sense, in addition to the case previously provided for, relating to cases in which the Judge or Court requires the intervention of counsel to ensure the equality of the parties in the process (Art. 6.3 a) Law 1/1996, of January 10, on Legal Aid), a second case is now added. These are cases of minor offenses in which the accused has exercised his/her right to be assisted by a lawyer and it is so decided by the court or tribunal, taking into account the nature of the offense in question and the personal circumstances of the applicant for legal aid (Art. 6.3 a) Law 1/1996, of January 10, on Legal Aid). In short, legal aid is generalized, also for proceedings in which legal assistance is not mandatory, provided that the defendant requests it, unless the Judge considers it unnecessary. Once again, it can be seen, on this point, how the transposition has served as an opportunity to improve the level of domestic protection of the right, since this modification was not expressly required by the Directive 2016/191/EU, which leave the door open to deny legal aid on grounds of the merits of the case, the low seriousness of the criminal offense, the simplicity of the case or the leniency of the possible sanction.

Likewise, the right of the beneficiary of legal aid to request the appointment of new professionals to replace those initially appointed when there is a justified cause for such replacement has been regulated as a result of the transposition (Art. 21 bis Law 1/1996, of January 10, on Legal Aid[101]).

[100] This same precept had already been recently amended by Law 2/2017, of 21 June, amending Law 1/1996, of 10 January, on legal aid, to establish the obligation to provide the legal aid service, a provision whose constitutionality was endorsed by the Spanish Constitutional Court (Plenary), Judgment No. 101/2018, of 4 October. The referred Law 2/2017, of 21 June, also contains some provision of interest in terms of ensuring the quality of legal aid services, entrusting the competent public administrations to establish the minimum general requirements of training and specialization necessary to provide such services.

[101] According to this new precept entitled «*substitution of the designated professional*» "*1. The person benefiting from legal aid shall have the right to request the designation of new professionals by means of a duly justified*

This power of substitution is required by Art. 7.4 Directive 2016/1919/EU, as a way to guarantee the quality of the services provided and to ensure, therefore, the effectiveness of the defense[102].

Finally, the transposition was completed with the amendment of the Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union, to extend legal aid to the right of dual defense promoted by Directive 2013/48/EU. In this sense, a paragraph 4th was introduced in Art. 39 of the aforementioned law stating that: "*When the requested person exercises in the executing State his/her right to appoint a lawyer in Spain to assist the lawyer in the State of enforcement, the exercise of this right and, where appropriate, the right to legal aid shall be guaranteed, in the terms legally applicable under Spanish law. The request shall be processed by the Spanish judicial authority immediately and the appointment of professionals by the Bar Association shall be of a preferential and urgent nature*" (Art. 39.4 Law 23/2014, of November 20, on Mutual Recognition of Criminal Decisions in the European Union).

The other provisions of the Directive 2016/1919/EU, although not expressly transposed, are *de facto* respected. For example, decisions on legal aid are made by an administrative body (Legal Aid Commission), always existing the possibility of appeal before the judicial body competent to hear the merits of the case (Art. 20 Law 1/1996, of January 10, on Legal Aid). The procedure for deciding on the recognition of the right and the possibilities for challenging such a decision are

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request, which shall not suspend the designation of the professionals that have already been agreed upon. 2. Said request shall be made to the professional association that has made the designation. Once the request has been received, the Bar Association shall forward it for five days to the professional whose replacement is sought, and shall then issue a reasoned decision within a period of fifteen days. 3. The decision that there is cause to justify the substitution shall be communicated by the corresponding professional association to the Legal aid Commission, to the applicant and, immediately, to the new professional designated in such a case. 4. The Legal aid Commission may deny the processing of the request for substitution, confirming the designation of the appointed professionals, provided that the request is based on a cause that has already been denied in relation to the same matter and professional, without new facts or circumstances that justify it. Resolutions denying the right to the designation of a new professional may be challenged by the beneficiary of legal aid, under the terms of Art. 20".

[102] It is worth mentioning, on this point, the Supreme Court, Order No. 7770/2017, of July 7 (ECLI:ES:TS:2017:7770A) which annuls the appointment of a public defender made at the court of appeal for lack of effective defense, declaring the nullity of the proceedings and requesting a new appointment. The decision cites Art. 3.1 Directive 2013/48/EU, taking a further step in the control and monitoring of the quality of legal aid and, therefore, in the effectiveness of the right to defense. In the aforementioned order, the Supreme Court holds that "in cases, such as the one that is the subject of this judicial decision, where an absolute lack of defense is observed, the Court may refer the case to the corresponding Bar Association so that it may appoint a new member of the Bar Association to implement in substantial terms the right of defense that corresponds to every party. This is a consequence of the commitment of this Supreme Court with the materiality of the right of defense, and not only with a formal compliance".

in compliance with Arts. 6 and 8 of the Directive 2016/1919/EU.

There are no specific provisions on the quality of legal aid services and training of public defenders (Art. 7 Directive 2016/1919/EU). Likewise, there is a lack of specialization programs in criminal law for public defenders, who are discretionally assigned to defendants entitled to legal aid. However, despite the absence of such specific provisions, public defenders are registered lawyers, with the necessary training requirements for registration. Moreover, continuous training is offered by the Bar Association.

9.2 Case-law

Since the transposition of the Directive has not entailed major changes in the regulation of the right to legal aid, there is also no relevant case law on the application of the Directive 2016/1919/EU.

The Spanish regulation is quite safeguarding in this area, since it establishes at the constitutional level the right to legal aid for anyone who proves insufficient resources to litigate in any judicial proceeding (Art. 119 Spanish Constitution). In this sense, the Constitutional Court has long held that there is a minimum constitutional content, and unavailable to the legislator, which implies that free justice must be recognized, at least, to those who cannot afford the expenses arising from the process without neglecting their vital needs and those of their family, so that no one is deprived of access to justice for lack of economic resources. In other words, procedural expenses should be paid by the State to those who, if such payment were required, would find themselves in the alternative of ceasing to litigate or endangering the minimum level of personal or family subsistence[103].

The right to legal aid is considered by the Courts as a fundamental right, instrumental to the right to effective judicial protection. That is why, even in cases where legal assistance is not compulsory, the right to legal aid is recognized whenever the interested party requests it, demonstrating a situation of insufficient economic resources. On the other hand, the untenability of the claim may be a reason to reject the assignment by the appointed lawyer. However, the accused in criminal proceedings will always have the right to have another lawyer appointed (Art. 32 Law 1/1996, of January 10, on Legal Aid). Therefore, the lawyer appointed *ex officio* who considers that the claim is unsustainable, will have a very short and preclusive period of time – 15 days- to refuse the request. This allows another lawyer to be appointed.

[103] Constitutional Court, Judgment No. 16/1994, of January 20.

Regarding the rejection of the matter on the grounds that the claim is untenable, it is worth noting the Provincial High Court of Pontevedra[104] rejected the extemporaneous request of the public defender who intends not to take over the assignment of the alleged victim of a crime on the grounds that the claim was untenable. The Court affirms that, although it is paradoxical that the lawyer is forced to defend a claim that s/he considers untenable, in the conflict of interests between the effective judicial protection of those who lack the means to litigate, and the restriction of the public service of legal aid to cases that have to be qualified as sustainable, the law has sought to protect the applicant of this right by temporarily restricting, in a severe manner, the possibility of assessing the untenability. Finally, it must be taken into account that in criminal proceedings and with respect to convicted persons, it shall not be possible to formulate untenability of the claim of the lawyer appointed to file the appeal against the sentence of conviction (Art. 35 Law 1/1996, of January 10, on Legal Aid).

10 Directive (EU) 2016/343: Presumption of innocence and of the right to be present at the trial

10.1 Legislation

Directive (EU) 2016/343 has not entailed any legislative modification in the Spanish legal system, despite the fact that it had to have been transposed before April 1, 2018.

This Directive has been criticized for several reasons. Firstly, because it groups together two rights that have little or nothing to do with each other, moving away from the 2009 Roadmap, and addressing the right to be present at trial, with the risk of entering into collision with Framework Decision 2009/299/JHA of 26 February on trials in absentia. And, secondly, because, unlike the previous Directives, this one is largely limited to stating general principles of law, rather than providing the procedural framework for the protection of the rights of the suspect or accused person, with the consequent risk that States, which already recognize and protect such rights, will not feel the need to revise their domestic legal system[105].

[104] Order No. 642/2019, of November 13 (JUR\2020\48732. ECLI:ES:APPO:2019:1854).
[105] Arangüena Fanego (n 10) 24.

However, a closer analysis of the content of Directive (EU) 2016/343 shows that, at least in Spain, certain legal amendments are necessary, particularly with regard to the right to the presumption of innocence. Not so with regard to the right to be present at trial, an aspect in which the Spanish legal system, is particularly protective, as was made clear in the well-known Melloni case[106]. In this sense, it must be taken into consideration that, in Spain, trials *in absentia* are limited to those cases in which the requested sentence does not exceed two years of imprisonment or, if it is of a different nature, when its duration does not exceed six years, when the accused does not attend the trial without justification, despite having been summoned in person, or at the domicile that s/he himself has designated for the purpose of notifications or at the person designated by him/her to receive official communications on his/her behalf, with the warning that the summons made at the aforementioned domicile or to the designated person will allow the trial to be held *in absentia*. In addition, for the trial to be held *in absentia*, it is required that the Prosecutor's Office or the private prosecutor request it, that the defense be heard, and that the Judge or Court considers that there are sufficient elements for the prosecution without the intervention of the defendant, since, otherwise, the hearing will be suspended (Arts. 786 and concordant legal precepts of the Criminal Procedural Act). And, in any case, there is the possibility of reviewing the sentence issued *in absentia* through an appeal for annulment (Art. 793 Criminal Procedural Act).

As for the presumption of innocence, despite the fact that Spain recognizes this right at the constitutional level (Art. 24.2 Spanish Constitution), there is a lack of a legal configuration of the right, which details, as the Directive does, what is its temporal scope of application (Art. 2 Directive (EU) 2016/343), what is its content and its implications (Arts. 3, 4 and 5 Directive (EU) 2016/343) or how it affects issues such as the distribution of evidentiary burdens in criminal proceedings (Art. 6 Directive (EU) 2016/343) and, especially, how it interrelates with the right to silence of the accused (Art. 7 Directive (EU) 2016/343). In this sense, I agree with GUERRERO PALOMARES when he states that neither in our Constitution nor in our procedural laws there is a definition or a legal-positive construction of the content, contours and attributes of the presumption of innocence[107]. And the fact is that the few precepts that refer to this right are limited to stating it, without detailing its content[108].

[106] Court of Justice of the European Union (Grand Chamber), Case C-399-11, Melloni [2013] ECLI:EU:C:2013:107. In this well-known case, the CJEU came to point out that, being regulated in European legislation the cases in which it is possible to prosecute *in absentia*, it is not possible to subject the execution of a European Arrest warrant to additional conditions, established in national legislation.

[107] Guerrero Palomares (n 3) 166.

[108] In fact, references to the presumption of innocence in Spanish criminal procedural law are quite limited. In this sense, Art. 24.2 of the Spanish Constitution limits itself to enumerating several procedural rights, among which is the presumption of innocence, without specifying anything more about its content or its consequences, stating that "*all persons have the right of access to the ordinary judge predetermined by law; to the defense and assistance of a lawyer; to be informed of the charges brought against them; to a public*

To simply highlight some aspects that need to be reviewed in the light of the Directive (EU) 2016/343, the following should be pointed out. Firstly, the application of the right to the presumption of innocence throughout the case, as a rule of treatment (Art. 2 Directive (EU) 2016/343), which is not protected in our legal system either at the legal level nor at the jurisprudential level. Secondly, the provisions relating to the so-called "extraprocedural dimension" of the right to the presumption of innocence (Arts. 4 and 5 Directive (EU) 2016/343), which are not reflected either in the Criminal Procedural Act nor in other national rules. Thirdly, the incorporation of the principle of *in dubio pro reo* as part of the content of the right to the presumption of innocence (Art. 6.2 Directive (EU) 2016/343), which clashes with the current and reiterated doctrine of the Spanish Supreme Court on the matter which will be discussed in the following section. And, finally, the treatment of the right to silence, whose exercise, according to the Directive (EU) 2016/343, may not be used against the accused (Art. 7.5 Directive (EU) 2016/343), which could collide with the doctrine of the Supreme Court according to which, in the existence of incriminating evidence that requires an explanation from the accused, his/her silence serves to strengthen or shore up such evidence.

Thus, in the first place, the presumption of innocence as a rule of treatment, applicable, therefore, to all phases of criminal proceedings, from the moment the individual becomes a suspect or accused, is not sufficiently guaranteed in our legal system, which tends to link the protection of this right to the practice of the evidence, its sufficiency and the reasonableness of the sentence when declaring certain facts proven, limiting, therefore, its scope of application to the moment of the oral trial, the evaluation of the evidence and the passing of the sentence. In this sense, as GUERRERO PALOMARES points out, the lack of express normative reflection, together with the lack of jurisprudential concretion in this regard, fuels the arbitrariness in the application of the fundamental right to the phases prior to the oral trial[109].

Regarding the so-called extra-procedural dimension of the presumption of innocence, it is clear that the Directive (EU) 2016/343 has assumed part of the case law of the European Court of Human Rights and has codified it in its Arts. 4 and 5, aimed at prohibiting public authorities, including judicial authorities in their interim decisions, to make statements referring to the suspect or accused as guilty, as well as to prevent such defendants from being presented to the public as guilty through the application of physical restraints, such as handcuffs, glass booths, cages or

trial without undue delays and with full guarantees; to the use of evidence appropriate to their defense; to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent"). For its part, Art. 846 bis c) of the Criminal Procedural Act establishes that the appeal may be based on any of the following grounds (...): "*e) That the right to the presumption of innocence has been violated because, in view of the evidence presented at the trial, the sentence imposed lacks any reasonable basis*".

[109] Guerrero Palomares (n 3) 170.

shackles, except when the use of such means is necessary for security reasons (Recital 20 Directive (EU) 2016/343). In Spain, however, there is no legal rule regulating public references to the guilt of the accused person by authorities or public officials. Nor is there any regulation that limits the media's treatment of certain criminal cases, especially those with a high media profile, or that determines to what extent, how or by whom the media should be informed of the proceedings *sub iudice*[110]. In addition, the sanctions established for disclosing secret or confidential data of an ongoing judicial investigation (Art. 301 Criminal Procedural Act[111]) do not make any reference to the presumption of innocence, but rather serve other purposes, such as guaranteeing the success of the investigation or the privacy of the persons involved in the process, among others.

Likewise, there is a lack of legal provisions regulating the public exhibition of detainees. In this regard, the way in which suspects or accused persons are usually presented to the public, often appearing handcuffed and/or covering their faces with their hands or with certain objects is not respectful of the Directive (UE) 2016/343[112]. The problem lies, surely, not so much in what the law indicates, but in the usual police practices. Thus, although the law does not regulate the issue in detail, it states that [t]he arrest and provisional detention must be carried out in the manner that least harms the person, reputation and assets of the detainee or prisoner (Art. 520.1 Criminal Procedural Act). This precept is surely insufficient, especially because of its safeguarding orientation towards other legal rights –dignity, honor, property- which have nothing to do with the presumption of innocence. However, interpreted in accordance with the Directive (UE) 2016/343, it could serve to banish certain practices that do not respect the right to the presumption of innocence. Equally relevant on this point could be the provision of the Criminal Procedural Act, according to which [n]o extraordinary security measure shall be taken against the detainee or

[110] As García Molina argues (n 3) 3, although the important thing is that the information respects certain limits, and not so much who provides it to the media, this is not a minor issue, since whoever provides this information is who, in general, should assess the concurrence or not of the aforementioned limits. In this sense, the author proposes that the police be prohibited from making communications to the media that had not been previously authorized by the Investigating Judge, as responsible for the investigation.

[111] According to this precept: "*[t]he investigative proceedings shall be reserved and shall not be made public until the oral trial is opened, with the exceptions determined in this Law. The lawyer or attorney of any of the parties who unduly discloses the contents of the investigative proceedings shall be liable to a fine of 500 to 10,000 euros. The same fine shall be imposed on any other person who, not being a public official, commits the same offence. The public official, in the case of the preceding paragraphs, shall incur the liability that the Criminal Code indicates*".

[112] And this, despite the fact that the Spanish Attorney General's Office in the Instruction 3/2009, of December 23, on the control of the manner in which the detention is to be carried out, pp. 11-13, indicates that both the detention and the transfer must be carried out in such a way as to guarantee respect for the dignity of the detainee, adopting the appropriate precautions to protect the persons transferred from the curiosity of the public and from any type of publicity, as well as avoiding, as far as possible, that they appear handcuffed or shackled in front of photographers and television cameras.

prisoner except in the case of disobedience, violence or rebellion, or when s/he has attempted or made preparations to escape. In any case, a more precise legal provision on the use of handcuffs or other means of physical coercion would be desirable[113].

Another nuclear issue of Directive 2016/343/EU, which certainly Spanish legislation does not develop, is the interrelation between the fundamental right to the presumption of innocence and the principle *in dubio pro reo*. To analyze this issue, given the lack of reflection at the legislative level, we must necessarily turn to the case law of the Courts (see below the section devoted to case-law).

Regarding the right not to incriminate oneself, Spanish legislation recognizes this guarantee in the abstract level, both in the Constitution as a fundamental right[114], and in the Criminal Procedural Act when regulating the rights of the defendant[115] and the detainee[116]. However, its content and its applicable consequences are not specified at the legislative level, something that has been developed at the jurisprudential level (see below the section devoted to case-law).

[113] As indicated by García Molina (n 3) 4, another obstacle to the effective realization of the rights of detainees in terms of avoiding their public exposure derives from the fact that police headquarters do not have an independent entrance hidden from the eyes of the public for police vans, an architectural adaptation that would require a specific budget allocation.

[114] "(…) all persons have the right of access to the ordinary judge predetermined by law; to the defence and assistance of a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; *to not make selfincriminating statements; to not declare themselves guilty; and to be presumed innocent*. The law shall determine the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding alleged criminal offences" (italics are mine)

[115] Any person to whom a punishable act is attributed may exercise the right of defense, intervening in the proceedings, as soon as s/he is informed of its existence, has been subject to arrest or any other precautionary measure or has been ordered to be prosecuted, for which purpose s/he shall be informed, without undue delay, of the following rights: (...) g) Right to remain silent and not to make a statement if he does not wish to do so, and not to answer any or some of the questions put to him; h) Right not to testify against himself and not to confess guilt (Art. 118. 1 Criminal Procedural Act).

[116] Every detained or imprisoned person shall be informed in writing, in simple and accessible language, in a language s/he understands and immediately, of the facts attributed to him/her and the reasons for his/her deprivation of liberty, as well as of his/her rights and especially of the following: a) The right to remain silent, not to declare if he does not wish to, not to answer any or some of the questions put to him, or to state that he will only declare before the judge. b) The right not to testify against himself and not to confess guilt (…) (Art. 520.2 Criminal Procedure Law).

10.2 Case-law

As mentioned above, one nuclear issue of Directive (EU) 2016/343, which Spanish legislation does not regulate, is the interrelation between the fundamental right to the presumption of innocence and the principle *in dubio pro reo*. In the absence of express reference to the principle of *in dubio pro reo* in Spanish legislation, it is necessary to study the jurisprudential development of this principle. For this purpose, it is relevant the Judgment of the Supreme Court No. 549/2018, of November 13, which collects a consolidated jurisprudence of the Supreme Court according to which the principle *in dubio pro reo* is not part of the right to the presumption of innocence. In fact, this decision alludes to Supreme Court case law, reiterated since the year 1983, then followed by many others judgments, according to which the *in dubio pro reo* principle is a general legal principle, which involves a subjective problem of evaluation of evidence and which, therefore, cannot be subject to appeal or *amparo remedy*, as it is a matter of subjective assessment[117], in contrast to the presumption of innocence, which is subject to review, as it is based on objective parameters[118]. This same distinction is included in the Judgment of the Provincial Court of Cadiz, No. 369/2019, of 25 November, in which it is emphasized that, despite the fact that the *in dubio pro reo* principle provided for in Directive (UE) 2016/343 is not expressly included in the Spanish legal system as in other national legal systems, in Spain is considered to be a rule of judicial decision (not an evidentiary assessment rule, since it is only applied once the evidence has been assessed). This sentencing rule can be deduced from Art. 741 Criminal Procedural Act, which includes the principle of rational assessment of evidence, as well as the principle of guilt, which requires that the accused must appear guilty with such a degree of probability that no reasonable person, considering all the evidence adduced, could believe in his or her innocence. In the case at hand, given that the victim's version of the crime of sexual abuse is contradicted by the witnesses,

[117] According to consolidate Spanish case-law, the *in dubio pro reo* principle can be challenged in cassation, but only when its normative aspect is violated, that is, to the extent that it is proven that the Court has convicted despite the doubt (Judgments of the Supreme Court No. 70/1998, of January 26 and No. 699/2000, of April 12)

[118] For its part, the Judgment of the Supreme Court No. 593/2018, of 27 November, states that the "*in dubio pro reo*" principle is a maxim addressed to the decision-making body to temper the assessment of the evidence to criteria favorable to the accused when its content casts some doubt on its inculpatory potential. The application of the *in dubio pro reo* principle presupposes, therefore, the existence of valid evidentiary activity with an incriminating sign, but whose consistency offers loopholes that must be decided in favor of the accused. The *in dubio pro reo* principle is different from the presumption of innocence. The former is addressed to the judge as a rule of interpretation to establish that in those cases in which, in spite of having carried out a normal evidentiary activity, there are doubts in the mind of the judge, he should incline in favor of the thesis that benefits the accused. The presumption of innocence, on the other hand, obliges to acquit the accused when there is no valid and/or sufficient evidence to convict.

the Court doubts that things happened as the victim tells and, therefore, is obliged to acquit the accused[119].

According to GUERRERO PALOMARES, the jurisprudential doctrine that separates the *in dubio pro reo* principle from the presumption of innocence must be reviewed in light of the Directive (UE) 2016/343, especially insofar as the separation between them limits the challenge of violations of the referred principle, being that Directive (UE) 2016/343 indicates that any violation of the rights set forth therein must enjoy effective remedies (Art. 10.1)[120].

However, the truth is that, having analyzed in depth the Supreme Court's conception of the presumption of innocence, in practice it can be seen that the principle of *in dubio pro reo* is not alien to the jurisdictional control deployed in cassation in relation to the fundamental right of the presumption of innocence. When examining a possible violation of the right to the presumption of innocence, the Supreme Court does not limit itself to determining whether there was evidence for the conviction, whether evidence was lawful and whether it was given in the oral trial with the due guarantees of orality, immediacy, publicity and contradiction, but also examines the sufficiency of that evidence and the reasonableness of the argumentation of the Court of first instance when linking the evidence given in the trial with the facts declared proven in the sentence[121]. Well, this examination of sufficiency and reasonableness, in short, constitutes a sort of objectification of the control around the possible existence of doubts about guilt, which may be manifested in insufficient argumentation or in an incoherent connection between the evidence and the facts, as well as in the consideration that, in view of the insufficient evidentiary material, the trial judge could not acquire certainty about the guilt of the accused.

On the other hand, this initial separation made by the Supreme Court between the presumption of innocence, understood as an objectifiable and controllable element on appeal, and the principle of

[119] Provincial High Court of Cádiz, Judgment No. 369/2019, of November 25 (ARP\2020\546; ECLI:ES: APCA:2019:2013)

[120] Guerrero Palomares (n 3) 178.

[121] See, for all, the Judgment of the Supreme Court No. 262/2017, of April 7, in which the Supreme Court, reiterating the consolidated doctrine in this matter, distinguishes between, on the one hand, "*the judgment on the evidence*" -i.e., whether there was evidence for the prosecution, understanding as such that obtained with respect to the constitutionally required canon of legality; introduced in the plenary in accordance with the canon of ordinary legality and subject to the principles of contradiction, immediacy, publicity and equality-; and on the other hand, "*the judgment on sufficiency*", that is, if the existence of evidence for the prosecution has been established, it is of such consistency that it has the potential to cause the presumption of innocence to lapse; and, thirdly, "*the judgment on the reasoning and its reasonableness*" - that is, if the Court of first instance complied with the duty to state reasons and sufficient explanation to justify the effective undermining of the presumption of innocence-.

in dubio pro reo, as a subjective matter not subject to review because it belongs to the intimate sphere of judicial conviction, is not so evident in other judicial decisions. Thus, the Supreme Court, in the Judgment No. 24/2015, of January 21, establishes that the principle "*in dubio pro reo*" is fully integrated in the constitutional content of the right to the presumption of innocence, in such a way that, whenever there is objective doubt as to guilt, the constitutional presumption of innocence, with the subsequent acquittal of the accused, is imposed. In this sense, according to the Supreme Court, the presumption of innocence would require, as a premise in the reasoning, the innocence of the accused, while the "*in dubio principle*", on the other hand, would not require to doubt, but rather to acquit when, after evaluating all the evidence, doubts about guilt persist. Therefore, if despite the doubts, the defendant is convicted, the decision must be annulled.

However, regardless of whether or not the case law of the Spanish Supreme Court is considered to be in line with the provisions of Directive (UE) 2016/343, what is clear is that this confusing, and sometimes diffuse, jurisprudential position lacks the potential to generate confidence among the Member States, and that legislative intervention to ensure the unity of criteria for its application is highly desirable.

In relation to the right to silence, which according to Art. 7.5 of Directive (UE) 2016/343shall not be used against the accused, despite being enunciated in Art. 24.2 Spanish Constitution, as well as in Arts. 118 and 520 of the Criminal Procedural Act, there are also certain interpretations that blur the content of the right, insofar as they allow certain negative consequences of silence to be extracted. Thus, although silence evidently has no value as evidence against the accused, it is used to reinforce the existing evidence against the accused, understanding which has a doubtful place in the letter of Directive (UE) 2016/343.

On this point, it is appropriate to bring up certain decisions of the Spanish Supreme Court according to which: “Silence is in fact the absence of an explanation that, precisely because it does not exist, in no way affects the rationality of the inference obtained from the evidence; a rationality in the deduction that, if it flows from the evidence itself, and runs through the rules of logic and experience, the mere silence of the accused by itself does not destroy or mitigate. One is not convicted for not explaining. It is condemned for sufficient evidence to rationally construct a deduction, that is, for the existence of circumstantial evidence, which as such does not find in turn in the silence of the accused other evidence that neutralizes its demonstrative capacity”[122]. In this

[122] In this sense, see Supreme Court, Judgment No. 450/2007, of May 30, 2007, 16th Legal Basis. Also the more recent Supreme Court, Judgment No. 474/2016, of June 2, in which the Court argues the following: it is not that the silence has operated as an evidentiary element against the accused, but rather that we are dealing with a case in which the important body of incriminating evidence that integrates the prosecution's evidence, in itself sufficient to overturn the presumption of innocence, is endorsed by the lack of exculpatory arguments of the accused in the oral hearing of the trial.

regard, the Spanish Supreme Court seems to follow the controversial interpretative line of the European Court of Human Rights, according to which taking into consideration the passive attitude of the defendant in situations that require an explanation on his/her part in order to assess the persuasive force of the incriminating evidence is compatible with the right to remain silent [123].

More recently, and with express mentions of Directive (UE) 2016/343, the Supreme Court[124] stated that silence is in no way a sign of guilt. A conviction can never be based on the silence of the accused. However, in certain contexts and conditions, silence is not something totally neutral in an evidentiary assessment, just as other attitudes or procedural strategies of the accused or other parties to the procedure are not neutral (but may be part of the factual motivation). For example, the fact that the accused refuses to give a sample of his/her handwriting when handwriting evidence could be irrefutable proof of his/her innocence; the refusal to submit to biological tests in a proceeding to determine paternity when many indications point to such paternity; the negligence of a prosecution in not bringing to testify as witnesses those who, according to the prosecution, witnessed the facts. They are not evidence *stricto sensu*; but they are valuable elements that help, sometimes decisively, to reach a conclusion from the evidentiary picture. According to the Spanish Supreme Court, it is not simply a matter of burden of proof (if that concept should not be definitively abandoned, especially in the criminal field); but rather that in the procedural attitudes of each party provide elements that are sometimes useful or revealing.

In the Supreme Court's opinion (same Judgment No. 298/2020), despite the fact that silence is not a sign of guilt in any way, as occurs with silence in social life, in language, in conversation, in a meeting or dialogue or discussion, the action to remain silent sometimes speaks and communicates and carries messages depending on the context. We cannot blind this source of conviction to the criminal Courts: if it were formally prohibited, wanting to abolish what is a maxim of experience that handled with prudence and caution can provide good reasons, it would appear camouflaged and hypocritical and, therefore, without the possibility of control. Indeed, the fact that the Court of first instance had honestly expressed that in its conviction has weighed the initial silence of the accused, is what allows the accused to fight it with arguments.

Therefore, according to the Spanish Supreme Court, silence is not always neutral from the point of view of the evidentiary evaluation, although obviously, if there is no incriminating evidence *stricto sensu* and can never be the basis for a conviction. The prevailing thesis in Spanish case-law is based on what is known as the Murray doctrine: silence is a powerful counter-indictment when the prosecution evidence that is presented calls for an explanation that only the accused could give, and the accused, being able to do so, refuses to provide it (*explanation test*). But if

[123] European Court on Human Rights, Case John Murray v. United Kingdom [1996], Application No. 18731/91
[124] Supreme Court, Judgment No. 298/2020, of 11 June (ECLI:ES:TS:2020:1678)

there are no such circumstances or if there are other explanations for the silence (the prudent advice of counsel, for example) no negative consequences can be drawn from it[125].

In short, mere silence is no more than the exercise of a fundamental procedural right; it is never an indication of guilt. But it can have significance when silence also has a positive aspect: it implies refusal to offer an explanation that, if it existed, only the accused can offer. From this attitude of the defendant, it is possible to legitimately draw the conclusions that the explanation is not offered, because it does not exist. But, at the same time, it would be inappropriate to consider that the acceptance of the right not to testify is a sign that something unconfessable is hidden, and therefore could generate legitimate suspicions. This conception must be categorically rejected[126].

However, once there is "sufficient" prosecution evidence to override the presumption of innocence (as occurs in this case), it is when the lack of explanations by the accused can be used as a further argument. In this specific case, in the face of the solid evidence explained by the Court of first instance to justify a coordinated plan to traffic drugs in which the appellant appears as actively involved, there could be some version adduced by the defendant that breaks the coherence of the deduction and allows the construction of an equally possible alternative hypothesis. If it is not provided, it is a non-reproachable maxim of experience to deduce that, in addition to not being imaginable, it does not exist. If such a reasonable exculpatory explanation existed, the accused would not hesitate to expose it. This is not condemning the exercise of a constitutional right. It is resorting to an epistemological rule based on common sense experiences[127].

The problem, at this point, is, therefore, the jurisprudential interpretation together with the lack of legal concreteness of the consequences of the exercise of the right to silence. Precisely, to counteract this jurisprudential line, a legal provision analogous to Art. 7.3 of Directive (UE) 2016/343, which helps to define the content of the right not to testify, by excluding from its scope of protection the obtaining of evidence of existence independent of the will of the suspects - in line with the case law of the European Court of Human Rights[128]- should be introduced into the

[125] Supreme Court, Judgment No. 298/2020, of 11 June (RJ20/2020; ECLI:ES:TS:2020:1678)

[126] Supreme Court, Judgment No. 298/2020, of 11 June (RJ20/2020; ECLI:ES:TS:2020:1678)

[127] Supreme Court, Judgment No. 298/2020, of 11 June (RJ20/2020; ECLI:ES:TS:2020:1678)

[128] In this regard, the ECtHR specifies that, for the right against self-incrimination to be effective, the investigative coercive measures must be aimed at obtaining documents or sources of evidence whose existence depends on the will of the person under investigation. Therefore, those documents that have an existence independent of the will of the subject under investigation, or that exist by will of the law, would be outside the scope of protection of the right in question (Judgments of the European Court of Justice of 17 December 1996. Case Saunders v. United Kingdom, of 11 July 2006; Case Jallohc v. Germany, of 29 June 2007; Case O'Halorand and Francis v. United Kingdom). In a similar vein, Spanish Constitutional Court excludes from the scope of protection of the right not to self-incriminate the documentation

domestic legal system to generate legal certainty and enhance mutual trust between the Member States of the European Union.

Finally, certain police and prosecutorial practices, such as keeping defendants handcuffed as they enter and leave the courthouse or even during court hearings, are also open to criticism. On this point, there have been some rulings that have criticized such practices, despite the lack of legal regulation at the national level. For instance, the Provincial High Court of Barcelona[129] indicates that the fact of keeping the investigated minor handcuffed during the court hearing in which the adoption of precautionary measures must be decided is a practice incompatible with the Convention on the Rights of the Child (1989), which considers a "child" to be any human being under 18 years of age, therefore, fully applicable to the jurisdiction of minors, as well as contrary to the dignified treatment that the minor detainee deserves during the appearance in order to decide on the precautionary measures in question. Likewise, this ruling refers to the need to respect the presumption of innocence of the minor under investigation. In this regard, express reference is made to Directive (UE) 2016/343, whose Art. 5 obliges Member States to take appropriate measures to ensure that suspects and accused persons are not presented as guilty before the courts or the public, through the use of means of physical coercion. The Provincial High Court of Barcelona, in the aforementioned judgment, points out that Directive (UE) 2016/343 applies to criminal proceedings in general, so that its application to juvenile defendants is obvious and constitutes an unavoidable requirement.

requirements, referring to materials whose existence is mandatory *ex lege* and, therefore, independent of the will of the suspect or investigated person (10th Legal Basis of the Judgment of the Constitutional Court No. 76/1990, of April 20, and 6th Legal Basis of the Judgment of the Constitutional Court No. 161/1997, of October 2)

[129] Judgment No. 151/2020, of February 12 (JUR\2020126465)

11 Concluding remarks

Although the deadline for the transposition of the six Directives has expired, so far only four of the six Directives have been implemented. From the supranational perspective, it should be noted that, when the Directives are not sufficiently precise when configuring the procedural legal framework for the application of procedural rights, and are limited, on the contrary, to taking up general principles (e.g. *in dubio pro reo*) or even issues that are not clearly procedural in nature (e.g. extraprocedural dimension of the presumption of innocence), States may tend not to transpose them, considering that their legal systems already sufficiently protect such rights and that, therefore, there is no need for express legislative adaptation. This may lead to the creation (or maintenance) of differences in the level of national enforcement of the various procedural rights, and may thus have a negative impact on the ultimate objective of harmonization in this area, which is to strengthen mutual trust between Member States as a basis for the mutual recognition of judicial decisions. This could explain - but not justify - the Spanish legislator's failure to transpose the Directive on the presumption of innocence. However, it does not explain the lack of transposition of the Directive on juvenile defendants, which is highly specific and detailed in its regulation.

The lack of specificity in the Directives, especially the one on the presumption of innocence, creates the risk of over-reliance on judicial action as a way of bringing domestic law into line with European regulations, rather than making an *ad hoc* legislative amendment. While it is true that Courts have the obligation to interpret domestic legislation in accordance with the wording and purpose of the Directives, it is also true that case-law, by its very nature, is casuistic and therefore mutable in view of the circumstances of the case. Therefore, it does not have the same potential to generate confidence as legislation, general and abstract by nature, and of mandatory observance for all public authorities, including, obviously, the Judiciary. This is precisely why the Directives provide a plus in the generation of trust, which neither national nor supranational case law - especially that emanating from the ECtHR and the CJEU - are capable of promoting.

The first Directive to be incorporated into the Spanish legal system was that relating to the right to translation and interpretation, which was transposed, albeit with some delays and with important deficiencies, especially affecting quality guarantees for translation and interpretation services. These deficiencies are particularly evident in the absence of regulated training for acting

as a translator or interpreter in judicial proceedings, in the lack of a public registry of translators and interpreters with adequate training and in the legal possibility of appointing a so-called "interim interpreter", consisting of authorizing as interpreter any person who knows the language in question (Arts. 142 and 143 of the Civil Procedural Act, applicable to criminal proceedings not provided for in the Criminal Procedural Act). To this must be added the difficulty inherent in the interpretation of oral proceedings of detecting in real time the deficiencies and errors of the translation, which is aggravated by the legal uncertainty as to the manner and scope of the jurisdictional control of the translation and interpretation[130]. On this point the law only states that the judge, when he/she appreciates that the translation or interpretation does not offer sufficient guarantees of accuracy, may order the necessary verifications to be carried out and, if necessary, order the appointment of a new translator or interpreter (Art. 124.3 Criminal Procedural Act). Judicial control is also made difficult by the lack of technical means for simultaneous translation and recording, given that in practice, the most common technique is “simultaneous whispered interpreting” (*chuchotage*) (which is used to interpret what the other speakers intervening are saying to the foreign interlocutor through whispered translation in his/her ear, when this person is not intervening directly in the communication exchange (for example, during the intervention of witnesses or experts).

The transposition of the Directive on translation and interpretation meant a change of paradigm, in such a way that the intervention of translators and interpreters in criminal proceedings was no longer understood as a form of assistance to the judge, but rather as a fundamental right of the detainee or defendant, linked to the effectiveness of the right of defense. However, the lax manner in which the Courts allow the translation of essential documents to be replaced by the assistance of an interpreter is worthy of criticism, confusing both rights - translation and interpretation - and preventing the right to translation from being consolidated as an autonomous right. The lack of resources, which also causes problems related to the quality of services or to the absence of technical means to produce simultaneous translations that can be recorded on audiovisual media, is probably behind this lax interpretation of the right to translation.

The scientific doctrine proposes, as a good practice that will allow the Court to effectively control the quality of the interpretation, that the oral proceedings be recorded in audiovisual format, including the statements during the pre-trial phase, which are often introduced in the oral trial in case of contradiction between what was declared in one and the other procedural moment by the defendant or, even, in case of silence of the accused in the oral trial having previously declared

[130] Jaime Campaner Muñoz; Nuria Hernández Cebrián, ‘Guía de buenas prácticas relativas al derecho a la traducción y a la interpretación de investigados y acusados’, in Coral Arangüena Fanego, Coral; Montserrat De Hoyos Sancho (edts.); Alejandro Hernández López (coord.) *Garantías procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España* (Aranzadi, 2020), 15, 16-17.

before the Examining Judge[131]. In this regard, it may also be interesting to refer to the good practice guide of the Spanish Professional Association of Court and sworn interpreters and translators[132], which establishes certain deontological ethical principles of a court or police interpreters (such as accuracy and integrity of texts or oral communication[133]; impartiality and absence of conflicts of interest[134]; confidentiality[135]; professional conduct[136]; professional limitations[137]) and also indicates that in order to prepare his or her intervention, the interpreter must have access to all relevant documentation of the proceedings sufficiently in advance, which in criminal proceedings means having access to the complaint, charge or indictment, as well as to any expert reports or prior statements that may exist.

Regarding the technique to be used for the interpretation of oral proceedings, according to specialized doctrine, the combination of simultaneous interpretation (whispered, in the absence of technical means, such as fixed or mobile translation booths) with consecutive translation aloud during the defendant's statement is the only way to ensure the full participation of the defendant in the oral trial, since it allows him/her to take knowledge of what was said by all the intervening parties in the process[138].

Another best practice pointed out by the scientific doctrine has to do with how legal operators should act with interpreters and translators. In this regard, specific training for judges and prosecutors is lacking. It is important that in the translation of documents and the substitution of such translation by an oral summary, the legal operator -judge or prosecutor- and not the interpreter or translator, determines the specific content to be translated. As for the interpreter's performance, due to the high level of concentration required in simultaneous translation, it is very important that the legal operators ask clear and simple questions, and also that they do not interrupt the

[131] Ibid, 21-22.

[132] Available at http://www.aptij.es/img/doc/APTiJ_BestPracticeGuide.pdf

[133] The interpreter or translator will provide a true and complete translation, as far as is possible, without altering, omitting or adding anything to what is declared or written.

[134] The interpreter or translator will work impartially and independently. This independence will be maintained in the face of any kind of outside interference, demands or interests that could undermine their work.

[135] The interpreter or translator will not disclose confidential or privileged information of which they have become aware while providing their professional services or while preparing them.

[136] The interpreter or translator will act in good faith, with loyalty and respect. They will act in a manner consistent with the dignity of the court or institution in which they are providing their services.

[137] The interpreter or translator will only interpret and translate. They will not provide legal advice, express personal opinions to those for whom they are interpreting or become involved in activities other than those pertaining specifically to their work

[138] Campaner Muñoz; Hernández Cebrián (n 130) 25.

interpreter, respecting his/her time and allowing him/her to rest when needed[139]. For his/her part, the translator should consult with the legal operator about any doubts raised by the text, as well as comply with the stipulated deadlines for carrying out his/her translation work[140].

The Directive on the right to information in criminal proceedings was also duly transposed between 2015 and 2018, which meant the adaptation of national legislation to the Directive and the revision of the regime for incommunicado detainees. With respect to this Directive, the most innovative aspect of the transposition has to do with the recognition of the right of access to the materials of the case, an aspect on which the Spanish Constitutional Court and the State Attorney General's Office pronounced themselves extensively when determining both its content and the details relating to the form and time in which the right can be exercised. Likewise, the transposition served to complete the content of the information that must be provided to the accused or detainee both in terms of the rights to which s/he is entitled and the facts with which s/he is charged, or which have led to his/her detention, always with the aim of guaranteeing his/her right of defense and his/her possibilities of defending himself/herself or challenging the legality of his/her deprivation of liberty. In particular, it has served to establish the form and moment in which such information must be provided to the interested party.

Most of the good practices that scientific doctrine provides to enforce the right to information has to do with the fact that it is provided in an understandable way, adapted to the needs of the interested party, especially when it is about a vulnerable subject (due to lack of understanding of the language, age, mental or intellectual illness or physical disability which may affect the ability to understand the information provided). Depending on the circumstances of the case, and always in order for the information to be correctly assimilated by its recipient, it is proposed to go to pictograms when necessary, serigraph the basic information on the walls of the police station and allow the detainee to retain the information by written as long as there is no risk of self-harm with the document in question[141]. All this always accompanied by an oral explanation, detailed and adapted to the circumstances of the interested party, regarding the information to be provided[142]. Another important good practice has to do with the audiovisual recording of the provision of the information. Likewise, before the first appearance before the Examining Judge, it is recommended

[139] Ibid, 30 and 33.
[140] Ibid, 28-29.
[141] Coral Arangüena Fanego; Carmen Rodríguez Medel-Nieto, 'Directiva 2012/13/UE, relativa al derecho a la información en los procesos penales. Buenas prácticas para su aplicación', in Coral Arangüena Fanego, Coral; Montserrat De Hoyos Sancho (edts.); Alejandro Hernández López (coord.) *Garantías procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España* (Aranzadi, 2020), 35, 44.
[142] Ibid, 43.

that this judicial authority ask the accused if s/he has been informed of his/her rights and if s/he has understood them, making sure that this is the case[143].

In the same period, between years 2015 and 2018, the Directives on the right of access to a lawyer and legal aid were transposed, which required some adaptation at the legislative level, despite the fact that Spain started from a high level of protection with respect to the right to legal assistance, configured as mandatory, with few exceptions, and free of charge for all those who accredited insufficient resources to litigate.

Regarding legal assistance to the detainee, although the law indicates that it should be provided immediately, in practice, the appointment of a lawyer often does not take place until the moment of interrogation. In this sense, it would be a better practice to immediately ask the person deprived of liberty if s/he will appoint his/her own lawyer or if s/he wishes to have one assigned to him/her from the public defender's office [144]. This delay in appointing a lawyer is due to the fact that the specific role of legal assistance in the prevention of ill-treatment or police malpractice is often forgotten, being understood primarily as a guarantee of a fair trial.

It is also very relevant how the accused is informed of the possibility of waiving counsel, when possible. In this area, the need to inform the defendant of the specific consequences of this waiver (for example, the impossibility of later claiming the nullity of his statements due to the absence of counsel) is considered good practice[145]. In addition, the waiver should be required for any act requiring the intervention of a lawyer, without a generic waiver being valid, and should ideally be recorded in audiovisual form[146].

It would also be a good practice, which still needs to be implemented in Spain, to require specific training for lawyers in criminal justice, especially for serious criminal offenses or for complex and rapid processes such as those of the European Arrest Warrant. This need for specialized and continuous training is even more relevant in cases in which free justice prevents the accused from choosing his/her own lawyer, being assigned one from the public defender's office, as happens in Spain, who should have adequate and sufficient training for the handling of the case[147].

[143] Ibid, p. 42.
[144] Jaime Campaner Muñoz; Vania Costa Ramos; Begoña Vidal Fernández, 'Asistencia letrada y asistencia jurídica gratuita (Directivas 2013/48 y 2016/1919)', in Coral Arangüena Fanego, Coral; Montserrat De Hoyos Sancho (edts.); Alejandro Hernández López (coord.) *Garantías procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España* (Aranzadi, 2020), 69, 75.
[145] Ibid, 76.
[146] Ibid, p. 77.
[147] Ibid, 79 and 82.

The Directive on the presumption of innocence has not been transposed, despite the fact that its proper incorporation into Spanish law should entail the specification of certain fundamental rights that our domestic legislation only provides for in a generic and abstract manner. Moreover, there are no plans to implement this Directive, even though legal scholars consider certain legal adaptations necessary (e.g. the use of handcuffs or the scope of application of the right not to testify with regard to documentary requirements). In addition, its complete assumption should surely also entail the review of the jurisprudence of the Spanish Courts in relation to aspects such as the separation between the fundamental right to the presumption of innocence and the principle "*in dubio pro reo*" or the interpretation of the silence of the defendants.

There is no clear explanation as to why this Directive has not been transposed, although it is possible that the fact that it incorporates general principles and fundamental rights that lack a legal definition in our legal system, together with questions that are not strictly procedural, such as those relating to public statements on the guilt of the accused, has discouraged the legislator from incorporating its provisions into our domestic legislation.

Some good practices proposed by Spanish doctrine to improve the implementation of this Directive would be the following: 1) regarding the principle *in dubio pro reo*, as the basic content of the right to the presumption of innocence, its improper application should be able to be reviewed on appeal. Furthermore, it should also apply to extenuating and exonerating circumstances[148]; 2) Regarding the right to silence, the explanation test applied by the Spanish Courts should be abandoned since, with this jurisprudential interplay, there is a risk that silence will be used de facto to give the prosecution test a solidity which it initially lacked[149].

Regarding the references of public authorities to suspects and accused, it should be noted that the Spanish Courts have the so-called "Protocol of communication with Justice" of the General Council of the Judiciary[150] in which communications with the press are carried out through the Communication Offices of the Superior High Courts of Justice (*Tribunales Superiores de Justicia*), the National High Court (*Audiencia Nacional*) and the Supreme Court (*Tribunal Supremo*). The Protocol tries to reconcile the transparency and publicity of the processes with the rights of the parties, indicating that public manifestations by the judicial authorities must always

[148] Montserrat De Hoyos Sancho; Salvador Guerrero Palomares, 'Directiva 2016/343, de 9 de marzo, por la que se refuerzan en el proceso penal determinados aspectos de la presunción de inocencia', in Coral Arangüena Fanego, Coral; Montserrat De Hoyos Sancho (edts.); Alejandro Hernández López (coord.) *Garantías procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España* (Aranzadi, 2020), 93, 99.

[149] Ibid, 100.

[150] https: //www.poderjudicial.es/cgpj/es/Poder-Judicial/Trdamientos-Superiores-de-Justicia/TSJ-Aragon/Oficina-de-Comunicacion/Protocolo-de- Communication-of-Justice

be carried out with due prudence and moderation, so that appearance of impartiality or the image of justice is not negatively affected. Likewise, there are indications of good practices for communication with the press by the Public Prosecutor's Office (Instruction 3/2005, of the State Attorney General's Office on the relations of the Public Prosecutor's Office with the media[151]) as well as directed to the National Police Force (Internal circular 1/2015, of March 16, on competencies in matters of the press, relations with the media and social networks).

The Directive on juvenile defendants has not been transposed either, despite being very detailed and specific. This Directive has gone unnoticed, not only by the legislator, but also by the Courts. The adaptation of our domestic legal system to the European regulation should involve the incorporation of certain legal adjustments in the Organic Law on the criminal liability of minors, which, without being directly contrary to the provisions of the Directive, lacks sufficiently specific regulation in certain specific aspects that the European regulation does contain. In this sense, it would be necessary to regulate a specific procedure for the correct determination of the age of minors and to clearly establish the presumption of minority while doubts remain. It would also be necessary to review the Spanish regulation regarding the way in which the right to information of minors will be made effective. Likewise, it is necessary to determine legislatively how the adult other than the holder of parental responsibility who will accompany the minor will be designated, as well as to expand the information that must be provided to that adult; establish the need to update the individual evaluation throughout the procedure, as well as the periodic review of the custodial precautionary measures imposed on the minor.

Another gap in Spanish legislation has to do with the need to record police interrogations, an aspect that part of the doctrine considers unnecessary in the event that the minor is assisted by a lawyer, as will happen in most cases. On this aspect, the doctrine points out as good practices regulating in detail who will be present in the recording, the data that will be recorded (the privacy of the minor must be respected, avoiding his/her personal identification and the recording of his/her image), who should be the custodian of the recording, the destination that will be given and the deadline for its destruction, which should be a minimum once the process is finished[152].

[151] State Attorney General's Office, available at: https://www.boe.es/buscar/abrir_fiscalia.php?id=FIS-I-2005-00003.pdf. This instruction indicates that when the Prosecutors provide information they must always bear in mind that the right to the presumption of innocence not only guarantees the accused to be acquitted if his guilt is not duly proven before the court, but also to be treated as innocent and not as guilty as long as his guilt is not declared by the only one who can constitutionally do so. It is therefore necessary in this information during the processing of the case to highlight in any case that the accused or accused continues to enjoy the presumption of innocence.

[152] Francisco Javier Garrido Carrillo; Jorge Jiménez Martín, 'Guía de buenas prácticas en el tratamiento procesal de los menores infractores, Las garantías procesales de menores sospechosos o acusados en los procesos penales' in Coral Arangüena Fanego, Coral; Montserrat De Hoyos Sancho (edts.); Alejandro Hernández

Finally, it should be noted that the level of protection provided by our legal system in relation to certain rights, such as the right to legal assistance, legal aid or the right to be present at trial, are sometimes more demanding than those provided for in European regulations. For this reason, especially in view of the forthcoming approval of a new Criminal Procedural Act to replace the nineteenth-century Criminal Procedural Act[153], it is particularly important to bear in mind the risks of regression in order to try to prevent them. In this sense, despite the fact that all the Directives include non-regression clauses, there is a risk that the minimum standard of the Directives will be the one applied in future regulations, causing an erosion or reduction in the level of national guarantees. In this sense, the legislator must avoid mimetically importing European regulations, without adaptation or systematic analysis of their integration into the national legal system.

López (coord.) *Garantías procesales de investigados y acusados en procesos penales en la Unión Europea. Buenas prácticas en España* (Aranzadi, 2020), 111, 119.

[153] The preliminary draft of the new Criminal Procedural Act is available at: https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf