مشروع الوصول إلى العدالة والتمكين القانوني في الأردن
Access to Justice and Legal Empowerment in Jordan

التعاون الاسباني

Access to Justice and Procedural Guarantees

Presentations from the Seminars on Legal Aid for Judges and Prosecutors

Jordan 2022-2023

Abogacía Española
CONSEJO GENERAL

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Foreword

The Spanish Bar Council has been committed to improving the legal aid system in Jordan as a partner in the European project "Access to justice and legal empowerment in Jordan: towards an effective and sustainable legal aid system," co-funded by the European Union and AECID. As part of this effort, the Spanish Bar Council organized, in cooperation with the Ministry of Justice and the Judicial Council of Jordan, a series of specialized courses on legal aid for Jordanian judges and prosecutors.

Using a peer-to-peer approach and following an initial Training of Trainers course, a total of fourteen seminars were organized, and 280 judges and prosecutors were trained from all over Jordan. The courses were delivered by Jordanian judges and prosecutors in collaboration with Spanish experts, lawyers, and judges who provided an international perspective on a broad range of topics relevant to access to justice and procedural guarantees.

Following this excellent experience, we are now pleased to offer a collection of the Spanish experts' contributions in Arabic and English to the Jordanian authorities responsible for strengthening the rule of law and justice in Jordan, as well as to any other stakeholders interested in this topic.

We hope that this collection of contributions will serve as a useful resource for Jordan as it moves towards a more effective and sustainable legal aid system. We are grateful for the opportunity to contribute to this important project and look forward to continued collaboration with our Jordanian partners.

Victoria Ortega
President
Spanish Bar Council

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THEORY OF DUE PROCESS IN CONSTITUTIONS:

FUNDAMENTAL PROCEDURAL RIGHTS

Jose Antonio Morales Mateo
Magistrate

Summary

I. PROCEDURAL GUARANTEES

This can be understood as the totality of mechanisms foreseen in procedural laws whose purpose is to protect citizens' constitutional rights and to allow them to be effective. These guarantees must be contained in the Constitutions of the different countries.

Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 May 1950 sets out the following procedural safeguards common to all trials:

1. The right to an ordinary judge appointed by law. The legal rule of attribution for a judge to hear a specific case must be created beforehand and its composition must be governed by judicial impartiality and independence. In other words, "ad hoc" courts i.e. courts created specifically to judge a particular case, are prohibited.
2. The right to defence and legal assistance.
3. The right to a public trial in its twofold nature of subjective right for the citizen and duty for the judicial bodies, with the exceptions that we will see in due course.
4. The right to a trial without undue delays so that it is conducted within a reasonable period and with the guarantees necessary for the defence of the parties, taking into account the nature and circumstances of the dispute, the normal time frames for disputes of the same kind, the procedural conduct of the litigants, the interest of the plaintiff at stake, the conduct of the judicial bodies, the consequences of delay for the litigants and consideration of the means available.
5. Right to due process.
6. The right to use the relevant means of evidence, i.e. to propose the taking of evidence and to the taking of the relevant evidence.

We can quote other generic guarantees: the right to judicial protection (see effective judicial protection), the presumption of innocence, the right to defence and due process. And in turn, other specific guarantees are developed, namely: the natural judge, disclosure, or *res judicata.*

1. **Presumption of innocence:** the supreme guarantee of the accused and one of the pillars of the adversarial criminal process. It means that everyone is presumed innocent until proven guilty at trial, without having to prove his/her innocence. This obligation is incumbent on the public or private prosecutor.
2. **Right of defence:** the right of citizens to have the time and means necessary to exercise their defence in all proceedings in which they are involved, that is, the possibility of asserting their positions and objecting to the arguments of the opposing party. Related to the right of defence may include the assistance of a translator or interpreter; information about the act with which the accused is charged; communication between the accused and the lawyer; preparation of the defence; presentation of evidence and the use of resources. Many of these are discussed below.
3. **Right to due process:** this is shaped by the principles and minimum procedural requirements that all jurisdictional proceedings must meet in order to ensure the certainty and legitimacy of the outcome for the defendant. It would include rights such as: the right to a natural judge predetermined by law, as mentioned above; the right to be heard; the right to a reasonable length of time for the proceedings; the right to public disclosure; the prohibition of being tried twice for the same deeds.

   However, these are not absolute rights. The right to propose evidence, for example, has been established by the Constitutional Court in the Judgement of the Constitutional Court of 11 September 1995 EDJ 1995/4413 and reiterated by that of 21 July 1998 EDJ 1998/10003. The first of the aforementioned judgments declares in its second ground of law that "The right to the use of the means of evidence relevant to the defence guarantees those involved in a conflict that is being judicially resolved, the possibility of promoting an evidential activity in accordance with their interests, provided that it is authorised by the legal system (SJudgement of the Constitutional Court 101/1989 EDJ 1989/5708, 233/1992 EDJ 1992/12342, 89/1995 EDJ 1995/2462, for all). This power does not imply a disempowerment of the powers of the ordinary judges and courts to examine the legality and relevance of the proposed evidence.

4. **The right to effective judicial protection:** this is the right of every person to have access to the judicial system and to obtain from it a decision that is founded in law —and therefore, legally justified—. This would include the right not to be defenceless, i.e. to be able to exercise all legally recognised powers in the proceedings, as well as other rights such as: access to the courts; obtaining a legally founded ruling; the effectiveness of judicial decisions and, lastly, access to the system of appeals.

II. THE CONSEQUENCES OF ENSHRINING DUE PROCESS IN A CONSTITUTION

- The direct and immediate application of such guarantees. That is to say, their positive-legal scope.
- Their interpretation in accordance with the Universal Declaration of Human Rights and international human rights treaties and agreements ratified by the country concerned.
- Its regulation by an organic law, which must in any case respect its essential content, i.e. principle of legality.
- The possibility of applying to the ordinary courts through a preferential and summary procedure.
- The possibility, likewise, of requesting the protection of the Constitutional Court by means of a writ of protection.
- And, finally, special protection before the Constitutional Court by means of an appeal on grounds of unconstitutionality.

In Spain, the Spanish Constitution includes them in the form of a principle, specifically that of due process, which is found in Article 24.2: "All persons have the right to obtain the effective protection of judges and courts in the exercise of their rights and legitimate interests, without, under any circumstances, being deprived of their rights".

The Constitutional Court is the interpreter of the Constitution and the highest body in the defence of the rights that the fundamental rule of the State recognises for the participants in judicial proceedings. The Supreme Court is not on a higher level of hierarchy than the Constitutional Court, but the relationship between the two is one of competencies, not subordination.

At the international level, the rights of the Spanish judicial system are subject to the treaties and organisations to which Spain is a party. In this sense, the European Court of Human Rights (ECHR) can accept appeals from a national trial and, subsequently, judge them with complete independence from our system.

Finally, it is worth mentioning other treaties that contain these rights, such as the European Convention on Human Rights and the United Nations Universal Declaration of Human Rights. The former has a European (not only Community) scope of action and the latter a global scope of action. They also recognise the same rights in content but not in form.

III. FAIR TRIAL

Contained in Article 10 of the Universal Declaration of Human Rights, UN General Assembly New York 1948: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him/her".

According to this precept, a fair trial must be characterised by the right to be present in court; to have a public trial without delay before an independent and impartial tribunal; and to have a lawyer of one's own choice or one free of charge. Also fundamental is the right to be presumed innocent until proven guilty and the right not to be compelled to testify against oneself. These rights are described in greater detail in the International Covenant on Civil and Political Rights, a legally binding compendium containing

some of the fundamental principles set out in the UDHR. The right to a fair trial is also enshrined in a number of regional human rights texts, such as:

- the African Charter on Human and Peoples' Rights,
- the European Convention on Human Rights and
- the American Convention on Human Rights.

The characteristics of a fair trial should include: access to transcripts and translations in court proceedings, equality of the parties or the need for an interpreter, prohibition of defencelessness and the right to defence expressly mentioned in Article 6(3), and implicitly included in Article 6(1) of the ECHR, the right to the free assistance of an interpreter —if the accused does not understand or speak the language used in the hearing— and to equal treatment. These characteristics have been merging indiscriminately with the rights not to suffer defencelessness and the right to defence, on the one hand, and with the right to a fair trial, on the other.

IV. THE RIGHT TO AN UNBIASED JUDGE

The impartiality of a judge can be analysed from a twofold perspective.

- A **subjective impartiality**, which guarantees that the judge has not maintained undue relations with the parties, in which all the doubts deriving from the judge's relations with them are included; and
- an **objective impartiality**, i.e. referring to the subject matter of the proceedings, which ensures that the judge approaches the thema decidendi without having taken a position in relation to it.

The guarantee of objective impartiality, according to our TC, aims to prevent the judge's prior beliefs on the merits of the case from influencing the trial or the resolution of the appeal when deciding in the previous instance or even when carrying out acts of investigation as an investigator.

Such prior beliefs do not, in themselves, merit any criticism, but "the mere possibility that they may be projected in the subsequent trial, or in the appeal, puts at risk the right of the defendant to obtain fair justice in one or the other, in the trial or in the appeal. The Law, in the face of such a risk, does not require the Judge to abandon or overcome the convictions at which he/she has thus legitimately arrived, nor does it require the parties to trust that such an overcoming will be achieved. Rather, by means of abstention or recusal, it allows the judge who has already formed a conviction as to the guilt of the accused, or who may have acquired it in the course of the investigation, to be removed from the trial of the appeal".

It is necessary to determine on a case-by-case basis whether they are so consistent as to be objectively and legitimately justified. It is necessary to examine the circumstances of the case, insofar as "the impartiality of the judge cannot be examined in abstracto, but it is necessary to determine, case by case, whether the simultaneous assumption of certain investigative and adjudicative functions may compromise the objective impartiality of the judge" (Judgement of the Constitutional Court 60/1995, 16 March, FJ 4). (Judgement of the Constitutional Court 60/1995, 16 March 1995, FJ 4, which brings the interpretation of this right into line with the case law of the European Court of Human Rights). Such doubts arise from "the incompatibility between the functions of deciding, or passing judgement, with the prior functions of prosecuting or assisting the prosecution" (Judgement of the Constitutional Court 11/2000, FJ 4, and those cited therein), or from the assumption that "the powers of investigation and prosecution are constitutionally incompatible".

V. OTHER PROCEDURAL SAFEGUARDS

The right to appeal and effective judicial protection

Of course, the right to appeal constitutes a basic guarantee of the process. Its non-provision in law or its judicial infringement would go against Article 24.2 of the EC in this specific aspect as a consequence of its recognition —limited, in fact, to the condemned party— in international texts.

Indeed, the constitutional references, implicit in any case with respect to the existence of a system of contestation as a criterion for configuring the proceedings, are scattered throughout the Spanish Constitution. Although they seem to indicate that our constituent has assumed such a configuration, they do not, however, allow us to conclude that the appeal forms part of the right to effective judicial protection enshrined in Article 24.1, nor that it can be considered as one of the essential guarantees of the process protected by Article 24.2, but that it will be a right of legal configuration, that is to say, subject to what the law establishes with regard to the appeal system.

Illegal evidence and the presumption of innocence

All agree on the impossibility of access to trial of evidence obtained unlawfully, acquired in violation of fundamental rights, and, even more so, of its impossibility of forming part of the body of evidence to be assessed by the judge. This would be a violation of a basic presupposition of the evidential activity and it would endanger the guarantee of the process itself. However, it is not expressly mentioned in the Constitution or in international norms. In any case, its major incidence, almost unique in practice, is in the field of criminal proceedings.

The presumption of innocence, in its role as a rule of judgment —which would be the relevant one in this case— operates, in the sphere of ordinary jurisdiction, as the right of the accused not to be convicted unless guilt has been established beyond reasonable doubt, by virtue of evidence that can be considered incriminating and obtained with full guarantees.

VI. THE RIGHT TO DEFENCE AND EFFECTIVE JUDICIAL PROTECTION

The guarantee of the defence was a narrower concept, but it was included in the concept of effective judicial protection, since it also includes aspects of the judge's activity, of the trial, and even other aspects prior to the trail. For a better understanding, I will make a brief reference to the content and structure of this right.

Effective judicial protection protects individuals, whether nationals or foreigners, who hold legitimate rights or interests in relation to the public authorities. Likewise, our Constitutional Court has recognised this entitlement for corporate entities.

This article recognises, in addition to the right to effective judicial protection, the prohibition of defencelessness, the constitutional guarantees of criminal proceedings, the presumption of innocence and the exclusion of the duty to testify. The right to effective judicial protection is an autonomous fundamental right with its own content.

It is not, however, a right that can be exercised directly from the Constitution, but rather a right of provision that can only be exercised through the channels established by the legislator, or, in other words, it is a right of legal configuration".

This right must protect both natural and corporate entities against the public authorities. The structure of this right to effective judicial protection is as follows:

1. Free access of citizens to the Courts to exercise their claims must be guaranteed. This we call the right of access to jurisdiction through the competent judicial body, to elucidate any type of claim regardless of whether it is successful or not, and the cost of the proceedings cannot be an obstacle to this access. (This is set out in art. 119 EC, which enshrines Legal Aid, in relation to Law 1/1996, of 10 January, on Free Legal Aid).
2. Secondly, there is the right to obtain a ruling that puts an end to the dispute in the appropriate instance.
3. Thirdly, there is the right to the enforcement of the ruling.
4. Finally, it should be noted that it also encompasses the right to pursue legal recourse.

When the guarantee of defence is violated, defencelessness is produced and this leads as a sanction to the ineffectiveness of the trial or of the affected resolution, invalidity which must be understood as a means to obtain respect for the guarantee of defence. Not having a defence is constitutionally prohibited. According to the Constitutional Court, "the idea of defencelessness encompasses, understood in a broad sense, all other violations of constitutional rights that can be placed within the framework of Art. 24 of the EC".

Thus, it can be concluded that defencelessness arises, according to abundant constitutional case law, when the means of defence are illegitimately deprived or limited in the heart of a process, producing in one of the parties, without being responsible, a definitive prejudice to their substantive rights and interests.

VII. THE RIGHT TO FREE LEGAL AID

The right to free Legal Aid can be considered as a right instrumental to other rights, which would lead to it being qualified as a fundamental right in relation to other such rights. It aims to provide access to justice without this access being limited by financial capacity, if a series of conditions is met.

The Legal Aid Act regulates the procedure for processing applications for Legal Aid, as well as the benefits that will accrue to those who are granted Legal Aid. The aim is to guarantee the principle of equality of parties, as well as to enable access to effective judicial protection.

Our constitution establishes that justice will be free when the law so provides, in any case, for those who can prove insufficient resources to litigate, although it is included in a title that does not give it the category of Fundamental Right. However, it does have this category in Article 24 EC, which includes the right to effective judicial protection and to a trial without undue delay.

The right to Legal Aid and the right to effective judicial protection, if we take into account the principle of equality that the constitution must contain, are undoubtedly linked, complementary terms, to the point that we could say that it is not possible for one to be fully effective without the other.

In other words, there cannot be a right to effective legal protection if citizens, due to their circumstances, find it financially impossible to pay the costs involved in bringing a legal action.

The relationship that exists between the right to free Legal Aid for those who lack the financial resources to litigate (art. 119 CE EDL 1978/3879) and the right to effective judicial protection (art. 24.1 CE EDL 1978/3879), has been highlighted by our jurisprudence. In the recent Judgements of the Constitutional Court 183/2001, of 17 September EDJ 2001/29659, and 95/2003, of 22 May EDJ 2003/10439 (recalling previous doctrine), we have ratified that art. 119 EC enshrines a constitutional right of an instrumental nature with respect to the right of access to jurisdiction recognised in art. 24. 1 EC, since "its immediate purpose lies in allowing access to justice, in order to file claims or oppose them, to those who do not have sufficient financial means to do so and, more broadly, it seeks to ensure that no person is procedurally defenceless because they lack the resources to litigate". Thus, as we recalled in the recent STC 180/2003, of 13 October (FJ 2) EDJ 2003/136112 , although we have described this right as a "entitlement to benefit and of legal configuration", whose content and specific conditions of exercise, as is the case with others of this nature, are for the legislator to delimit, taking into account the public and private interests involved and the specific budgetary availabilities, we have been categorical in stating that the broad freedom of legal configuration resulting from the first clause of art. 119 CE is not absolute, since the second clause of the said precept explicitly states that Legal Aid will be recognised "in any case, with regard to those who can prove insufficient resources to litigate". There is, therefore, an "unassailable constitutional content" for the legislator that obliges it to recognise the right to Legal Aid for those who can prove insufficient financial resources to litigate (Judgements of the Constitutional Court 16/1994, 20 January 1994, FJ 3 EDJ 1994/264, and 117/1998, 2 June 1998, FJ 3, among others EDJ 1998/14951).

VIII. THE RIGHT TO A PUBLIC TRIAL WITHOUT UNDUE DELAY AND WITH ALL THE GUARANTEES. PUBLIC DISCLOSURE. ORALITY. MOTIVATION

Public disclosure of the proceedings protects the public from possible secrecy of justice, in order to preserve the confidence of citizens in the courts and in the administration of justice. Thus, by making the administration of justice transparent, it contributes to the realisation of the aims of a fair trial.

Article 6.1 of the Convention of Rome, as we have said, refers to the right of every person to have their case heard within a reasonable time, so that their claims are not rendered meaningless and can be enforced in a reasonable time frame. The term undue delay is an indeterminate legal concept, which requires a specific assessment in order to verify whether there has been a delay attributable to the judicial body.

The Spanish Constitutional Court has declared that breaches of procedural norms or rules only constitute a violation of the right to due process if they result in a significant impairment of the possibilities of defence, since what the Constitution prohibits is that the accused has not been able to participate in the proceedings of the judicial investigation or that the accusation has been fabricated behind his/her back.

The public disclosure of judicial proceedings is ultimately a constitutional principle, which clearly recognises the possibility for procedural legislation to establish exceptions.

This is the case in Spanish criminal proceedings, where secrecy or relative confidentiality applies —the summary proceedings are not accessible to the public— as only the parties involved "may take cognizance of the proceedings and intervene in all the proceedings", with the investigating judge being able to declare the summary proceedings secret also for the parties, at the proposal of the Public Prosecutor, the parties or ex officio, by order, "for a period not exceeding one month and the secrecy must necessarily be lifted ten days prior to the conclusion of the summary proceedings".

When the examining magistrate declares the secrecy of the investigation, he or she is not agreeing to a measure that in itself limits a fundamental right —the right to a public trial— which is not affected, but he or she is only adopting a decision on the basis of which the moment in which the parties can become aware of the proceedings is postponed and they are prevented from intervening in the summary proceedings that are carried out during the period in which the investigation remains secret.

However, insofar as the secrecy of the summary proceedings restricts the possibility of contradicting the evidence gathered during the summary proceedings, this evidence cannot be admitted as circumstantial evidence, since, as we know, the constitutional legitimacy of pre-constituted evidence requires not only that it has been gathered before the judge, but also that it has been given with a guarantee of contradiction, and this is because it constitutes an exception to the rule that constitutionally valid evidence is only that which is gathered in the hearing under conditions of public disclosure, orality, immediacy and contradiction.

Oral proceedings must be public, on pain of invalidity (this is also established in the Spanish criminal code, although it is foreseen that in certain cases the trial may be held in camera). Sentences must also be delivered in open court, but in this case there is no restriction similar to that established for the oral proceedings.

The fundamental right to a trial without undue delay cannot be confused with compliance with the time limits established in the proceedings, but imposes on judicial bodies the obligation to decide without undue delay.

Article 6.1 of the Convention of Rome refers to the right of everyone to have his/her case heard within a reasonable time, a concept not exactly coinciding with the above, but related to it, insofar as the time limit of the proceedings will cease to be reasonable when unreasonable delays are incurred. This should be distinguished from undue delay.

In any case, both infringe the fundamental right of the accused —when they have not been caused by the accused— to have their case heard and resolved within a reasonable time. In view of the fact that the personal, family and social circumstances of the accused can change during unusually long periods of time, the penalty cannot fulfil the functions of exemplarity and rehabilitation proper to the moment in which the action evidenced the need for re-socialisation. In addition, the delay inflicts a natural suffering on the accused that must be included in the State penalty to be imposed, in order to maintain proportionality between the severity of the penalty imposed and the harm caused by his action.

Undue delay is an open or indeterminate concept that requires, in each specific case, an assessment of whether there has been an actual unjustified delay attributable to the court.

The fundamental lines of the doctrine that this Court has developed on the fundamental right to a trial without undue delay (art. 24.2 CE EDL 1978/3879) is summarised in STC 124/1999, FJ 2 EDJ 1999/13073. It can be transcribed as follows:

a) *"As regards the relationship between the aforementioned right and the fundamental right to effective judicial protection, we must begin by stating once again that, although the right of access to jurisdiction recognised in art. 24.1 CE EDL 1978/3879 cannot be understood as something detached from the time in which judicial bodies must ensure the protection of subjective rights and legitimate interests (Judgements of the Constitutional Court 24/1981, FJ 3 EDJ 1981/24 , and 324/1994, FJ 2 EDJ 1994/8976), from a legal perspective and within the framework of our legal system, it is unavoidable to recognise the autonomy of the right to a trial without undue delay (for example, Judgements of the Constitutional Court 26/1983, FJ 2 EDJ 1983/26 ; 61/1991, FJ 1 EDJ 1991/3080 ; 35/1994, FJ 2 EDJ 1994/678 ; 298/1994, FJ 2 EDJ 1994/10540 and 324/1994, FJ 2 EDJ 1994/8976). Thus, if the first of these rights includes access to jurisdiction and, where appropriate, obtaining a judicial decision, reasoned in law and, therefore, not arbitrary, on the merits of the claims made (among the most recent, STC 160/1998, FJ 4 EDJ 1998/10018), the right to a trial without delays and, where appropriate, the right to a fast-track trial (STC 160/1998, FJ 4 EDJ 1998/10018), the right to a trial without undue delay requires, in order to be satisfied, an appropriate balance between, on the one hand, the performance of all the judicial activity necessary for the resolution of the case being heard and for the guarantee of the rights of the parties and, on the other hand, the time required for such performance, which must be as short as possible (STC 58/1999, FJ 6 EDJ 1999/6881)".*

To conclude, I would like to refer to two other principles: the principle of orality and the principle that reasons must be given for judicial decisions.

The Principle of Orality

The constitutional enshrinement of a procedural principle such as orality is unparalleled in any European constitution.

Orality is certainly a formal principle of procedural acts, the logical consequence of which is that acts must be carried out verbally, which in turn requires immediacy. The constitutional precept emphasises orality in criminal proceedings, not eliminating written forms but rather making orality more important, making it predominant. Constitutional jurisprudence affirms that this principle is inherent in the accusatory system in which our process is inscribed, in such a way that the evidential procedure must necessarily take place in the contradictory debate which, in oral form, is held before the same Court which is to pass sentence, in such a way that the conviction of the latter on the prosecuted facts is reached in direct contact with the means provided for this purpose by the parties. With regard to witness evidence in particular, its restriction to the hearing forms part of the minimum rights that international standards recognise for the accused in order to guarantee a proper criminal trial (art. 6 .3,d) of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and art.14.3,e) of the International Covenant on Civil and Political Rights of 19 December 1966.

If in the criminal field the preference for oral proceedings is, according to the Constitution, indisputable, and this is reflected in criminal procedural laws, then the Criminal Procedure Act and the Military Procedure Act, the other procedural laws, the Civil Procedure Act, the Administrative Litigation Act and the Labour Procedure Act also underline this preference.

The Civil Procedure Act conceives of two main channels for the substantiation of claims of a declaratory nature: the oral trial or hearing, for those litigious matters of particular complexity or which require particularly rapid and predominantly oral protection, without prejudice to the preparatory preliminary proceedings; and the ordinary trial, which introduces an oral preliminary hearing, which aims to refine the process and establish the subject matter of the debate or possibly offer a channel for settlement.

For its part, the Law on Contentious-Administrative Jurisdiction, Law 29/1998, of 13 July, incorporates as a new feature a fast-track procedure for certain matters of a limited fixed amount, based on the principle of orality.

Law 13/2009 of 3 November 2009 on the Reform of Procedural Legislation for the implementation of the new Judicial Office in reference to the principle of orality, and for the reinforcement of the guarantees of the litigant, introduces in the Law on Labour

Procedure, in the Law on Contentious-Administrative Jurisdiction and in the Law on Criminal Procedure the generalised recording of hearings, as had been foreseen in Law 1/2000, of 7 January, on Civil Procedure.

Reasons for court rulings

Article 24.1 of the Constitution includes the fundamental right to obtain a decision based on law, which rules on all the claims and litigious issues raised by the parties in the proceedings.

The constitutional norm that establishes the necessary grounds is Article 120.3 of our Constitution, which expresses the relationship between the judge and the law and the system of sources of law deriving from the Constitution, but also expresses the right of the defendant and the legitimate interest of citizens to know the reasons for the decision adopted, to verify that the solution given to the case is the result of a rational interpretation of the legal system and not the result of arbitrariness. Moreover, this express reasoning allows the parties to know the reasons why their claim was rejected, and in turn allows the review by higher courts when the appeal against a decision is resolved.

However, it is not obligatory to respond explicitly and in detail to any arguments used by the litigants in support of their respective theses and claims, but rather to the issues, insofar as a tacit response that can be deduced from the whole is acceptable, without the need for an exhaustive description of the intellectual process followed or of a specific scope or intensity in the reasoning, provided that it can be verified that the solution given to the case is the result of rationality and not arbitrariness, without forgetting that the acceptance or rejection of some issues makes the analysis of others unfruitful. By way of example, it is sufficient to quote the following paragraph from the judgement of the Supreme Court of 16/11/2006 EDJ 2006/306308: "Case law has stated that the requirement to state reasons for judgements is met by referring to the grounds of law of the judgement handed down at first instance, and it is not necessary to fully exhaust the reasoning (Constitutional Court judgements of 5-6, 10-7 EDJ 2000/20475 and l8-9-2000 EDJ 2000/26240).

DUE PROCESS. PRINCIPLES OF CRIMINAL PROCEDURE

José María Asencio Gallego
Magistrate

Summary

I. GENERAL CONSIDERATIONS ON CRIMINAL PROCEDURE IN A STATE GOVERNED BY THE RULE OF LAW

Any legal text is not just a set of precepts arranged in a systematic way. The precepts contain rules which are a reflection of the embodiment of principles of such importance that their mere interpretation, in one sense or another, can lead to a profound modification of the whole normative system. It is for this reason that no study of criminal procedure can disregard prior analysis of the principles on which it is based.

When we talk about criminal proceedings, we cannot forget that it is within them that the well-known conflict of interests between collective security and the fundamental right to individual freedom, both of which are equally worthy of protection and safeguarding due to their public nature, is most intensely reflected.

Within this framework, criminal proceedings are conceived as an instrument aimed at discovering criminal acts and their perpetrators in order to, where appropriate, exercise ius puniendi or the right to punsh. The responsibility for this, regardless of how the crime is considered, always corresponds to the State.

This means that criminal prosecution itself has two apparently incompatible characteristics: on the one hand, from the outset, it is a penalty for those who are subject to it, insofar as, apart from the public impact it has on the reputation of the accused, it contains measures limiting fundamental rights which, whatever their intensity, are always adopted in an instrumental manner against those who have not yet been found guilty. However, on the other hand, criminal proceedings are a guarantee of the correctness of the state's decision, in the sentence, an unavoidable prerequisite for the determination of the truth to be declared with regard to the facts that form the object of the trial. And this guarantee is manifested in various aspects:

– Criminal proceedings are the only means of ensuring the discovery of the truth, for which it is an unavoidable presupposition, an indispensable condition, that they conform to and respect the principles of so-called due process or process with all the guarantees, that is to say, among many other ends, that they respond to the demands that characterise a substantially contradictory method.

– The criminal process is, as well as a limiting factor of rights, a guarantee of their respect by the State. In other words, the process and the rules that inform it limit the very restriction of rights, i.e. they subject it to precise and concrete requirements and conditions which would be infringed and never respected, outside the framework of the proceedings. It functions, therefore, as a mechanism of state self-policing.

– Finally, criminal proceedings are a guarantee of the rule of law itself, of its dignity, of its adaptation to democratic ends. It is not possible in such a state for criminal proceedings to exist that are detrimental to or opposed to the values of democratic culture. This is how GOLDSCHMIDT put it when he stated that *"The structure of the criminal process of a nation is nothing other than the thermometer of the corporative or authoritarian elements of its Constitution"*. Or the Spanish Constitutional Court itself, according to which *"there is no rule, legal or ethical, that allows the state to investigate at any price"*; in other words, criminal investigation, state action in criminal repression, is subject to the limits and conditions imposed by the constitutional and procedural rules that safeguard the effectiveness of fundamental rights and freedoms, intangible beyond admissible restrictions.

Only a process informed by dialectical principles, guaranteeing contradiction and equality between the parties, a process respectful of fundamental rights, especially the right of defence, is likely to provide the truth.

A process that violates even the minimum guarantees on individual, personal and procedural levels, is incapable of providing any certainty as to the verification of its purpose: the establishment of the reality of the facts that have occurred. This way of acting will undoubtedly produce condemnation in any case, as it would create a false, merely propagandistic sense of public security and instant gratification, but with feet of clay, and causing social claims of repression. But it will never verify the function of finding and determining the truth because of the mistakes it usually makes, the inconsistency of its decisions, the lack of success of its resolutions. The guilty will remain unconvicted and the innocent will have their rights unjustly affected.

Examples of such offences include: torture, coerced or deceptive statements by defendants[1], the use of methods that remove the will to self-determination, such as truth serum[2] or the lie detector or simply the use of measures that cause fatigue, physical or temporary disorientation or loss, through deprivation or humiliation, of the moral resources that are always a part of human dignity and that cannot be lost by subjection to a process.

II. THE ACCUSATORY MODEL IN CRIMINAL PROCEEDINGS

A criminal trial that wishes to adapt to and be coherent with a democratic Constitution can only and exclusively be an accusatory trial, understanding by this not only its formal aspect, referring to the splitting of state functions, but also all the guarantees contained today in the international texts that declare and provide protection of human rights. These include the Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Accusatory is, therefore, equivalent to due process or due process with all guarantees, this being a fundamental right with a admittedly broad profile, but which can be perfectly individualised in order to differentiate it from other rights, more specific and regulated in a particular way. This individualisation is necessary, because otherwise, the right to due process or due process with all guarantees would remain a mere rhetorical statement that could only be claimed when fundamental rights, with procedural repercussions, specifically foreseen in the law, are infringed.

1. Prieto-Castro y Ferrándiz, L. and Gutiérrez de Cabiedes y Fernández de Heredia, E. *Derecho Procesal Penal.* Second edition. First reprint. Madrid. 1982. P. 195. SAN MARTÍN CASTRO, C. Derecho Procesal Penal. Volume I. Second edition. Lima. 2003. Pág. 543.

2. Carnelutti, F. *Principios del proceso penal.* Translation of the Italian volume *Principi del Processo Penale,* Napoli, 1960, by Santiago Sentís Melendo. Buenos Aires. 1971. P. 194. ROXIN, C. Derecho Procesal Penal. Translation of the 25th German edition Strafverfahrensrecht, Munich, 1998, by Gabriela E. Córdoba and Daniel R. Pastor. Córdoba and Daniel R. Pastor, revised by Julio B. J. Maier. Buenos Aires. 2000. P. 214.

The public nature of the offence

Crime, as a state sanction that the legislator, in accordance with the principle of minimum intervention considered necessary to establish, cannot and must never be availed of, and its prosecution belongs to the state. This is so even if the passive subject of the action does not show his or her willingness. In other words, crime is a public phenomenon, not a private act.

However, in order to prevent the executive power from evading its obligations or acting arbitrarily, by granting itself an exclusive monopoly on the application of ius puniendi, the principle of legality must prevail as a rule, and citizens must be entitled to initiate criminal prosecution; and, on this point, not only the possibility must be regulated for those subject to the offence to file a complaint, but also, in certain cases and under certain conditions, any citizen through what is known in Spain as "acción popular" ("class action").

In short, the fact that the crime is of a public nature and that it cannot be availed of because it affects the general interest, collective security and because its repression may be necessary in order to avoid vigilantism, cannot imply that the State acts with complete and absolute freedom in its prosecution, but is subject to the principle of legality, which prevents it from abstaining.

The recognition of the so-called principle of opportunity within the criminal procedural system is a different and perfectly valid thing, provided that it is not absolutely free, but subject to legally established conditions and predetermined to the achievement of relevant objectives, both in particular for the offended or injured party or even for the rehabilitation of the victim, and in general, i.e. socially useful.

Independence as a guarantee of the judiciary

The judge must always be an impartial third party who, as such, cannot formulate, support or even contribute minimal elements of accusation, either directly or indirectly through apparently neutral actions. This affirmation is not only applicable to the judge or court making the decision, in which case it must be absolute, but also to the investigating judge, who is still a judge (in the

case of Spain and, in the European Union, with exceptions, also in France) and who, therefore, cannot assume functions that correspond to the prosecuting parties.

An equal distribution of functions implies that the court, as the body vested with jurisdictional power and in order not to break the necessary balance derived from the principle of equality, should be left out of the work of constructing and shaping the accusation, the criminal prosecution and the criminal claim.

In the pre-trial phase, the accusatory principle imposes on the judge the obligation to guarantee due process and the rights of the accused parties[3]. The technical or legal direction of the investigation corresponds to the Public Prosecutor's Office as the prosecuting party. The examining magistrate, investigating magistrate or judge of guarantees (or any of the names given) cannot, ex officio, positively shape the prosecution, prepare it or form it. Except in cases of previewing of evidence or authorisation to restrict fundamental rights, his or her work must be merely negative, of delimiting the investigation, of purging the investigation in the sense of issuing partial or total, subjective or objective, free or provisional dismissal decisions.

At the oral trial stage, on the other hand, the trial court must restrict itself to conviction or acquittal for reasons of legal certainty. In other words, the judge or court in the plenary session cannot indict directly, indirectly support the indictment or shape the indictment by means of a decision that extends or exceeds the limits of the criminal prosecution, as the indictment is always an act of the party. But neither can the trial court support the prosecution by means of indirect mechanisms. For this reason, a withdrawal of the indictment or a request for acquittal must prevent the court from passing a conviction, as conviction presupposes the existence and maintenance of a criminal prosecution.

Finally, any ruling must be handed down and must respect the objective and subjective framework of the criminal claim and of the subject matter of the proceedings. It is not possible to convict for deeds that have not been charged, or to convict persons who have not been formally accused.

3. Gimeno Sendra, V. Manual de Derecho Procesal Penal. Madrid. 2008. P. 215. Moreno Catena, V. and Cortés DomíngueZ, V. Derecho Procesal Penal. Valencia. 2004. P. 141.

The adversarial process as a process of the parties

The accusatory criminal process cannot be any other than the criminal process with all the guarantees established and sanctioned in international treaties, which cannot lead to any other reality than a process of parties, in a situation of contradiction and equality, similar in its basic rules to the civil process, except for the differences that derive from the public nature of its object and the fact that that it should not be availed of.

A criminal trial that wishes to be described as accusatory must be governed by two principles that are inherent in its own structure and to its essence as a trial and without which, it must be categorically stated, it is not possible to speak of the existence of a heterocompositional method of conflict resolution, but rather of a simple case file. These two principles are contradiction and equality.

The contradiction principle

This principle derives from the existence of a duality of positions within the process. The accusing parties, whether public or private, criminal or civil, formulate a punitive or restorative claim, i.e. they accuse (or sue, in the case of the civil plaintiff) and the subject of this claim tries to oppose it or, in other words, to defend themselves, with the aim of asserting their right to freedom.

The principle of contradiction is, therefore, a consequence of the dialectical nature of the process as a method of ascertaining the truth. Finding the truth requires a confrontation between both parties, accuser and accused, as well as giving them the opportunity to present their arguments and defend their version of the facts on an equal footing. Contradiction is thus identified in a particular manner with the right of defence.

In this sense, jurisprudence has spoken out on repeated occasions, recalling that the faculties of alleging, proving and intervening in the evidence of others, in order to control its correct practice and contradict it, are a specific manifestation of the accused's

right to defence1[4]. More specifically, it is the right to question or have questioned the witnesses who testify against him/her, a right recognised both in art. 6.3.d) of the European Convention on Human Rights and in art. 14.3.e) of the International Covenant on Civil and Political Rights.

The latter power is the most paradigmatic manifestation of the adversarial principle and is satisfied by giving the accused an adequate and sufficient opportunity to dispute a testimony against him and to cross-examine its author[5].

However, we cannot forget the importance of the principle of contradiction in the precurement of sources of evidence, although it is more present in the practice of the means of evidence, since it is here where it operates in all its breadth. In the words of ASENCIO MELLADO[6], *"It is not sufficient to guarantee contradiction in the practice of the means, when this elementary principle is more often than not absent in the collection of evidence, given that, as is well known, much evidence is obtained without the intervention of the defence and, due to its unrepeatable nature, has full probative value (for example, telephone tapping, house searches, fingerprints, etc.)".*

The principle of equality

Equality, the second principle mentioned above, which complements and gives virtuality to contradiction, is equivalent to avoiding or denying the primacy of any of the parties in the process and in any of its phases. This, although it may seem impossible, is coherent with a model that attributes the investigation to the Public Prosecutor's Office, given that this is a state body and objectively impartial, as long as it incorporates not only acts aimed at forming the accusation, but also those that form the basis of the defence.

4. See, among many others, SSTC 176/1988, 4 October 1988; 122/1995, 18 July 1995; and 76/1999, 26 April 1999; and SSTS 1329/2002, 15 July 2002 and 779/2012, 22 October 2012.

5. It is also interesting to consult the doctrine established by the European Court of Human Rights in the judgments of 24 November 1986 (Case of Unterpertinger v. Austria), 20 November 1989 (Case of Kostovski v. Holland), 27 September 1990 (Case of Windisch v. Austria), 19 February 1991 (Case of Isgro v. Italy), 20 September 1993 (Case of Saïdi v. France), 27 February 2001 (Case of Luca v. Italy), 2 December 2008 (Case of Kes v. Turkey), 15 September 2001 (Case of Luca v. Italy), 2 December 2008 (Case of Kes v. Turkey) and 15 September 2008 (Case of Kes v. Turkey). Italy), 20 September 1993 (Case Saïdi v. France), 27 February 2001 (Case Luca v. Italy), 2 December 2008 (Case Kes v. Turkey), 15 September 2009 (Case Pacula v. Latvia), 27 May 2010 (Case Berhani v. Albania), 28 February 2013 (Case Mesesnel v. Slovakia) and 28 June 2016 (Case Dimovic v. Serbia).

6. Asencio Mellado, JM. Derecho Procesal Penal. Valencia. 2015. Pp. 278 and 279.

In any case, the role of the judge of guarantees is essential to ensure this balance when the Public Prosecutor's Office unjustifiably breaks it in its favour.

The public disclosure of the process

Public disclosure of the process is a basic principle insofar as it is a guarantee of control by society to ensure the correct administration of criminal justice. It is also one of the requirements without which the accused's right of defence could never be deemed to be fulfilled. If the plenary session were held behind closed doors, there would be no mechanism to monitor whether the principles of contradiction and immediacy mentioned above had been respected. In the words of STS 660/2004, of 14 May, *"the disclosure of the debates and the right to evidence are specific manifestations of the right to a fair trial".*

Nevertheless, the disclosure of the acts of the plenary is a relatively modern concept, derived from the successive implementation in Europe of the tennets of the accusatory model and the progressive retreat of the inquisitorial system. As early as 1764, Beccaria[7] demanded: *"Let the trials be public, and the evidence of crime public, so that opinion, which is perhaps the only foundation of society, may impose a check on force and passions, so that the people may say we are not slaves and are defended, a sentiment which inspires endeavour and is equivalent to a tribute to the sovereign who understands their true interests"*. And so did Bentham[8], who defended public disclosure as *"the most effective of all safeguards or guarantees of testimony and of the decisions which depend on it; it is the soul of justice; it must extend to all parties who particpate in the formation of the cause and to all kinds of causes".*

It is now recognised in all international treaties. For example, Articles 10 and 11 of the Universal Declaration of Human Rights enshrine the right of everyone to a fair and public hearing by an independent and impartial tribunal at a trial at which they have had all the guarantees necessary for their defence. Art. 14.1 of the International Covenant on Civil and Political Rights recognises

7. Beccaria, C. Tratado de los delitos y de las penas. Carlos III University of Madrid. 2015. P. 37.

8. Bentham, J. Tratado de las pruebas judiciales (Compiled by Esteban Dumont with comments by B. Anduaga Espinosa). Madrid. 1843. Pág. 102. Quoted by PEDRAZ PENALVA, E. Derecho Procesal Penal. Volume I. Principios de Derecho Procesal Penal. Madrid. 2000. Pág. 266.

the right of everyone to *"a fair and public hearing"*. Art. 8.5 of the American Convention on Human Rights establishes that *"el proceso penal debe ser público, salvo en lo que sea necesario para preservar los intereses de la justicia"*. And Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms endorses the right of everyone to a fair and public hearing.

In Spain, the key precept in this area is art. 24.2 CE, which enshrines the fundamental right *"to a public trial with all guarantees"*, a requirement reiterated in art. 680 LECrim, which, in turn, sanctions the non-disclosure of the debates of the oral trial with the penalty of being declared null and void.

This general rule however, admits exceptions, contained in art. 681 LECrim, which allows the judge to agree, ex officio or at the request of the parties, after hearing them, to hold some or all of the acts or sessions of the oral trial in camera when there are compelling reasons to justify it. The decision, according to case law, must be made in such a way that the reasons for the decision can be known by the affected party.

Specifically, the reasons that may give rise to the restriction of disclosure focus on ensuring security or public order, protecting the rights of the victims or avoiding significant harm to the victims. These reasons alone, where an in camera hearing may entail a significant disadvantage and which may mean only limited disclosure, justify the non-violation of this principle. Therefore, although not expressly stated in the law, as these are exceptions to the full validity of a fundamental right, they must be applied with extreme caution and always be interpreted restrictively.

Similarly, in order to protect the privacy of the victim and their family members, the judge may forbid the disclosure of the victim's identity, as well as their image. In any event, the judge will forbid the disclosure of any information relating to the identity of the victims when they are minors or persons with disabilities.

Furthermore, art. 682 LECrim. foresees the possibility of restricting the presence of audiovisual media in the sessions of the oral trial or some of the hearings for the same reasons given above.

Finally, it is important to bear in mind that what has been said so far is limited only to plenary proceedings. In other words, while these must be public (with the exceptions listed), the investigation phase is governed by the opposite principle: the summary proceedings will be confidential and will not be public until the oral trial is opened (art. 301 LECrim.).

III. THE SYSTEM OF FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDINGS

As we have said before, for criminal proceedings to effectively fulfil their function of finding the truth about past events and their authorship, it is necessary and essential that each and every one of the guarantees outlined above, which are inherent to the classic accusatory principle, be respected. In other words, that the process be configured as an instrument that preserves procedural guarantees. This concept must include both procedural guarantees, which have a more relevant value than that commonly assigned to them and whose infringement can generate the absolute nullity of formally improperly executed acts, and those derived from fundamental rights which, due to their place in the constitutional norm, and their preferential position in the legal system, must produce, without exception, the absolute nullity of the elements of investigation affected by the unlawful interference.

Every democratic Constitution nowadays regulates fundamental rights of procedural content, be they those of the accused in their statements, or those referring to restrictions on their freedom, secrecy of communications, inviolability of the home, or, finally, those referring to evidential activity, especially through the complex enshrinement of the right to the presumption of innocence.

The importance of the fundamental rights of the defendant in criminal proceedings

The defendant is the passive subject of the criminal proceedings, not a mere object of it, as was the case in the inquisitorial period. Furthermore, the defendant is an essential part of the proceedings: without him/her, these proceedings do not exist. Without him/her assuming the status of a party, with the qualities and characteristics proper to it, it is not possible to describe it as proceedings, but only as mere investigation files.

The status of the accused must respond to this reality, so that it is necessary to assume that the accused is not called to trial to seek proof of his or her own guilt, in order to obtain a confession or any other type of evidence, even though these practices are not prohibited. The accused, as a party, has rights inherent to this position, in particular the right of defence, which ensures the right of contradiction.

At the same time, however, the accused may, of course, be subject to restrictions on their rights at any time during the trial and prior to sentencing, since all rights, except life, can be restricted in criminal proceedings, provided that they are subject to certain absolute assumptions.

There is thus a clear confrontation of apparently opposing interests: on the one hand, that of the State in the investigation of the crime and on the other, that of the accused in the preservation of his or her liberty and the rest of their rights.

For this reason, all constitutional bodies, aware of this reality, set out a list of fundamental rights which, with their corresponding and statutory contraints, constitute an insurmountable barrier for the State itself, beyond which it is not possible for the organs of criminal prosecution to extend their reach.

The requirements for the limitation of fundamental rights

All fundamental rights, with the exception of life, may be limited in the course of a criminal investigation, provided, of course, that the Constitution expressly authorises their limitation and that this is done in accordance with the following conditions:

Legality

The mere enshrinement of a fundamental right at the constitutional level implies its full recognition and validity, without it being necessary for a law to implement it. That is to say, the laws that regulate fundamental rights are not laws that tend to give them any virtuality or effectiveness, but only to establish the limits to their exercise.

However, a right can only be limited to the extent that it is expressly permitted by law. There is no room for extensive interpretation, nor can case law be used to authorise restrictions that are not provided for by law. In matters of restriction of fundamental rights, case law is not a source of law.

Jurisdictionality

Apart from the legally established exceptions, which are always restricted and justified on grounds of absolute urgency, any deprivation of fundamental rights must be agreed by judges or courts, and such authorisation must, as a rule, be prior to the restriction of the right, not merely enabling or qualifying an authorisation previously adopted by the police or the public prosecutor.

The latter authorities may only take decisions depriving citizens of their rights in the course of a criminal investigation when this is explicitly provided for by law and there is an emergency situation that justifies it. In any case, however, such measures must be immediately subject to review by the courts, which will thus have the final say.

Prior indictment

It is only possible to restrict fundamental rights in the course of a criminal investigation in respect of persons who have already been charged. It is inadmissible to do so when there is no suspicion of any criminal offence against the persons under investigation, since the accusation constitutes the basis for the measure.

For example, it is not possible to carry out police or court raids on non-specific subjects in search of drugs or to enter a building in search of such substances. The restriction of rights must always be adopted in a reasoned and individual, concrete and determined manner.

This requirement can only be waived in specific situations justified by the principle of proportionality. Thus, for example, in cases of police checks in public places following the perpetration of a serious crime against public safety (terrorism) or in crimes of abstract danger, where the charge can never be made in advance with a minimum degree of certainty (breathalyser checks).

The proportionality test

Any limitation of rights must be subject, at the time of its adoption and for its maintenance and configuration of its extension, to a test of proportionality. This analysis has no other purpose than to ensure that interference is not unjustified because it is excessive in view of the aim pursued by it, being applicable the well-known rule of "prohibition of excess".

Proportionality is manifested by the following requirements:

– The duty to state reasons for decisions limiting rights. This requirement is justified by the need to make, specify and communicate to the accused the specific proportionality test carried out in a given case.

- The necessity or suitability of the measure. Any measure restricting rights must be necessary for the achievement of an end, as well as suitable for obtaining the result sought. Necessity, therefore, implies that a right should not be limited when the investigation can be carried out by other means that are less intensive or that affect the rights of the accused to a lesser extent. Necessity also implies strict justification of the measure, so that it cannot be adopted if it does not respond to constitutionally legitimate ends or ends that are not susceptible to protection. Suitability, on the other hand, is equivalent to the usefulness of the measure for the specific purpose proposed. It is not possible to impose a restriction of rights when it is not going to achieve an objective result.
- Proportionality in the strict sense. In short, the proportionality test implies a balance between the seriousness of the intrusion and the crime being investigated, so that a restriction of rights can never be authorised in cases of criminal investigations of little seriousness or social repercussion.
- Guarantees in the execution of the restriction. Lastly, and in order to avoid inadmissible interference or interference that could be burdensome for the accused, any restriction of fundamental rights must be conditional on the verification of certain conditions that, on the one hand, make it reliable in order to obtain results and, on the other hand, avoid causing unnecessary suffering to the accused. For example, a body search must be carried out in conditions of respect for privacy and personal honour, in closed spaces and specially arranged for this purpose; and a telephone tapping must be carried out by specialists, regardless of the authority that agrees to it.

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RULE OF LAW AND OPPORTUNITY

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Summary

I. INTRODUCTORY APPROACH - LEGALITY VERSUS OPPORTUNITY

In the field of criminal procedure, the doctrine usually refers to the principles of legality and opportunity as two alternative types of determination of the powers that the law grants to the body responsible for public prosecution, at the time of filing the criminal action.

The rule of law would result in the obligation of the Public Prosecutor's Office to bring such action as soon as there is evidence of the perpetration of a criminal offence (typical and unlawful act), excluding any other way of resolving the conflict generated by the unlawful act. **The discretionary principle**, on the other hand, would allow the Public Prosecutor's Office not to prosecute the person under investigation and to close the proceedings —closing the case for reasons of opportunity— despite the fact that the investigation has established his or her participation in the criminal act. It implies the existence of a less belligerent and alternative means of conflict resolution within the Administration of Justice to the traditional judicial process.

From this perspective, the two principles are often irreconcilably opposed, since opportunity, understood absolutely or purely as discretion in decision-making by the Public Prosecutor's Office, would imply the exercise of decision-making powers without legal cover.

Spanish criminal procedure, as is the case with practically all continental legal systems —outside the *common law* tradition— is based on the rule of law, so that prosecutors, the guarantors of legality in the prosecution of crimes, are obliged to bring criminal actions against those acts which are criminal in nature, whether or not there is a private prosecution. However, this is not an obstacle to the gradual introduction of institutions that reflect the principle of regulated and non-discretionary opportunity, to which I will refer later.

II. DEFINITION OF THE RULE OF LAW: FOUNDATIONS, GUARANTEES AND CRISIS OF THE RULE OF LAW

Under the rule of law, criminal proceedings must necessarily be initiated on suspicion of any crime without the Prosecutor being authorised to rule on the propitious dismissal of the case or the judicial body to grant it; both are prevented from exercising discretion. We can say that it is a principle that manifests itself in the official nature of the commencement, the conduct and the termination of the proceedings, which the parties are not subject to.

Foundations of the rule of law

The doctrine has traditionally been based on two main pillars: the democratic-representative political and the criminal political.

- **According to the democratic-representative political foundation,** ein a democratic system, the criminal procedural rules are drawn up by the Legislative Power, made up of the representatives of the citizens. Citizens find legitimacy in the rules they have to obey, since they have been created by the one who represents them and whom they have elected through the appropriate electoral process.
- **From a criminal policy perspective,** the rule of law:
  1. It responds to **the demand for maximum clarity** as to what is criminally prohibited, so that citizens know with absolute certainty what they may or may not do.
  2. It is based on the **non-retroactivity of unfavourable criminal laws,** since the citizen can only be punished on the basis of laws enacted prior to the committing of the criminal act.
  3. It forms the basis **of the general prevention** of criminal conduct, since the penalty, previously provided for in Law, exerts a psychological coercion on the citizen, who will avoid committing a crime for fear of the penalty that may be imposed on him/her.

Guarantees (benefits) provided by the rule of law in the criminal process

The exercise of *ius puniendi*, a monopoly of the State and an instrument of social pacification —citizens cannot take justice into their own hands— is subject to certain limits in order to avoid discretionary use by public authorities, which helps the State itself to maintain its legitimacy in the eyes of the citizens. Some of these limits or guarantees are included within the rule of law:

- **It provides citizens with the legal assurance** that they will neither be punished for offences nor sentenced to penalties that are not provided for by law, and that these penalties will be imposed by a judge in a legally established process. It protects him/her against the arbitrariness/discretionality of the powers of the State.
- **It guarantees the individual freedom of the citizen** in that it limits the punitive power of the state to only those behaviours previously defined in the law. It is a guarantee that inspires democratic systems, where priority is given to respect for individual rights and freedoms, which will be restricted only when absolutely necessary (the principle of minimum intervention).
- **Guarantee of the fundamental right of equality** of all citizens before the criminal law, as there is an obligation to prosecute all those who transgress the law. It implies that the law is applied uniformly and equally to all, which gives citizens greater confidence in the administration of justice.

The crisis of the rule of law

Despite all the advantages (guarantees) that the rule of law in criminal proceedings provides for the citizen, judicial practice has shown for decades that it is utterly impossible to comply with the mandate of absolute prosecution of all transgressions. States lack sufficient human and material resources to punish all unlawful conduct in society. Without the possibility of practical implementation, the principles that emanate from strict legality become an illusion.

Similarly, the high number of cases that reach the courts means that criminal proceedings take too long, so that in many cases, when the sentence is handed down and becomes final, it is inadequate to resolve the conflict generated by the criminal action. As a result, criminal proceedings do not achieve their intended purpose, which is not exclusively the exercise of the state's ius puniendi, but rather the protection of the accused —their re-education and social reintegration— and the protection of the victim —reparation for the harm caused by the crime—. Thus, procedural guarantees and rights, often recognised at constitutional level, are violated.

Faced with this situation, from the First World War onwards, scientific doctrine began to evoke the application of principles which, far removed from legality in the strict sense of the word, were more effective in dealing with the prosecution of crimes. It was after the Second World War that States considered modifying their procedural systems in order to provide a rapid and effective response to new forms of crime. They were now faced with a considerable increase in property crime, usually of a minor nature, as a result of the war and prevailing poverty,

Thus, there is talk of a crisis in the rule of law, given the increase in criminal offences and the scarcity of human and material resources in the administration of justice. The birth of the discretionary principle proposes principles that simplify and speed up the criminal process, either by empowering the bodies responsible for prosecuting crimes not to act in the case of certain offences —normally minor offences, which make up so-called *"petty crimes"*— or by establishing the possibility of negotiation between the parties to the proceedings. The accused obtains a reduced sentence and the possibility of an oral trial is excluded *(criminal agreement)*, which considerably shortens the duration of the proceedings. Formal criminal proceedings are limited to the most serious forms of crime.

These new alternative means to the principle of the rule of law would first find a place in *common law* legal systems, and would soon be reflected in continental systems, starting in Germany and then in Portugal and Italy.

III. DEFINITION OF THE DISCRETIONARY PRINCIPLE

The discretionary principle has its origin in the need to make the application of strict legality more flexible, taking into account the seriousness of the offences and the circumstances of the perpetrator. It introduces the possibility of closing the proceedings on the grounds of expediency or of modulating the prosecution through conciliation and mediation. The legislator establishes mechanisms that promote the public interest in the administration of justice, by means other than the traditional process and the prosecution of the perpetrator.

Gimeno Sendra defines it as the power that the procedural system confers on the Public Prosecutor's Office or the organs of criminal prosecution in general, in spite of suspicion of the committing of a public offence, to cease criminal proceedings or to request the judicial authority to dismiss the case or substantially reduce the sentence to be imposed on the accused, in the cases expressly provided for in the law —normally offences that are not particularly serious— and provided that constitutionally protected interests are to be respected. Reasons such as the low social harm caused by the acts, the redress of the damage, procedural economy or the rehabilitation of the offender are taken into account[1].

We have just defined **legal opportunity** as it is only applied in cases expressly provided for by law and on the basis of a constitutionally or legally protected interest, whether it is the best application of *ius puniendi* for the aggressor —to achieve his rehabilitation— or the prompt redress of the victim.

We distinguish, therefore, between two representations of the discretionary principle:

– **Pure or discretionary opportunity:** gives a wide degree of discretion to the prosecution, or even the police, in deciding whether or not to prosecute. It prevails in Anglo-Saxon criminal procedural systems.

1. Gimeno Sendra V. *El principio de oportunidad y el Ministerio Fiscal,* Diario la Ley nº 8746, 2016, p.3.

– **Legal opportunity:** systems in which the rule of law applies, but exceptions to it are allowed for reasons of opportunity; in these cases, the discretion with which the Public Prosecutor's Office acts is determined and limited by the norm. It applies in continental procedural systems.

Under the principle of legal opportunity, there is therefore no absence of legal regulation. When the rule of law applies, the regulation obliges the public body to carry out an action, since the legislator has already assessed the circumstances. On the contrary, in the discretionary principle, the regulation authorises the Public Prosecutor's Office to carry out this assessment, whose decision will be taken **in order to achieve the public interest defined by the legal system,** which does not necessarily have to be the punishment of the guilty party, but rather his or her rehabilitation or the victim's reparation.

International position on the principle of opportunity

The adoption of the principle of opportunity by the procedural systems of states has been a necessity rather than an option for several decades. This has been made clear by various international bodies at European and international level.

In 1990, the UN, through the so-called ***TOKYO Rules*** (Standard Minimum Rules for Non-custodial Measures), adopted by Resolution 45/110 of 14 December 1990, urged its members to establish other mechanisms to avoid criminal proceedings: *"Where appropriate and consistent with the legal system, the police, prosecution or other agencies dealing with criminal cases should be empowered to withdraw charges against the offender if they consider that the protection of society, the prevention of crime or the promotion of respect for the law and the rights of victims do not require the prosecution of the case. For the purposes of deciding whether to drop charges or institute proceedings, each legal system will formulate a set of well-defined criteria. In minor cases, the prosecutor may impose suitable non-custodial measures, as appropriate".* The same approach had been evoked in the ***United Nations Guidelines on the Role of Prosecutors,*** agreed at the Eighth Congress on the Prevention of Crime and the Treatment of Offenders, held in Havana on 7 September 1990. States were urged to explore new ways of reducing the number of cases going to court, not only to alleviate the excessive burden on the courts, but also to

avoid the stigma of pre-trial detention, prosecution and conviction, as well as the possible adverse effects of imprisonment: all this with full respect for the rights of the suspect and the victim.

Earlier, in September 1987, the **Council of Ministers of the Council of Europe,** at its 410th session, issued Recommendation R (87) aimed at simplifying criminal justice, pointing out guidelines based on the American model, such as discretionary prosecution, the establishment of summary and simplified procedures and the promotion of out-of-court settlements.

IV. REASONS IN FAVOUR OF THE INTRODUCTION OF ALTERNATIVE MEASURES TO CRIMINAL PROSECUTION

Reasons of public interest and procedural economy

When we speak of the public interest, we are thinking of reasons based on the mildness of the act and the low social impact of the conviction of the guilty party. When these circumstances are present, it is advisable to close the criminal proceedings and seek more effective ways of rehabilitating the accused and repairing the harm caused to the victim.

With regard to procedural economy, given the unstoppable increase in criminal offences, the aim is to make rational use of the limited human and material resources available within the Administration of Justice, reducing the volume of cases to be tried and procedural delays by means of alternative routes, aimed at dismissing the case or avoiding prosecution.

Reasons of social and material justice and avoidance of recidivism

If alternative measures to criminal proceedings are adopted, the defendant will be able to start a treatment programme outside the prison environment, maintaining family and social ties, avoiding the stigma of a criminal conviction in terms of acceptance by society and more easily achieving rehabilitation, which will prevent reoffending in the future.

From the victim's point of view, there is only one purpose in pursuing criminal proceedings in so-called *"petty"* crimes: to be financially compensated for the damage suffered. If the offender goes to prison, it is very likely that he/she will not be able to pay the appropriate compensation, as he/she will be deprived of the possibility of obtaining or maintaining employment.

Reasons for prison overcrowding

The *12th United Nations Congress on Crime Prevention and Criminal Justice,* held in Salvador (Brazil) in April 2010, highlighted the need to reduce the high levels of prison populations, which have a negative impact on respect for the fundamental rights of prisoners and the safety of prison staff. The UN delegates advised, in cases of minor offences, the introduction in legal systems of alternative measures to criminal proceedings, such as dismissal for reasons of opportunity or mediation formulas (restorative justice).

V. ALTERNATIVE MEASURES TO CRIMINAL PROCEEDINGS AS A REFLECTION OF THE DISCRETIONARY PRINCIPLE

Conditional dismissal on the grounds discretion or opportunity

It is defined as a formal procedure, authorised by the legislator and consented to by the prosecution, in which those accused of certain criminal offences are withdrawn from ongoing criminal proceedings and are referred to a rehabilitation programme (training, support, etc.), all subject to pre-established criteria set out in the regulation. If the programme is successfully completed, the criminal proceedings are definitively closed. Otherwise, they are reopened and continue their course.

It has been recognised in many European countries since it was introduced in Germany in the 1970s. The condition offered to the accused by the Public Prosecutor's Office in exchange for dismissal of the case will be to carry out some activity for the benefit of the community, to comply with civil responsibilities towards the victim or to follow a rehabilitation programme for addictions (drugs, alcohol, etc.), if the crime has been committed for this reason. Here are some examples:

1. **Germany:** Although the Public Prosecutor's Office must initiate criminal proceedings for conduct that corresponds to the type of offence (rule of law), in the case of petty offences (minor offences) it can close the criminal proceedings provided that the accused complies with the conditions imposed, such as the performance of community service or reparation of the damage. If the accused is to undergo rehabilitation treatment (drugs or alcohol), the judge must authorise the order to close the case.
2. **Belgium, France and Portugal:** similar to the German system, the termination of proceedings on the grounds of expediency is foreseen for offences with a sentence not exceeding 3 years imprisonment, provided that the victim has been compensated for the damage caused. In France, judicial authorisation of the dismissal is required.

3. **Netherlands:** this measure is provided for when the custodial sentence does not exceed 6 years, provided that the defendant consents and the victim has been compensated.
4. **Austria:** the offences attributed to the accused may not exceed 5 years imprisonment. Both the judge and the prosecutor are empowered to take the measure of conditional acquittal.

Criminal compliance

We can define the institution of criminal compliance as the acceptance, by the accused, of the imposition in a subsequent sentence of the most serious penalty requested by the prosecution, without a prior oral hearing.

It is an exception to the fact that the object of criminal proceedings cannot be availed of and is one of the most obvious reflections of the discretionary principle.

It was introduced into continental European law under the influence of the American ***plea bargaining system***, where 93% of criminal cases end with an agreement between the prosecutor and the defence. The accused obtains a series of official concessions if he/she pleads guilty, without a trial. This agreement is ratified by the judge. The Prosecutor's powers are enormous, almost unlimited, as he/she can offer the accused a reduction, substitution, suspension of the sentence or modification of the type of offence for which the prosecution was initially brought. It is considered positive that clear cases (flagrant cases or cases in which there is direct evidence) are concluded quickly —saving financial and personal costs for the Administration of Justice— and that the resources of the judicial system are allocated to complex and controversial criminal cases. In addition, it contributes to the social reintegration of the convicted person, to his or her non-stigmatisation by possible imprisonment and to the quickest possible redress to the victim.

However, there are also disadvantages to this system from the point of view of the rights of the accused, since there is no real equality in the position of the parties when negotiating: the Public Prosecutor's Office always occupies a preponderant position

vis-à-vis the accused, with the real risk that the former may exert great pressure on the accused, leading them to admit facts of which they are innocent, with the sole motive of avoiding a long trial with an uncertain outcome in their interests.

This is why continental European law has not taken on plea bargaining in its American dimension, but rather with its own characteristics and rules, inspired by the safeguarding of the fundamental procedural rights of the accused and greater judicial control of the agreements reached between the parties. This is what has happened in Italy (patteggiamento) and Germany (absprachen).

Other European countries, such as France, Switzerland, Romania, Belgium, Poland, Greece, Moldova, the Czech Republic, Croatia and Finland, have introduced negotiated settlements into their legal systems, under the influence of American law, although with their own characteristics that distinguish them from the purely American system.

This alternative system to criminal proceedings has reached other continents and has been adopted in India, Russia, China, Indonesia and Japan, as well as in many African countries (South Africa and Nigeria). Not to mention the common law countries, which, for obvious reasons, follow in the footsteps of the United States in this area (England and Wales, Canada, Australia and New Zealand).

We cannot forget the Latin American legislations whose recent procedural reforms are aimed at introducing the criteria of discretion and negotiated settlements in criminal proceedings.

Criminal mediation

We can define this, with Gimeno Sendra, as a means of resolving the conflicts that underlie criminal proceedings, *"informed by the discretionary principle, to which the parties can resort as long as the person under investigation acknowledges their participation in the punishable act and expresses their willingness to make reparation, by means of which an impartial third party, the mediator, will try to bring the aggressor and his victim together so that, after the latter has been compensated, their inter-subjective conflict can be resolved and the defence and the private prosecution can propose to the Public Prosecutor's Office* ***a***

***negotiated agreement**, that ends with a sentence in which, while fulfilling the aims of penalty prevention, the reintegration of the accused can also be obtained"*[2].

Its purpose is always restorative, and is part of the so-called Restorative or Reparative Justice. In it, the leading role is played by the parties in conflict (victim and aggressor) and not by the Judicial Authority or the Public Prosecutor's Office. It seeks a rapprochement between the victim and the offender in order to reach an agreement between them to settle the conflict generated by the criminal behaviour, through dialogue and communication. The offender can express the reasons that led him/her to commit the offence and the victim can express the psychological and emotional impact that the criminal action has had on him/her. It makes the victim feel more at ease, as he/she is the protagonist and participant in the treatment given by the legal system to the offence committed against him/her. Likewise, the rehabilitation and reintegration of the offender is achieved, avoiding the criminalising effects that imprisonment may entail.

As a result of the meetings between aggressor and victim, the proceedings end with the reduction of the aggressor's sentence, by means of a sentence of conformity. The victim's pardon and the imposition of certain measures on the accused, such as work for the benefit of the community or the victim him/herself, reparation of the damage caused or submission to drug or alcohol rehabilitation or detoxification treatment, if the offence was committed under its dependence, are intrinsic to this alternative route to formal proceedings.

The figure of the professional mediator, who directs the meetings between victim and aggressor, is particularly important. He or she must meet the requirements of professionalism, neutrality and impartiality. They are not an arbitrator, as they do not settle the conflict between the victim and the aggressor, but facilitate the dialogue between them, mediate and persuade the protagonists to reach a solution, both with regard to the criminal and the civil claim.

The Public Prosecutor's Office —or, where appropriate, the judge— has the role of selecting the cases that may be subject to mediation, determining the measures or conditions agreed as a result of the mediation and to be complied with by the offender, as well as monitoring compliance with them.

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2. Gimeno Sendra V., *El principio de oportunidad y la mediación penal.* En Postmodernidad y Proceso Europeo: la oportunidad como principio informador del proceso judicial. Ed. Dykinson, Madrid. 2020. p. 240.

Both the Council of Europe Committee and the United Nations General Assembly have recommended mediation as an alternative measure to criminal proceedings.

Respect for the fundamental rights of defendants

Criminal proceedings, based on the rule of law are, as we have already explained, a guarantee for the accused. The citizen knows that legal rules will be followed, which provides predictability and security. This is why the introduction of alternative measures to criminal proceedings, for reasons of expediency, could pose a risk to the procedural rights of the accused and to their procedural status. To a certain extent, all the basic principles of criminal proceedings are distorted, such as the fact that the object cannot be availed upon, the search for the material truth, oral law, contradiction, immediacy and the assessment of the evidence proposed by a jurisdictional body.

To avoid the aforementioned problems, the legislator must seek formulas that make the tenets of the discretionary principle compatible with respect for the fundamental rights of the individual, as a subject of criminal proceedings. Along these lines, **the Economic and Social Council of the United Nations** issued a manual of guiding principles for lawmakers when regulating these measures, including:

1. **Ensuring the right to a defence,** both for the victim and the offender (assistance of a lawyer and a translator if necessary) and
2. **Ensuring the right to the presumption of innocence,** in such a way that alternative measures can only be promoted when there is sufficient objective incriminating evidence to support the accusation. The rule must guarantee that the accused has recognised the facts freely and voluntarily, without any coercion, and always in the presence of their lawyer, fully aware of what this recognition means and entails, the consequences of the application of the alternative measure accepted and, where appropriate, of the consequences of non-compliance with the condition imposed.

VI. STATEMENTS OF THE PRINCIPLE OF OPPORTUNITY PROSECUTION IN THE SPANISH LEGAL SYSTEM

Criminal compliance

The Spanish Criminal Procedure Act does not provide, in general terms, for an *agreement procedure,* which regulates the scope, processing and consequences of the agreement, but includes various cases in which it is possible for the prosecutor and the defence to enter into an agreement, subsequently approved by the judge, with the avoidance of a hearing.

1. **Abbreviated procedure:** the defendant's agreement may be expressed once the indictment is known, or later, just before the start of the oral proceedings, or once the trial has begun, but before the evidence has been heard. In all three cases, the agreement must be signed by the accused and the defence counsel and assumes that there have been negotiations between the Public Prosecutor's Office and the defence counsel to reach an agreement on the sentence, always with the knowledge and consent of the accused.
2. **Fast-track trials:** these are cases in which it is the examining magistrate on duty who holds the trial and passes sentence, as it is not necessary to carry out further investigative procedures, nor has the victim attended. The Public Prosecutor's Office immediately files the indictment and if the accused agrees —after negotiation with the Public Prosecutor's Office— the examining magistrate will hand down a conviction by agreement, **with a reduction of one third of the sentence requested by the prosecution.** This is the reason why we speak of "rewarded acquiescence". This is only possible in cases in which the acts charged constitute crimes punishable by up to three years' imprisonment, a fine of any amount or, if the penalty is of a different nature, a term of imprisonment not exceeding 10 years. If the public prosecutor requests a prison sentence, this must not exceed two years. The judge may also suspend or substitute the custodial sentence, even if this has not been requested by the parties.

In the absence of a general regulation by the Legislator, in 2009 the State Attorney General's Office and the General Council of Lawyers drew up a ***Protocol of Action for Compliance Trials,*** which establishes rules for the celebration of guaranteed and efficient compliance and establishes a system of communication between the prosecutors' offices and the lawyers in the proposal and processing of conformities.

Dismissal of minor offences

In so-called minor offences, which do not carry a prison sentence, the Spanish legislator has expressly introduced the principle of legal discretion (thefts of less than 400 euros, damages of less than 400 euros, minor injuries, minor coercion, etc.).

This is a **pure acquittal,** as the effectiveness of the dismissal is not conditional on the subject complying with conditions, measures or rules of conduct for a specific period of time. There is no investigative or intermediate phase. The investigating judge receives the complaint or the police report and assesses its remit. After initiating the proceedings, he/she may agree to dismiss and close the case if the Public Prosecutor's Office so requests —he/she cannot do so on his/her own initiative— and if the following circumstances are met:

1. **The reported minor offence is of very low seriousness** (petty offences) in view of the nature of the act, its circumstances, and the personal circumstances of the perpetrator
2. **There is no relevant public interest in the prosecution of the act.** In minor property offences, it shall be understood that there is no relevant public interest in their prosecution when the damage has been repaired and there is no complaint from the injured party

Criminal order for payment procedure or acceptance by decree

This is also regulated in other European legal systems (Germany, France, Italy and Portugal), as a way of avoiding traditional criminal proceedings.

It applies to minor and less serious offences, provided that the following conditions are met:

1. The offence is punishable by a fine, community service or imprisonment for a term not exceeding one year and which may be suspended, with or without deprivation of driving licence.

2. The Public Prosecutor's Office considers that the specific penalty applicable is a fine, community service and, where appropriate, the deprivation of the driving licence.
3. That the victim is not present.

During the investigation phase, if the Public Prosecutor's Office is faced with this type of offence, it can issue a decree proposing a sentence, so that the Investigating Court can authorise it and notify it to the person under investigation, suspending the investigation of the case in the meantime.

If the Magistrate's Court authorises the public prosecutor's decree, it notifies the defendant and summons him/her to an appearance at which they will be assisted by a lawyer. If at the hearing the defendant accepts the proposed penalty, the decree becomes a non-appealable conviction and the criminal proceedings are terminated.

In the event that the decree issued by the Public Prosecutor is not approved by the judge, or if the accused does not appear or does not accept the content of the decree, the investigation of the case will continue through its ordinary channels.

The criminal liability of juvenile offenders

The law regulating the criminal liability of juvenile offenders in Spain (Organic Law 5/2000, of 12 January, *regulating the criminal liability of minors)* is inspired by principles aimed at their re-education, taking into consideration their personal, family and social circumstances. The best interests of the minor are above the *ius puniendi* of the State and must always be protected, which allows the discretionary principle to be fully established in this type of process, not only in Spain but in most countries.

In the sphere of international organisations, the introduction of the discretionary principle in juvenile penal systems has often been recommended to States. As an example, the ***United Nations Standard Minimum Rules for the Administration of Juvenile Justice,*** the Beijing Rules, adopted on 29 November 1985, expressly state (rule 11): "Consideration shall be given, where appropriate, to dealing with juvenile offenders without recourse to competent authorities for formal adjudication". Also

the Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989, which promotes the need to encourage measures to be taken through alternative means to the judicial process. Finally, ***Recommendation 20/1987 of the Committee of Ministers of the Council of Europe, of 17 September 1987,*** on social reactions to juvenile delinquency, expressly speaks of "encouraging the development of de-judicialisation and mediation procedures at the level of the prosecuting body or the police" in order to spare minors the negative consequences of the criminal justice system.

Focusing on the applications of the discretionary principle in the Spanish regulation of the criminal responsibility of juvenile offenders, they only apply to minor or less serious offences, committed without serious violence or intimidation. They are as follows:

1. **Dismissal of the case by the Public Prosecutor's Office,** who decides not to initiate any proceedings. It then transfers all the proceedings to the public entity in charge of the protection of minors, which will promote protection measures appropriate to the circumstances.
2. **Mediation, reparation and educational activities:** these are manifestations of restorative justice that take place once the case against the child has been opened. The Public Prosecutor's Office desists from continuing with the procedure when one of the following situations occurs: that an agreement has been reached between the minor and the victim (the minor has to recognise the facts and apologise to the victim), that the harm caused by the minor has been repaired or that the minor has undertaken to carry out the educational activity proposed by the technical team working in the juvenile court (psychologists and social workers). The technical team is the one that carries out the mediation tasks between the minor and the victim or injured party, and will inform the Public Prosecutor's Office of the commitments entered into and their degree of compliance.
3. **Dismissal of the case at the request of the technical team:** such a request shall be made when the team considers that the reproach to the minor has been sufficiently expressed with the steps taken up to that moment, or because it considers any other subsequent intervention to be inappropriate for the minor's interests, given the time that has elapsed since the committing of the acts.

VII. CONCLUSIONS: RELATIONSHIP BETWEEN THE TWO PRINCIPLES

The aforementioned crisis of the rule of law, which has led practically all legal systems to adopt to a greater or lesser extent the various expressions of the discretionary principle, requires that the relationship between the two principles be clearly and precisely established.

Nor is the application of the discretionary principle exempt from criticism. It is criticised for departing from basic principles of the democratic state and the rule of law, such as the principle of equality before the law, the principle of the division of powers or even the presumption of innocence, the guiding principle of criminal law. The general preventive purpose of punishment would also be undermined when expediency leads to impunity. Speeding up the process and saving costs cannot justify affecting the rights and guarantees of the accused, who is the weakest party in the process.

The doctrine, in the face of these approaches, is not unequivocal. While, for some, both fundamental principles must complement each other, seeking a balance between the demonstrations or tools that one and the other provide for the administration of justice, others allude to their incompatible and opposing nature, as they respond to very different reasons and lead to different consequences. On the one hand, we have the rule of law, which conceives of punishment as something absolute that must be imposed on anyone who has infringed, in any way, the criminal law, a manifestation of the ius puniendi that the state exercises on an exclusive and excluding basis. On the other hand, we have the discretionary principle, which is inspired by utilitarian approaches and is therefore *relative*.

From our point of view, this second position, which considers both notions irreconcilable, can only be defended from a strict vision of the tenets of the discretionary principle, understood as discretionary or free —Anglo-Saxon and American mode — in which the assumptions and conditions for deciding whether or not to bring charges are left to the discretion of the Public Prosecutor's Office (and sometimes the police). However, if we consider the discretionary principle to be regulated, where the prosecutor can only waive or condition the exercise of criminal prosecution when certain legally established conditions are met and are subject to judicial control, the truth is that both axioms —legality and opportunity— can be complementary and can work together to achieve a better functioning of the administration of justice. We can thus say that **the discretionary principle is**

a manifestation of the rule of law, since it is the law that establishes it and allows the aims pursued by the legislator to be achieved with the establishment of specific penalties. In these cases of regulated opportunity, it does not replace the rule of law, but rather tries to provide a solution to dysfunctions in the administration of justice, such as its delay, speeding it up, while at the same time fulfilling other objectives that the legislator also pursues with the criminal process, which does not always coincide with the conviction of the accused (their rehabilitation, reintegration, redress for the victim, etc.).

In other words, the crisis suffered by both principles must be resolved with a criminal procedural system that *"without sacrificing the traditional criminal process, makes room for new forms of conflict resolution, in such a way that the principles of legality and opportunity prevail in a balanced way and without compromise, because, as HASSEMER said, there must be as much legality as possible and as much opportunity as necessary"*.

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THE PRESUMPTION OF INNOCENCE I

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Summary

I. THE PRESUMPTION OF INNOCENCE AS A FUNDAMENTAL RIGHT

The presumption of innocence is universally regarded as a fundamental human right, recognised and proclaimed in various international conventions. This is stated, for example, in Article 11 of the **Universal Declaration of Human Rights** of 10 December 1948, which stipulates that:

"1. Everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which they has had all the guarantees necessary for their defence."

It is reiterated in Article 6 of the **Rome Convention for the Protection of Human Rights and Fundamental Freedoms** of 4 November 1950, which reads as follows:

"1. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide (...) the merits of any criminal charge against him or her.

2. Everyone charged with an offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has at least the following rights:

a) to be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation against him/her;

b) to have adequate time and facilities for the preparation of his/her defence;

c) to defend himself/herself in person or through legal assistance of his/her own choosing and, if he/she has not sufficient means to pay for it, to be assisted free of charge by a public defence counsel, when the interests of justice so require;

d) to examine or have examined the witnesses who give evidence against him/her and to obtain the summons and examination of witnesses who give evidence in his/her favour under the same conditions as witnesses who give evidence against him/her;

e) to have the free assistance of an interpreter if he/she does not understand or speak the language used at the hearing."

These rights constitute the essential elements of the notion of a **"fair and equitable trial"** in criminal matters, which is a total concept, composed of a variety of elements, so that the absence of any one of them may result in its violation. The presumption of innocence enshrined in Article 6 (2) is one of the elements of a fair criminal trial required by paragraph 1 (Janosevic v. Sweden, 2002, § 96).

Article 14.2 of the **International Covention on Civil and Political Rights** signed in New York on 19 December 1966 states:

"2. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law.

3. During the trial, everyone charged with a criminal offence shall be entitled to the following minimum guarantees, on a fair and equal footing:

a) To be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the charge against him/her.

b) To have adequate time and facilities for the preparation of his/her defence and to communicate with counsel of his/her own choosing.

c) To be tried without undue delay.

d) To be present at the trial and to defend himself/herself in person or through legal assistance of his/her own choosing; to be informed, if he/she does not have legal assistance, of his/her right to have it assigned to him/her and, in any case where the interests of justice so require, to have legal assistance assigned to him/her free of charge if he/she does not have sufficient means to pay for it.

e) To examine or have examined the witnesses against him/her and to obtain the attendance and examination of witnesses on his/her behalf under the same conditions as witnesses against him/her.

f) To have the free assistance of an interpreter if he/she does not understand or speak the language used in court.

g) not to be compelled to testify against himself/herself or to confess guilt."

Similarly, Article 48 of the **Charter of Fundamental Rights of the European Union** (2000 and 2009) states:

"Article 48. Presumption of innocence and rights of the defence.

1. *Everyone who has been charged shall be presumed innocent until proved guilty according to law.*
2. *Every accused person shall be guaranteed the rights of the defence."*

The **Rome Statute for the establishment and operation of the International Criminal Court** (1998) also enshrines the right to the presumption of innocence in Article 66 (1) by providing:

"1. 1. Any person shall be presumed innocent until proved guilty before the Court in accordance with applicable law.

2. *The burden of proof shall be upon the Prosecutor to establish the guilt of the accused.*
3. *In order to convict, the Court must be convinced of the guilt of the accused beyond reasonable doubt."*

Almost all modern constitutional and democratic states include the right to the presumption of innocence in the list of fundamental rights. It is closely linked, as we have seen in the wording of international texts, to the right to a fair trial and the right to defence.

In its broad outline it would mean that everyone has the right to be presumed innocent until the criminal act and his or her participation are established before an impartial tribunal, following a fully fair trial, in which his or her right of defence is respected.

A decision declaring a person guilty before the completion of the trial would violate the fundamental right to the presumption of innocence[1].

In addition, various conditions must also be respected, such as:

1. The procedural burden of proving guilt always rests with the prosecution and consequently there is no burden of proof for the accused to prove his innocence.
2. The non-requirement of the accused to take an oath in their statements, not being obliged to testify against themselves and the right to remain silent, without the exercise of such rights being interpreted as an element of guilt.
3. The requirement of full conviction of the judge beyond a reasonable doubt, together with the principle of in dubio pro reo, which requires that, in case of doubt, it must always be resolved in favour of the accused.

Some sociologists point out that the social belief that may correspond to the average citizen is more aligned with giving credence to any news or speculation about participation in the commission of a crime ("they must have done something to have been arrested or charged") in a very different way to what the presumption of innocence is intended to guarantee; or even the social or media pressure that arises in the face of execrable crimes that shock the public, tends to minimise the strict demands that derive from the fundamental right to the presumption of innocence that corresponds to every citizen and which constitutes one of the pillars of any modern penal system.

1. Thus, for example, the European Court of Human Rights, in the case Ürfi Çetinkaya v. Turkey, 2013, confirming its previous case law in Krause v. Switzerland, 1978 or Allenet de Ribemont v. France, 1995, declared contrary to the right to the presumption of innocence proclaimed in Art. 6.2 of the Convention the public assertion by the police, published in the press, that a suspect —not yet convicted— was an "international drug trafficker". In other words, the Court clearly states that the accused cannot be publicly presented as guilty prior to conviction.

For its part, the United Nations Human Rights Committee has criticised the fact that defendants are exhibited handcuffed or in cages, because this falsely indicates that they are dangerous criminals, when at that very moment they should be presumed innocent, since they are on trial and nothing less than a conviction is at stake.

HR Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

When a person has been detained or is identified as a suspect, a suspicion arises in society, which has been explained from sociological or psychological perspectives. But the truth is that legally innocent people have been socially condemned on the basis of mere suspicions, rumours or fictitious information. Hence the importance of this guarantee, both inside and outside criminal proceedings, which has been elevated to the rank of a fundamental human right.

II. THE RIGHT TO THE PRESUMPTION OF INNOCENCE IN THE EUROPEAN UNION

As stated in Articles 2 and 3 of the **Treaty of the European Union,** one of the objectives of the European Union is the creation of an "area of freedom, security and justice", which is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. The Union recognises the rights, freedoms and principles set out in the **Charter of Fundamental Rights,** and also provides in Article 6(3) of the Treaty of the **European Union that the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms** shall form part of the Union's law as general principles.

The guarantee of such fundamental rights, including the presumption of innocence, will allow and reinforce the mutual recognition of judicial decisions between the different Member States, enhancing judicial cooperation in criminal matters in all areas and ensuring the judicial protection of individual rights. In this way, a principle of mutual trust in the criminal justice systems of the other Member States is achieved, which is the key to facilitating the mutual recognition of judicial decisions in criminal matters.

In order to achieve the necessary approximation of the laws of the Member States, the European Union has issued a series of minimum standards for the protection of the procedural rights of suspects and accused persons[2], and specifically, with regard to the protection of the presumption of innocence, it has issued **Directive 2016/343 of 9 March 2016 strengthening certain aspects of the presumption of innocence and the right to be present at trial in criminal proceedings.**

Article 3 of Directive 2016/343 states that Member States shall ensure that suspects and accused persons are presumed innocent until proven guilty according to law. It applies as soon as a person is suspected or accused of having committed a criminal offence, and therefore even before that person has been informed by the competent authorities of a Member State, by official notification or otherwise, of his or her status as a suspect or accused person. That guarantee also applies to any stage of the criminal proceedings until the final decision on whether the accused suspect has committed the criminal offence has become final.

Art. 4 of Directive 2016/343 specifically states that there is a violation of the presumption of innocence if public statements by public authorities or judicial decisions other than those of conviction refer to a suspect or accused person as guilty until proven guilty according to law. Such statements and judicial decisions should not reflect the view that the person is guilty, without prejudice to preliminary procedural acts of a procedural nature which must be based on suspicion or on prosecution evidence (e.g. arrest or arrest warrant, indictment, etc.).

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2. The need for a homogeneous framework of safeguards for suspects and defendants in the Member States of the European Union, as set out in Article 82(2)(b) TFEU, in order to achieve the consolidation of a European area of freedom, security and justice, has led to the publication of various regulatory texts:

Directiva 210/64/UE sobre el derecho a la interpretación y traducción en los procesos penales;

Directiva 212/13/UE sobre el derecho a la información en los procesos penales;

Directiva 213/48/UE relativa al derecho a la asistencia letrada en los procesos penales y en los procedimientos relativos a la orden de detención europea, y sobre el derecho que se informe un tercero en el momento de la privación de libertad y a comunicarse con terceros y con autoridades consulares durante la privación de libertad;

Directiva 2016/343/UE 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;

Directiva 2016/800/UE relativa a las garantías procesales de menores sospechosos acusados en los procesos penales;

Directiva 2016/1919 relativa a la Asistencia Jurídica Gratuita a los sospechosos y acusados en los procesos penales y a las personas buscadas en virtud de un procedimiento de orden europea de detención.

Art. 5 of Directive 2016/343 contains an obligation for Member States to ensure that when providing information to the media, public authorities must refrain from presenting suspects or accused persons as guilty, as long as the guilt of those persons has not been proven in accordance with the law. They should also refrain from presenting suspects or accused persons before the courts or the public as guilty, through the use of physical restraints —such as handcuffs, glass cabinets, cages or shackles— unless such restraints are necessary in specific cases (either for security reasons, for example to prevent them from injuring themselves or others or from causing damage to property, or to prevent them from absconding or coming into contact with third persons, such as witnesses or victims). Furthermore, according to Recital 21, competent authorities should avoid presenting suspects or accused persons before the courts or the public in prison clothing that may give the impression or appearance that they are guilty.

Art. 6 of Directive 2016/343 states that the burden of proof for establishing the guilt of suspects and accused persons lies with the prosecution and that Member States shall ensure that any doubt as to guilt always benefits the suspect or accused person.

Other important aspects of the presumption of innocence are regulated in Art. 7 of Directive 2016/343 such as the right to remain silent in relation to the criminal offence of which they are suspected or the right not to testify against themselves without being compelled to produce evidence or documents or to provide information which may be self-incriminating. However, it specifies that it does not prevent the competent authorities from collecting evidence that can be lawfully obtained through the legitimate exercise of coercive powers that have an existence independent of the will of the suspects or accused persons (e.g. material obtained pursuant to a court order, blood, urine or body tissue samples for DNA analysis).

It specifies that the exercise by suspects and accused persons of the right to remain silent and not to testify against themselves shall not be used against the suspect and should not in itself be considered as evidence that they have committed the criminal offence.

Finally, as set out in recitals 31 and 32, it must be ensured that suspects and accused persons are informed of these rights, in line with the doctrine established by the ECtHR (Ibrahim and others v. United Kingdom, 2016, § 272). The importance of informing a suspect of the right to remain silent is such that, even if a person voluntarily agrees to give evidence to the police after being informed that their words may be used as evidence against them, this cannot be considered a fully informed choice if they have not been expressly notified of their right to remain silent and if their decision has been taken without the assistance of a lawyer (Stojkovic v. France and Belgium, 2011, § 54).

III. THE PRESUMPTION OF INNOCENCE AND THE EUROPEAN COURT OF HUMAN RIGHTS (ECHR)

As we have already explained, Article 6(2) of the Rome Convention proclaims the fundamental right to the presumption of innocence. In the delimitation of the content and scope of this precept, the ECtHR has found violations of the fundamental right to presumption on various levels[3], to which we will refer below:

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3. In *ECHR judgement Dicle and Sadak v. Turkey,* 2015, the Court considers:

"50. Article 6 § 2 protects everyone's right to be "presumed innocent until proved guilty according to law". As the Court has reiterated (see Allen v. the United Kingdom [GC], no. 25424/09, § 93, ECHR 2013), viewed as a procedural guarantee in the context of a criminal trial itself, the presumption of innocence imposes requirements in respect of, inter alia, the burden of proof (see Barberà, Messegué and Jabardo v. Spain, 6 December 1988, § 77, Series A no. 146, and Telfner v. Austria, no. 33501/96, § 15, 20 March 2001); presumptions of fact or of law (see Salabiaku v. France, 7 October 1988, § 28, Series A no. 141-A, and Radio France and Others v. France, no. 53984/00, § 24, ECHR 2004-II); and premature statements by the trial court or any other public authority concerning an accused person's guilt (see Allenet de Ribemont, cited above, §§ 35-36, and Nešťák v. Slovakia, no. 65559/01, § 88, 27 February 2007).

51. The Court considers that the presumption of innocence has been flouted if an official statement concerning an accused person reflects an opinion that he/she is guilty even though his/her guilt has not yet been legally established. It is sufficient, in this context, even if no formal finding has been made, for a given reasoning to suggest that the judge in question considers the person in question guilty. The Court also observes that the presumption of innocence may be infringed not only by a judge or court but also by other public authorities (see Allenet de Ribemont v. France, 10 February 1995, § 36, Series A no. 308; Daktaras v. Lithuania, no. 42095/98, § 42, ECHR 2000-X; Butkevičius v. Lithuania, no. 48297/99, § 49, ECHR 2002-II; and Gutsanovi v. Bulgaria, no. 34529/10, §§ 191 and 193, ECHR 2013).

52. The Court further reaffirms that a distinction must be made between decisions that reflect an opinion that the person in question is guilty and those which simply describe a situation of suspicion. The former violates the principle of the presumption of innocence, while the latter are considered compatible with the spirit of Article 6 of the Convention (see Marziano v. Italy, no. 45313/99, § 31, 28 November 2002 and the references therein).

53. Lastly, the Court reiterates that Article 6 § 2 of the Convention governs criminal proceedings in their entirety, "irrespective of the outcome of the prosecution". However, once an accused has been found guilty, in principle, it ceases to apply in respect of any allegations made during the subsequent sentencing procedure (see Matijašević v. Serbia, no. 23037/04, § 46, ECHR 2006-X).

54. Finally, however, in keeping with the need to ensure that the right guaranteed by Article 6 § 2 is practical and effective, the presumption of innocence also has another aspect. Its general aim, in this second aspect, is to protect individuals who have been acquitted of a criminal charge, or in respect of whom criminal proceedings have been discontinued, from being treated by public officials and authorities as though they are in fact guilty of the offence charged. In these cases, the presumption of innocence has already operated, through the application at trial of the various requirements inherent in the procedural guarantee it affords, to prevent an unfair criminal conviction being imposed. Without protection to ensure respect for the acquittal or the discontinuation decision in any other proceedings, the fair-trial guarantees of Article 6 § 2 could risk becoming theoretical and illusory (see Allen [GC], cited above, § 94).

Extra-procedural declarations

Generally speaking, it can be established that the obligation imposed on the judge to respect the presumption of innocence is closely linked to his or her duty of impartiality, ensuring that the judge is free from any prejudice as to guilt (Mucha v. Slovakia, 2021, §§ 48 and 66).

But this principle is not only addressed to judges, but to all public authorities (Allenet de Ribemont v. France, 1995, § 36; Daktaras v. Lithuania, 2000, § 42; Petyo Petkov v. Bulgaria, 2010, § 91). France, 1995, § 36; Daktaras v. Lithuania, 2000, § 42; Petyo Petkov v. Bulgaria, 2010, § 91), when an official statement conveying a feeling of a subject's guilt is produced, which encourages the public to believe that the suspect is guilty (Ismoilov and Others v. Russia, 2008, § 161), even before the actual criminal proceedings have been initiated, thus prejudging the assessment of the facts and guilt which can only be established in the final ruling.

The principle of the presumption of innocence does not prevent the authorities from informing the public about ongoing criminal investigations, given the right to receive and impart information which prevails where there is a social interest in the content of the information. However, the ECHR requires that they do so with all the discretion and caution necessary to respect the presumption of innocence (Fatullayev v. Azerbaijan, 2010, § 159; Allenet de Ribemont v. France, 1995, § 38; Gary de Ribemont v. France, 1995, § 38; Gary de Ribemont v. France, 1995, § 38). France, 1995, § 38; Garycki v. Poland, 2007, § 69). The ECHR has underlined the importance of the choice of words by public officials in their statements before a person has been tried and convicted of a crime (Daktaras v. Lithuania, 2000, § 41; Arrigo and Vella v. Malta (dec.), 2005; Khuzhin and Others v. Russia, 2008, § 94). In order to find such a violation, a clear statement would therefore be required, in the absence of a final conviction, that a person has committed the offence in question (Ismoilov and Others v. Russia, 2008, § 166; Nešđ ák v. Slovakia, 2007, § 89). It would not be sufficient for a finding of a violation to state that a person is merely suspected of having committed a crime (Garycki v. Poland, 2007, § 67). It is the making of a formal finding of guilt that is barred.

It would also be the case when judges themselves make statements to the press outside the trial that demonstrate conviction before a final conviction is handed down (Minnelli v. Switzerland, 1983, § 37; Nerattini v. Greece, 2008, § 23; Didu v. Romania, 2009, § 41; Didu v. Romania, 2009, § 42; Nerattini v. Greece, 2008, § 43; Nerattini v. Greece, 2008, § 43; Didu v. Romania, 2009, § 44).

Where the impugned statements are made by private entities (such as, for example, press media), and do not constitute a verbatim reproduction of (or a direct quotation from) any part of the official information provided by the authorities, an issue does not arise under Article 6(2), but may arise under Article 8 of the Convention protecting the right to respect for private and family life (Mityaniny Leonov v. Russia, 2019, §§ 102 and 105).

Statements by the judicial authorities

The presumption of innocence will be violated if a court decision concerning a person charged with a criminal offence reflects the view that he or she is guilty before guilt has been proved according to law. It is sufficient that some reasoning has been included to suggest that the court considers the accused guilty (Minelli v. Switzerland, 1983, § 37; Nerattini v. Greece, 2008, § 23; Didu v. Romania, 2009, § 41; Gutsanovi v. Bulgaria, 2013, §§ 202-203).

The fact that the applicant was ultimately found guilty cannot override his or her initial right to be presumed innocent until proven guilty according to law (Matijaševiđ c. Serbia, 2006, § 49; Nešđ ák v. Slovakia, 2007, § 90, in relation to decisions extending the applicants' pre-trial detention). In order for a person's guilt to be established, a conviction at first instance is not sufficient, but must be final. The presumption of innocence does not cease to apply merely because the first instance proceedings resulted in the defendant's conviction when the proceedings continue on appeal (Konstas v. Greece, 2011, § 36).

It even extends its effectiveness beyond the death of the defendant so that a court cannot make a finding of guilt after the defendant's suicide without determining guilt in a formal trial (Vulakh v. Russia, 2012, § 34).

The expression of suspicions about an accused is conceivable during criminal proceedings (Sekanina v. Austria, 1993, § 30). However, once an acquittal has become final, the expression of any suspicion of guilt is incompatible with the presumption of innocence (Rushiti v. Austria, 2000, § 31; O. v. Norway, 2003, § 39; Geerings v. Netherlands, 2007, § 49; Paraponiaris v. Greece, 2008, § 32; Marinoni v. Italy, 2021, §§ 48 and 59).

The presumption of innocence prohibits statements hinting at the guilt of the accused in a ruling of acquittal, where the reasoning reflects the view that the accused is indeed guilty (Cleve v. Germany, 2015, § 41). A description of a "state of suspicion" or "doubts that are resolved in favour of the defendant" would, however, be admissible, although it must be acknowledged that the delimitation between arguments hinting at the actual guilt of the accused and the expression of mere suspicions is certainly complex and casuistic.

In Karaman v. Germany, 2014, § 42, it is established that the presumption of innocence can also be infringed by a premature expression of the suspect's guilt in the context of a judgment against co-suspects prosecuted in separate criminal proceedings.

Compensation for pre-trial detention in the event of acquittal or dismissal

Although neither Article 6(2) nor any other clause of the Convention grants a right to compensation for lawful pre-trial detention where a prosecution is dropped or an acquittal is granted, the ECHR concludes that it is not permissible for suspicions to be raised as to the innocence of an accused person following an acquittal that has become final, and for such suspicions to be used as a ground for refusing to pay compensation. The ECHR points out that there should be no qualitative difference between an acquittal based on a lack of sufficient evidence and an acquittal resulting from an irrefutable finding of innocence. In Marcelo Lanni v. Spain, 2016, one of the applicants had been acquitted at first instance and another had been provisionally dismissed, and compensation was denied because they had not been acquitted on the basis of exculpatory evidence confirming their innocence, but for lack of sufficient prosecution evidence. The ECHR thus concluded that there was clearly a doubt as to the applicants' innocence, finding a violation of Art. 6.2 of the Convention.

Right to remain silent and not incriminate oneself

Another aspect of the presumption of innocence is the right to remain silent and not incriminate oneself, since a person who is to be presumed innocent does not have to contribute to the proof of the contrary and is not obliged to prove his or her innocence. Self-incriminating statements made in breach of this right, e.g. confessions made by torture or inhuman or degrading treatment[4], or the use of means contrary to human dignity such as lie detectors or narco-analysis, are therefore excluded. In this regard, the ECHR has recalled that the admission of statements obtained as a result of torture or other ill-treatment in breach of Article 3 ECHR, as evidence to establish the relevant facts in criminal proceedings, would automatically deprive the entire proceedings of fairness (Gafgen v. Germany, 2010 § 166; Ibrahim and Others v. the United Kingdom [GC], 2016, § 254; El Haski v. Belgium, 2012, § 85; Cđ snieks v. Latvia, 2014, §§ 67-70). United Kingdom [GC], 2016, § 254; El Haski v. Belgium, 2012, § 85; Cđ snieks v. Latvia, 2014, §§ 67-70), even where the person subjected to torture from whom the evidence is extracted was a third party (Othman (Abu Qatada) v. United Kingdom, 2012, §§ 263 and 267; Kaçiu and Kotorri v. Albania, 2013, § 128; Kormev v. Bulgaria, 2017, §§ 89-90).

The presumption of innocence is also closely related to the right not to incriminate oneself (Heaney and McGuinness v. Ireland, 2000, § 40). This relates primarily to respect for the will of an accused person to remain silent (Saunders v. United Kingdom, 1996, § 68; Bykov v. Russia, 2009, § 92). The ECHR has identified at least three types of situations in which this right may be violated:

- where a suspect is compelled to testify under threat of sanctions (Saunders v. the United Kingdom [GC], 1996, Brusco v. France, 2010) or is punished for refusing to testify (Heaney and McGuinness v. Ireland, 2000; Weh v. Austria, 2004)
- where physical or psychological pressure, often in the form of treatment in breach of Article 3 of the Convention, is used to obtain statements (Jalloh v. Germany [GC], 2006; Gäfgen v. Germany [GC], 2010; Gäfgen v. Germany [GC], 2010)

4. Under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, any statement established to have been made as a result of torture may not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

– when authorities use subterfuge to obtain information that they could not obtain during interrogation (Allan v. the United Kingdom, 2002 - police informant who shared a cell with suspect)[5].

It does not extend to the use in criminal proceedings of material which can be obtained from the accused through the use of coercive powers and has an existence independent of the will of the suspect, such as, inter alia, documents acquired pursuant to a court order, samples of breath, blood, urine, hair or voice as well as body tissue for the purpose of DNA testing (Saunders, § 69; Choudhary v. the United Kingdom, 1999; J.B. v. Switzerland, 2001, § 68; and PG and J.H. v. the United Kingdom, 2001, § 80).

In Murray v. United Kingdom, 1996, para. 47, the ECHR states that it is clear that basing a conviction solely or principally on the defendant's silence or refusal to answer questions or to testify themselves is incompatible with such immunities. However, it considers that it is equally clear that these immunities cannot and should not prevent the defendant's silence, in situations which clearly require an explanation on their part, from being taken into account in assessing the persuasiveness of the evidence ad-

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5. In *Allan v. UK* the Court considered as follows:

"50. While the right to silence and the privilege against self-incrimination are primarily designed to protect against improper compulsion by the authorities and the obtaining of evidence through methods of coercion or oppression in defiance of the will of the accused, the scope of the right is not confined to cases where duress has been brought to bear on the accused or where the will of the accused has been directly overborne in some way. The right, which the Court has previously observed is at the heart of the notion of a fair procedure, serves in principle to protect the freedom of a suspected person to choose whether to speak or to remain silent when questioned by the police. Such freedom of choice is effectively undermined in a case in which, the suspect having elected to remain silent during questioning, the authorities use subterfuge to elicit, from the suspect, confessions or other statements of an incriminatory nature, which they were unable to obtain during such questioning and where the confessions or statements thereby obtained are adduced in evidence at trial.

51. Whether the right to silence is undermined to such an extent as to give rise to a violation of Article 6 of the Convention depends on all the circumstances of the individual case. In this regard, however, some guidance may be found in the decisions of the Supreme Court of Canada, referred to in paragraphs 30-32 above, in which the right to silence, in circumstances which bore some similarity to those in the present case, was examined in the context of section 7 of the Canadian Charter of Rights and Freedoms. There, the Canadian Supreme Court expressed the view that, where the informer who allegedly acted to subvert the right to silence of the accused was not obviously a State agent, the analysis should focus on both the relationship between the informer and the State and the relationship between the informer and the accused: the right to silence would only be infringed where the informer was acting as an agent of the State at the time the accused made the statement and where it was the informer who caused the accused to make the statement. Whether an informer was to be regarded as a State agent depended on whether the exchange between the accused and the informer would have taken place, and in the form and manner in which it did, but for the intervention of the authorities. Whether the evidence in question was to be regarded as having been elicited by the informer depended on whether the conversation between him and the accused was the functional equivalent of an interrogation, as well as on the nature of the relationship between the informer and the accused."

duced by the prosecution. The accused must be warned about the legal effects of remaining silent and the possibility of drawing inferences. Only if the evidence against the accused "requires" an explanation that the accused should be in a position to give, the lack of any explanation "may, as a matter of common sense, permit an inference to be drawn that there is no explanation and that the accused is guilty". Conversely, if the case presented by the prosecution had so little probative value that it required no response, the lack of response could not justify an inference of guilt. Therefore, it cannot be said that an accused's decision to remain silent should not necessarily have implications.

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- *Mityanin and Leonov v. Russia,* nos. 11436/06 and 22912/06, 7 May 2019
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- *Nerattini v. Greece,* no. 43529/07, 18 December 2008
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- *Petyo Petkov v. Bulgaria,* no. 32130/03, 7 January 2010
- *Radio France and Others v. France,* no. 53984/00, ECHR 2004-II
- *Rushiti v. Austria,* no. 28389/95, 21 March 2000
- *Salabiaku v. France,* 7 October 1988, Series A no. 141-A
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- *Sekanina v. Austria,* 25 August 1993, Series A no. 266-A
- *Stojkovic v. France and Belgium,* no. 25303/08, 27 October 2011
- *Telfner v. Austria,* no. 33501/96, 20 March 2001
- *Vulakh and others v. Russia,* 10 January 2012
- Guide on Article 6 of the European Convention on Human Rights.

THE PRESUMPTION OF INNOCENCE II

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Summary

I. INTRODUCTION

The purpose of this document is to provide an overview of knowledge regarding "the presumption of innocence" which is one of the fundamental rights guaranteed in the Spanish Constitution and, as such, is one of the foundations of our penal system: the right to the presumption of innocence implies that any person accused of a crime must be considered innocent until proven guilty, through the development of valid evidence-based activity.

It is the principle whereby a person will be treated as innocent until there is a final judgement of guilt and therefore implies that the person under investigation has the same legal status as any innocent person. It is therefore not only a fundamental right, but the cornerstone of the criminal process.

Criminal proceedings are a consequence of the guarantee of procedural legality: no one can be convicted without a trial (***"nullum crimen, nullla poena sine previo legale iudicio"***).

When criminal proceedings are initiated, in the face of an act that may have the characteristics of a crime, however serious it may be, we are dealing with a person, a citizen. Therefore, the starting point in our legal system is clear: the presumption of innocence of the *"investigated"* (terminology recently introduced in the Spanish Criminal Procedure Act). From this point onwards, with respect for fundamental rights and all guarantees, two things must be proved: whether or not the act exists and the participation of the person in question.

The person under investigation cannot always be presumed guilty or treated as such, from the start of the proceedings, until a final judgement establishes that he or she is the perpetrator of the offence being prosecuted. Indeed, it is criminal proceedings that channel the action of *ius puniendi* (the State's right to punish, with limits, and the protection of the victim). But not at any price. Therefore, first of all, it is essential to know where and how this presumption of innocence is regulated, whether in Spanish or international law:

The Spanish legal system

In relation to Spanish legislation, we must refer mainly to **Article 24 of the Spanish Constitution,** drafted under the title "Judicial protection of rights", which in paragraph 1 regulates the right to effective judicial protection by the Courts, stating textually that: *"All persons have the right to obtain effective protection by the Judges and Courts in the exercise of their rights and legitimate interests, and in no case can they be without a defence".*

Specifically, paragraph 2 guarantees certain rights of persons in judicial proceedings, including the presumption of innocence, and is transcribed below, given the importance of its content:

"2. In addition, everyone has the right:

- *to the Ordinary Judge predetermined by law,*
- *to a defence and to the assistance of a lawyer,*
- *to be informed of the charges against them,*
- *to a public trial without undue delay and with all guarantees,*
- *to use the means of evidence relevant to his or her defence,*
- *not to testify against themselves, not to confess their guilt*
- *to the presumption of innocence".*

Also, **the Organic Law of the Judiciary** indirectly includes it in its **Art. 11.1** by establishing that *"in all types of proceedings, the rules of good faith shall be respected. Evidence obtained, directly or indirectly, by violating fundamental rights or freedoms shall have no effect".*

International regulations

The following should be noted:

- **The Universal Declaration of Human Rights (United Nations General Assembly).**

  In Art. 11 it determines that any person accused of a crime shall be presumed innocent until his or her conviction has been established in a public trial with all the guarantees of defence, in particular *"everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he or she has had all the guarantees necessary for his or her defence"*

- **The International Convention on Civil and Political Rights** (Multilateral treaty adopted by the United Nations General Assembly).

  Art. 14.2 also affirms the presumption of innocence, stating that "Everyone charged with a criminal offence has the right to be presumed innocent until proven guilty according to law".

- **The European Convention on Human Rights** (Council of Europe)

  Art. 6 of this Convention speaks of the right to a fair trial and specifically in paragraph 2 establishes the innocence of any person accused of an offence, stating that *"everyone charged with an offence shall be presumed innocent until proven guilty according to law".*

As a result, the presumption of innocence in Spain:

- Is a fundamental right, and is therefore constitutionally protected, specifically in Article 24.2 of the Constitution, in addition to Article 11 of the Universal Declaration of Human Rights, Article 6.2 of the European Convention on Human Rights and Article 14.2 of the International Covenant on Civil and Political Rights, all signed by Spain.
- The presumption of innocence has been further developed by **Directive 2016/343/EU of the European Parliament and of the Council of 9 March 2016** strengthening certain aspects of the presumption of innocence in criminal proceedings and the right to be present at trial.

The essential nature of the presumption of innocence, as a primordial rule of coexistence, has been highlighted by this Directive. Naturally, it obliges the countries of the European Union, including Spain, to abide by it. They must adapt their procedural systems to the principles established by this directive.

On the other hand, our Supreme Court and the Constitutional Court have emphasised in numerous judgements that *"the right to the presumption of innocence recognised in Article 24 EC implies that any person accused of a crime... must be considered innocent until proven guilty according to the law and, therefore, after a fair trial".*

In this sense, the Constitutional Court praises the importance of this right in repeated resolutions: *"The constitutional right to the presumption of innocence is the first and principal guarantee that the criminal procedure grants to the accused citizen... it is essential that the innocent are in all cases protected against unfounded convictions, whereas it is sufficient that the guilty are generally punished. The conviction of an innocent person represents an absolute breach of the basic principles of liberty, security and justice which underlie the social contract and that is why the constitutional right to the presumption of innocence constitutes the basic presupposition of all the other guarantees of due process".*

Having said that, it is essential to analyse in greater depth the **presumption of innocence in Spanish Criminal Law**, specifying its consequences in the criminal proceedings themselves, distinguishing **a two-fold effect in the situation in which the person under investigation is immersed in relation to the right to the presumption of innocence,** and analysed below:

1. On the one hand, he or she cannot be required to provide evidence to prove his or her innocence.
2. On the other hand, the burden of proving guilt will be on the opposing party, the prosecution.

The person under investigation is therefore protected by this presumption throughout the proceedings and the oral trial, so that only the evidence brought to trial can override its effects if, on the basis of this evidence, the judge or court is able to reach a level of certainty, beyond reasonable doubt, sufficient to affirm his or her guilt.

This implies that this presumption is necessarily complemented by the "in dubio pro reo principle", which we will examine later, which imposes on the judge or court the need to rule in favour of acquittal in the event of reasonable doubt, which it is unable to clear up, either regarding the committing of the criminal act or the involvement of the accused in it.

As a consequence of the above, we are dealing with a rebuttable presumption, which means that its effects may be overridden, and this will occur in those cases in which full proof of the guilt of the accused is brought to the trial. However, not just any proof is enough, as we will examine in more detail below.

The Spanish Constitutional Court, in its STC 128/1995 of 26 July 1995, established that **the presumption of innocence has a dual dimension, on the one hand as a rule of treatment, and on the other as a rule of judgment:**

1. **As a rule of treatment:** during all the phases of the process which the person under investigation is going through, he/she must be treated as if he/she were innocent until a final judgement is passed.
   In this way, the presumption of innocence is present throughout the criminal proceedings, and throughout the different stages of the process.
2. **As a trial rule:** from the outset, the judge must assume that the accused is innocent, so the prosecution has the responsibility to present a sufficient burden of proof for conviction.

The judge may assess the evidence according to the principle of free assessment of evidence in Art. 741.1 of the Criminal Procedure Act, but may only assess evidence that might weaken the right to the presumption of innocence. This precept establishes that *"The Court, assessing, according to its conscience, the evidence presented at the trial, the reasons put forward by the prosecution and the defence and the statements made by the defendants themselves, will pass sentence within the time limit established in this Law".*

As a *rule of judgement,* the presumption of innocence shows its impact at the moment of the assessment of evidence. It is linked to the very structure of the trial, and in particular to the technique of declaring the proven fact. In criminal proceedings, the judge's starting point is the innocence of the person under investigation, so that, if the accusing party does not fully prove their accusation against him/her, the innocence interim asserted will become the definitive truth.

Therefore, it should be clear that the presumption of innocence is present throughout all phases of criminal proceedings and at all stages. By way of example, it is particularly relevant to analyse some of the phases that may occur in the iter (route) of criminal proceedings and the incidence of the presumption of innocence on those phases: **arrest and reading of rights, pre-trial or provisional detention, oral trial and evidence presented.**

II. DETENTION: READING OF RIGHTS

Article 520.2 of the Criminal Procedure Act, which deals, among other matters, with the rights of all persons who are arrested, establishes that: *" All persons arrested or detained shall be informed in writing, in simple and accessible language, in a language they understand and immediately, of the facts attributed to them and the reasons for their deprivation of liberty, as well as of the rights to which they are entitled…".* These rights are as follows:

a. The right to remain silent by not testifying if one does not wish to do so, to not answer any or some of the questions put to one, or to state that one will only testify before the judge.

b. The right not to testify against oneself and not to confess guilt.

c. The right to appoint and be assisted by a lawyer without undue delay.

d. The right of access to those elements of the proceedings that are essential to challenge the lawfulness of the detention or deprivation of freedom.

e. The right to be informed, without undue delay, of one's deprivation of liberty and of the place where one is being held at any given moment, to any relative or person who so desires. Foreign nationals shall have the right to have the above circumstances communicated to the consular office of their country.

f. The right to communicate by telephone, without undue delay, with a third party of one's choice.

g. The right to be visited by, communicate and correspond with the consular authorities of one's country.

h. The right to be assisted free of charge by an interpreter in the case of foreigners who do not understand or do not speak Spanish or the official language of the action in question, or deaf or hearing impaired persons, as well as other persons with language difficulties.

i. The right to be examined by the forensic doctor or his or her legal substitute or, failing this, by the doctor of the institution in which one is being held, or by any other doctor employed by the State or by other public administrations.

j. The right to apply for legal aid, as well as how to do so and conditions for obtaining it.

We should not forget that the **Spanish Constitution,** itself, in its **Art. 17.3** refers to the most essential right of the detainee, where it states that any person who is detained must be informed immediately and in a comprehensible manner of the rights and reasons for their detention, and that they are not obliged to make a statement if they do not wish to do so. Furthermore, the detainee is guaranteed the assistance of a lawyer in police and judicial proceedings.

III. PRESUMPTION OF INNOCENCE AND PRE-TRIAL OR OTHER PREVENTIVE MEASURES

Case law establishes that *"the presumption of innocence is compatible with the application of precautionary measures", "provided that they are adopted by a decision founded in law and always based on a reasonable judgement of the purpose and circumstances". "Prison orders do not violate the presumption of innocence, since this can only be compromised by decisions that entail the definitive prosecution of behaviour"*.

Pre-trial detention functions in the Spanish procedural system as a precautionary measure of a personal nature whose purpose is to guarantee the substantiation of criminal proceedings in order to ensure the purposes of the proceedings and compliance with the future and possible sentence that may be imposed on the perpetrator of a criminal offence. This precautionary measure is one

of the State's duties to effectively pursue crime and ensure citizens' freedom, and is an important instrument for guaranteeing public safety and the effectiveness of the fight against crime.

The precise requirements for the authorisation of pre-trial detention are as follows:

1. The existence of one or more facts that present the characteristics of a crime must be recorded in the case (art. 503.1. 1º LECrim).
2. There are sufficient grounds for the criminal liability of the accused (art. 503.1. 2º LECrim).
3. The offence is punishable by a maximum of 2 years' imprisonment or more (art. 503.1. 1º LECrim).

However, pre-trial detention cannot be prolonged beyond what is strictly necessary, and must be used for specific purposes, which are now considered an unavoidable prerequisite for its decree in art. 503.3º LECrim (risk of absconding, well-founded and concrete danger of concealment, alteration or destruction of sources of evidence relevant to the prosecution, or risk of repeated offending –mainly taking into account the safety of the victim–).

With that in mind, it should not take so long that the presumption of innocence becomes a presumption of guilt. The precautionary measure of pre-trial detention seems to contradict this fundamental principle, since the presumption of innocence of the alleged offender does not affect those who are imprisoned as pre-trial detainees: they become inmates from the moment they are admitted to a penitentiary centre, and as such will suffer all the negative consequences of deprivation of freedom such as social stigmatisation, in addition to all the well-known negative psychological effects that admission to a penitentiary centre entails, particularly if this is the first time that a prisoner has been admitted. For this reason, we must ensure that provisional admission to prison does not contradict the presumption of innocence, because if this were not the case, it would in itself constitute a clear "presumption of guilt".

On the other hand, any precautionary measure adopted, whether of a personal or real nature (seizures, bail for civil liability, etc.) against a person not convicted, must be of an exceptional nature and cannot be used for punitive purposes (e.g. retribution or punishment).

IV. ORAL TRIAL: EVIDENCE PRESENTED

In accordance with the above, the right to the presumption of innocence implies that any person accused of a crime must be considered innocent until proven guilty, through the development of valid incriminating evidence. Its incriminating content must be rationally assessed in accordance with the rules of logic, experience and scientific knowledge in order to cast doubt on the initial premise, so that the judge can reach objective certainty about the facts and the participation of the accused. It is the judge's job to interpret and apply the law, subsuming the proven facts into the legal norm applicable to the case, after observing the grounds provided by the parties.

No one is obliged to prove his/her innocence, so the burden of proof shifts to the prosecution. The evidence against the accused must be sufficient and obtained following the legal procedure for that purpose, respecting the established constitutional parameters. After this, it will be assessed by the judge.

The bringing of evidence must refer to all the elements of the crime and the evidence presented must comply with a series of requirements for its assessment to be sufficient and lead to a conviction. According to Gimeno Sendra, a great Spanish jurist, the following essential notes can be established in order for the bringing of evidence to be sufficient to support a guilty verdict:

The material burden of proof lies exclusively with the prosecuting parties, and not with the defence

It is a repeated doctrine of the Constitutional Court (STC 303/1993) on the presumption of innocence that this presumption causes a shift of the burden of proof to the accusing parties, who are exclusively responsible (never the defence) for proving the facts constituting the criminal claim (STC 31/1981, STC 107/1983). On the other hand, this bringing of evidence must be sufficient to generate proof in the Court of the existence not only of a punishable act, but also of the criminal responsibility of the accused

(STC 141/1986, STC 150/1989, STC 134/1991). If they are intended to lead to a conviction, they must dispel doubts about the act and the participation of the accused.

This principle —ONUS PROBANDI (BURDEN OF PROOF) on the prosecution— means that it is inappropriate to ask the investigated/prosecuted/accused to cooperate in the investigation of the facts, which may be prejudicial to him/her. The defence, on the other hand, does not have the burden of showing that things were not the way the prosecution claims. Its mission is simpler: to try to demonstrate that the accusation's thesis is not solid, generating reasonable doubt (STS. 671/2021, of 9 September). In this sense,

Art. 6 Directive (EU) 2016/343, enshrines the rule clearly:

"1. Member States shall ensure that the burden of proof for establishing the guilt of suspects and accused persons rests with the prosecution. (…)

2. Member States shall ensure that any doubt as to guilt always benefits the suspect or accused person, including when the court is assessing whether the person concerned should be acquitted".

The evidence must be taken at the oral trial under the immediacy of the sentencing judge or court

Evidence to support a conviction must be taken in open court, in the presence of the court or judge who is to hand down the sentence.

The bringing of evidence must be based on authentic acts of evidence practiced in the oral trial under the principles of equality, contradiction, immediacy and public disclosure (STC 31/1981, STC 217/1989, STC 41/1991, STC 118/1991 and STC 303/1993).

Police reports and other investigative acts carried out by the police do not constitute evidence

It should be borne in mind that, in accordance with **article 297.1 of the Criminal Procedure Act,** *"the reports drawn up and the statements made by judicial police officers, as a result of the investigations they have carried out, shall be considered as reports for legal purposes".* In this way, the reports are not the means, but the object of evidence. For this reason, the facts stated in them must be introduced in the oral trial through authentic means of evidence, such as the witness statement of the police officer who intervened in the police report, a means of evidence through which the police statement of the detainee must necessarily be introduced, as no one can be convicted with just the police interrogation recorded in the police report (STC 47/1986, STC 80/1986). Rather than carrying out acts of evidence, what **article 126 of the Constitution** actually entrusts to the judicial police is the *"investigation of the crime and discovery of the offender"*, that is, the carrying out of the relevant acts of investigation to accredit the punishable act and its authorship.

The judge or court may not base its judgment on unlawful evidence

Evidentiary activity must be based on authentic acts of evidence obtained with strict respect for fundamental rights and not on evidence obtained in violation of these rights (right to privacy, inviolability of the home, etc.). To this end, the last paragraph of **Article 11.1 of the Organic Law** of the Judiciary establishes that: *"evidence obtained, directly or indirectly, in violation of fundamental rights or freedoms shall not be effective"* (unlawful evidence).

There is now a consensus that, when investigating a crime, however serious it may be, it is not so much what is investigated or the result obtained that matters, but how it is investigated. The discovery of the alleged truth cannot be pursued at the expense of the violation of fundamental rights.

The judge or court is obliged to give reasons for the evidence, i.e. he or she must explain the reasons why he or she has given weight to certain evidence.

Although this obligation is not expressly provided for in legal regulations, doctrine and jurisprudence derive it as a consequence of the right to effective judicial protection (Article 24.1 of the Constitution) and the right to the presumption of innocence (Article 24.2 of the Constitution).

The sentencing body must therefore express, in its decision, the evidence of an alleged infringement which has been taken into account to form its conviction, as well as the reasons justifying the value it has given them, and where appropriate, the reasoning carried out in the application of so-called circumstantial evidence. As **STC 34/1996 states,** *"the joint assessment of the evidence is an exclusive power of the judge, which he or she exercises freely, with the sole obligation of reasoning the result of this assessment"*.

Its relationship with the principle of free assessment of evidence contained in Article 741.1 of the Criminal Procedure Act must be analysed. The judge or court can assess the evidence according to the principle of free assessment, but can only assess evidence that meets the necessary requirements to overturn the presumption of innocence. In the sphere of criminal proceedings (in which there is no privileged evidence that exempts the judge from this duty to give reasons, and which can lead to a custodial sentence, so that the citizen must have the right to know the reasons why this fundamental right is denied), this basically means 'reasoning the evidence' (STC 34/1996; STS 1.140/2010, of 29 December).

Therefore, in the event of a conviction, it must state the reasons. The doctrine of this Court (STC 111/2008, of 22 September, FJ 2), states *"that any conviction must be based on valid, sufficient and conclusive incriminating evidence, such incriminating sufficiency must be rationally assessed by the judge and explained in the sentence, in such a way that a lack of reasoning or errors in the reasoning or its internal incoherence, in relation to the assessment of the evidence and, therefore, to the existence of incriminating evidence would, if upheld, entail a breach of the right to the presumption of innocence".*

Having analysed the importance of evidence in relation to the presumption of innocence, we have previously referred to the principle of **"in dubio pro reo"** and it is worth analysing the differences between this principle and the presumption of innocence.

In dubio pro reo is a basic legal principle in criminal law that expresses the obligation to favour the accused of a crime when the evidence is not sufficient to prove guilt, i.e. if the judge has doubts about the guilt of the accused after assessing the evidence, the accused must be found not guilty.

Thus, both the Public Prosecutor's Office and the private prosecution must prove the guilt of the accused by means of the evidence available to them. They must do so without any doubt whatsoever. If, once the evidence has been gathered and the trial is over, the judge has doubts about the guilt of the accused because it has not been proven, he or she must decide in favour of the accused when passing sentence, and the sentence passed by him or her will be acquittal. The application of this legal principle is based on the principle of innocence. It applies not only to the guilt of the accused, but also to circumstances that may aggravate his criminal liability (aggravating circumstances).

In this sense, case law indicates that the presumption of innocence supposes the imperative constitutional right of a public nature, which protects the accused when there is no evidence brought against him or her, and on the other hand, the "in dubio pro reo" principle is an interpretative criterion, to assess whether, despite all the evidence gathered, it is not possible for the Court to subsume the facts that have occurred in the precept, or it is not convinced that the negative and positive assumptions of the imputation trial concur, in which cases, the criminal proceedings must be concluded, for reasons of legal certainty, with a negative declaration of guilt.

V. PRESUMPTION OF INNOCENCE AND PARALLEL TRIALS

Finally, special mention should be made of the presumption of innocence and parallel trials. The presumption of innocence must extend beyond the strict scope of criminal proceedings.

The administration is obliged to effectively prevent media lynching - the premature condemnation of someone who must be presumed innocent for all intents and purposes. This is proclaimed in **Directive (EU) 2016/343: "Article 4:** *Public references to guilt. Member States shall take the necessary measures to ensure that, as long as a suspect or accused person has not been proved guilty according to law, public statements made by public authorities and judicial decisions other than those of conviction do not refer to that person as guilty".*

Nowadays, the most significant violations of the right to the presumption of innocence are closely connected to what we know as trials by media, although every time a parallel trial takes place, what is really called into question is Justice with a capital J and all the guarantees of a fair trial (art. 6 of the ECHR or art. 24 of the EC)

This is without prejudice to national law on the protection of the freedom of the press and other media, which implies that all interests must be taken into account, trying to combine them, using the criteria of reasonableness and proportionality. In any case, the directive also states that the form and context in which the information is disseminated must not create the impression that the person is guilty before their guilt has been proven in accordance with the law, also establishing the need for appropriate legal mechanisms to be adopted to guarantee the protection and defence of the rights that may be affected.

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INVESTIGATIVE MEASURES RESTRICTING FUNDAMENTAL RIGHTS

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Summary

I. INTRODUCTION

A basic principle of a social and democratic State governed by the rule of law is the recognition of a more or less extensive catalogue of Fundamental Rights, inherent to every person and rooted in the most basic principles of human dignity.

The right to life and physical integrity, the right to freedom, the right to privacy or the secrecy of communications, among others, constitute an inalienable status of every person, especially protected against external intervention and against the possible arbitrariness of public authorities.

Spanish Constitution[1] (hereinafter, SC) seeks to shield these Fundamental Rights by establishing a double mechanism to ensure their protection:

1. Requiring qualified majorities for the approval of Laws which, while respecting their essential content, affect Fundamental Rights and,
2. Providing for a special mechanism known as the Appeal for Protection (Recurso de Amparo) before the Constitutional Court (hereinafter, CC) to request their protection.

With the exception of the right to physical integrity, therefore, Fundamental Rights may be subject to restrictions when overriding needs are identified or conflict with other Fundamental Rights.

To this end, our CC states that, provided that the intervention of the Public Authorities in Fundamental Rights is provided for by Law, is proportionate and necessary, these find their limits, among other legitimate purposes, in the *"prosecution and punishment of crime"*.

1. Full text available here: https://www.boe.es/buscar/act.php?id=BOE-A-1978-31229

In the words of the **European Convention on Human Rights**[2] (hereinafter ECHR), Article 8(2), *"there shall be no intervention by a public authority with the exercise (...) except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety, the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".*

Our EC reserves for certain Fundamental Rights, such as the inviolability of the home or the secrecy of communications, protection which is conditional on judicial approval.

But there are other areas in which this condition is not so clearly determined, the intensity of the intervention being, in the final analysis, the intensity of the intervention in the specific case, in accordance with the standard set by the European Court of Human Rights (hereinafter ECHR) in its **ECHR Dumitru Popescu v. Romania of 26 April 2007**[3] and **Iordachi and Others v. Moldova of 10 February 2009**[4], which will determine whether or not court authorisation is required.

In this sense, our CC admits minor police intervention with fundamental rights such as privacy (Article 18 EC) provided that certain conditions are met: *"a) the existence of a constitutionally legitimate aim, considering as such the public interest in the prevention and investigation of crime, and, more specifically, the determination of relevant facts for criminal proceedings; b) that the measure limiting the right to privacy is provided for by law; c) that the police action complies with the legal authorisation (...) provided that the principle of proportionality is respected, specified in three requirements or conditions: appropriateness of the measure, necessity of the measure and a judgement of proportionality in the strict sense"* (for all, CC Judgment no. 173/2011[5]).

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2. Full text available here: https://www.echr.coe.int/documents/convention_spa.pdf

3. Ruling available in French at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22dumitru%20popescu%22],%22itemid%22:[%22001-70492%22]}

4. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22iordachi%202008%22],%22itemid%22:[%22001-91245%22]}

5. Full resolution available here: https://hj.tribunalconstitucional.es/es/Resolucion/Show/22621

As a corollary of this system, the Organic Law of the Judiciary (hereinafter, LOPJ) introduces an important rule of evidentiary exclusion for those interventions which, without taking into account constitutional or legal conditions, entail an unauthorised limitation of the rights of the persons under investigation.

In this sense, Art. 11. 1:: *"Evidence obtained, directly or indirectly, by violating fundamental rights or freedoms shall have no effect"*[6].

II. PHYSICAL INTERVENTIONS AND DNA SAMPLING

Measures such as the ones we are dealing with in this section, specifically the taking of body samples for DNA comparison, even though they have been subject to contradictory interpretations, are likely to affect not only privacy (Article 18 EC) but also physical integrity (Article 15 EC) or freedom (Article 17 EC).

The jurisprudence of our Supreme Court (hereinafter SC) that has been responsible for configuring a regulatory system governing this type of intervention.

6. Without going into the question raised in depth, we can only point out that in recent years this rule of exclusion of evidence has undergone a profound modification that has its origin, among other jurisprudential pronouncements, in STS 116/2017 of 23 February (Rapporteur: Manuel Marchena Gómez), also known as the "Falciani Judgment", which attenuates the requirements derived from such a rigid rule in cases in which the evidence is obtained by individuals outside the Public Authorities and is not evidence intentionally obtained to be used in criminal proceedings.

Based on the provisions of Additional Provision 3 of Organic Law LO 10/2007[7] which regulates DNA databases, and on Articles 282 and 363.2º[8] of the Criminal Procedure Act[9] (hereinafter, LECrim), the SC distinguished between::

1. In the case of the collection of **fingerprints, traces or biological residues left at the scene of the crime,** the Judicial Police, on their own initiative, may collect such signs, describing them and taking the necessary precautions for their preservation and placing them at the disposal of the court. The same conclusion shall be reached with regard to samples which may belong to the victim and which are found on personal objects belonging to the accused.
2. When, on the other hand, it is a question of **samples and fluids whose collection requires an act of bodily intervention** and, therefore, the collaboration of the accused, the consent of the latter will act as a true source of legitimisation of the state intervention represented by the taking of such samples.

   If the accused is in custody, such consent shall require the assistance of a lawyer.

   This guarantee shall not apply to a detained person when the taking of samples is obtained, not on the basis of an act of intervention requiring the consent of the person concerned, but on the basis of residues or excrement left by the accused himself.
3. Judicial authorisation will be indispensable on those **occasions when the police do not have the cooperation of the accused or the accused refuses to consent to the practice of the acts of inspection, examination or bodily intervention** that are necessary to obtain the samples.

7. Which establishes that *"for the investigation of the offences listed in letter a) of paragraph 1 of Article 3, the judicial police shall take samples and fluids from the suspect, detainee or accused person, as well as from the scene of the offence. The taking of samples that require inspections, examinations or bodily interventions, without the consent of the person concerned, shall in all cases require judicial authorisation by means of a reasoned order, in accordance with the provisions of the Criminal Procedure Act"*

8. Which establishes that *"whenever there are accredited reasons that justify it, the investigating judge may agree, in a reasoned decision, to obtain biological samples from the suspect that are indispensable for the determination of his DNA profile. To this end, he may decide to carry out those acts of inspection, recognition or temporary incorporation that are appropriate to the principles of proportionality and reasonableness"*

9. Full text available here: https://boe.es/buscar/act.php?id=BOE-A-1882-6036

This authorising resolution cannot legitimise the practice of violent acts or personal compulsion, subject to an explicit legal reserve - currently non-existent - that legitimises the intervention, without the open clause foreseen in art. 549.1.c) of the Organic Law of Judicial Power[10] This authorising resolution cannot legitimise the practice of violent acts or personal compulsion, subject to an explicit legal reserve —currently non-existent— that legitimises the intervention, without the open clause foreseen in art. 549.1.c) of the Organic Law of Judicial Power.

III. ENTRY AND SEARCH

Article 18.2 of the EC *"The home is inviolable and no entry or search may be made into it without the consent of the owner or a court order, except in the case of flagrante delicto"*.

In the context of a criminal investigation it is possible, in accordance with our Procedural Law, for the judge to decree the entry and search of all public buildings and places, whatever the territory in which they are located, when there are indications that the defendant or effects or instruments of the crime, or books, papers or other objects may serve for their discovery and verification (article 546 LECrim) or to order, in the same cases, the entry and search of any building or enclosed place or part of it, which constitutes the domicile of any Spanish or foreign national resident in Spain.

According to our SC, the decision of the Examining Magistrate, once the entry and search has been requested, has a two-fold approach, external and internal.

1. From the **external perspective**, the judicial decision will be justified. It will reflect the internal legal judgement and will explain the reasons that lead the judge to adopt the judicial decision.

   It is, however, acceptable to give the reasons given in the police letter requesting the measure.

10. That it legitimises the actions of the Judicial Police units in the material execution of actions that require the exercise of coercion and are ordered by the judicial or prosecutorial authority.

2. From the **internal perspective**, the judge must make a rational judgement on the fact under investigation, the concurrent evidence, the proportionality and necessity of the measure.

   Through this judgement, the fact is subsumed in the norm, the concurrent factual circumstances are assessed, action is taken on the basis of evidence, the possibilities of success of the measure requested are analysed and other less burdensome and equally useful possibilities for the investigation are assessed.

A court decision is not necessary in two cases:

1. The consent of the interested party "*Consent shall be understood to be given by the person who, when requested by the person who is to carry out the entry and search to allow it, carries out the necessary acts that depend on it in order for it to take place"* which means that both express and tacit consent is accepted.

   However, such consent must be untainted, properly informed and absolutely freely given.

   The person under investigation must know not only that he or she can refuse entry, but also the consequences that may result from the police action.

   And the absence of any kind of intimidation or coercion that could taint the freedom of decision must be guaranteed.

   In this way, **if the person under investigation is detained, this consent can only be given in the presence of a defence lawyer.**

2. The case of **flagrante delicto.** According to the jurisprudence of our SC there are three circumstances that form the backbone of the concept of flagrante delicto: the immediacy of the criminal action, the immediacy of the personal activity, and the need for urgent police intervention due to the risk of the disappearance of the effects of the crime.

   Thus, this exception will only apply when the police intervention takes place when the crime is being committed or has been committed moments before, which means that the offender is caught at the moment of committing it; the offender is present in relation to the object or instrument of the crime, which implies evidence of the crime and that the caught person has participated in it; and finally, due to the attending circumstances, the police are compelled to intervene immediately to prevent the progression of the crime or the spread of the harm that the offence generates.

The ECHR in the Ilieva v. **Bulgaria case (ECHR of 12 December 2019)**[11] considered that, in the specific case, Article 8(1) of the European Convention on Human Rights had been violated because the search did not meet the urgency required by Bulgarian law for the immediate intervention of the police forces, given that not even the investigating judge, in the decision that validated the police decision, took the trouble to justify this urgency.

Finally, in the case of entry into lawyers' offices, there is a body of ECHR case law (e.g. **ECHR André and others v. France of 24 July 2008**[12]) according to which **entry into and search of such physical space must be accompanied by a series of additional guarantees and a reinforced statement of reasons** to ensure the right to a fair trial.

IV. INTERVENTION IN COMMUNICATIONS

Article 18.3 of the EC: *"The secrecy of communications and, in particular, of postal, telegraphic and telephonic communications is guaranteed, except in the case of a judicial decision".*

Article 579 LECrim authorises the judge to *"order the detention of private, postal and telegraphic correspondence, including faxes, bureaufaxes and money orders, which the person under investigation sends or receives, as well as their opening or examination".*

There is no doubt that this research measure has lost some of the capacity it may have had in its day. This is mainly due to the evolution of the way in which we communicate.

However, we cannot ignore the importance that this provision had in our investigation system until the ECHR Prado Bugallo v. Spain, which we will refer to later.

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11. Ruling available at:: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Ilieva%20bulgaria%22],%22itemid%22:[%22001-198886%22]}

12.Ruling available at:: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22andre%20france%202008%22],%22itemid%22:[%22001-87938%22]}

In the field of the lawyer-client relationship, the ECHR established case law following the **STEDH Laurent v. France of 24 May 2018**[13].

In the case at hand, the Court considered as "protection of correspondence" a letter delivered by the lawyer to his clients in court, emphasising that, whatever its purpose, **correspondence between lawyers and their clients is private and confidential.** In the absence of suspicion of an unlawful act, the interception of the documents could not be justified.

V. TELEPHONE INTERVENTIONS

The **SETDH Prado Bugallo v. Spain, of 18 February 2003**[14], imposed on the Spanish legislator the obligation to articulate an appropriate legal regime for telephone tapping separate from its legitimisation through the detention of correspondence.

The doctrine of the **ECHR Huvig v. France**[15] and **Kruslin v. France** of 24 April 1990[16], gave rise to rulings which imposed the need to specify the nature of the offences that could give rise to interceptions, to set a limit on the duration of the execution of the measure, and to determine the conditions for establishing the procedure for transcribing the intercepted messages, the current article 588 ter (3) a) of our Criminal Procedure Act establishes that *"authorisation for the interception of telephone and telematics communications may only be granted when the investigation has as its object any of the crimes referred to in*

13. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22laurent%20france%202008%22],%22itemid%22:[%22001-183129%22]}

14. Ruling available in French at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-65499%22]}

15. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22huvig%20france%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57627%22]}

16. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22kruslin%20france%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-57626%22]}

article 579.1 of this law[17] *or crimes committed by means of computerised instruments or any other information or communication technology or communication service".*

This condition is only a necessary but not sufficient requirement because Article 588 bis (2) establishes that the adoption of any intervention must be subject to judicial authorisation subject to the principles of speciality, suitability, exceptionality, necessity and proportionality of the measure[18].

In this sense, the measure may only be granted in relation to an ongoing criminal investigation, when there are no other measures less burdensome to fundamental rights that could be adopted for the same purpose, when such a measure is suitable for the investigation of an ongoing criminal investigation or its perpetrators and *"when, taking into account all the circumstances of the case, the sacrifice of the rights and interests affected is not greater than the benefit to the public interest and to third parties that would result from its adoption".*

he maximum duration of the measure shall be three months, extendable for successive periods of the same duration up to a maximum period of eighteen months.

In urgent cases, when the investigations are carried out for the detection of crimes related to the actions of armed gangs or terrorist elements and there are well-founded reasons that make the measure essential, it may be adopted by the governmental authority. Such a measure shall subsequently be subject to judicial approval.

As we mentioned with the Entry and Search of a lawyer's office, it is true that the case law of **the ECHR is particularly restrictive when it comes to the interception of communications between lawyer and client.**

17. Article 579.1 of the LECrim refers to offences punishable by at least 3 years imprisonment; offences committed within a criminal organisation and terrorist offences.

18. "Telephone and telematics tapping. Disposiciones comunes a los actos de injerencia en las comunicaciones. Doctrina general", Zaragoza Aguado, Javier Alberto in "Investigación tecnológica y derechos fundamentales", coord. Zaragoza Tejada, Javier Ignacio. Thomson Reuters. 2017.

In this sense, **the STEDH Pruteanu v. Romania of 3 February 2015**[19] once again insists on the foreseeability of the Law, understanding that this intervention, in the specific case, was disproportionate in accordance with the aims pursued and could not be described as *"necessary in a democratic society"*.

VI. VIDEO SURVEILLANCE AND RECORDING OF DIRECT CONVERSATIONS

The most important evidence in our criminal proceedings are video recordings which, by their very nature, are likely to affect the right to inviolability of the home, privacy or the right to the protection of personal data or one's own image, all of which are protected as fundamental in Article 18 of the EC and Article 8.1 of the ECHR.

It is for this reason that, disseminated in substantive and procedural laws, a complex regime of protection of privacy against possible intervention by the State or private individuals in these fundamental rights is articulated.

1. It is a general principle that **recordings taken by video cameras used and/or employed by private individuals in public places can be used in criminal proceedings.**

   This is irrespective of the different solutions that have been given to the excessive use of technical means by some or others.

2. However, in the case of criminal investigations, Article 588 quinque of the LECrim expressly establishes that the police may obtain and record, by any technical means, **images of the person under investigation when they are in a public place or space,** if this is necessary to facilitate their identification, to locate the instruments or effects of the crime or to obtain relevant data for the clarification of the facts.

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19. Ruling available in French at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22pruteanu%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-152275%22]}

3. In the case of **closed places or spaces,** the regime for obtaining images is much more restrictive as, on the one hand, it would be subject to what has already been explained with regard to the Entry and Search and, on the other hand, to the provisions of Article 588c with regard to recordings of direct oral communications in an enclosed space[20].

   In relation to this last question, the CC has ruled in Ruling No. 99/2021 of 10 May[21] on the scope of judicial authorisation for the recording of this type of conversations[22] legitimising that it should be carried out during a certain and determined period of time without prejudice to the specific authorisation of each of the conversations to be recorded.

4. In this same sense, in order to guarantee the right to the image as data or the right to personal or family privacy, the recent LO 7/2021 establishes the requirements for the capture of images (and their processing) to be valid in the case of **fixed or mobile video-recording systems that the State Security Forces and Corps** are authorised to set up for the prevention of crime.

The ECHR has also had the opportunity to rule on the scope of this investigative measure in terms of its intervention with the right to privacy.

In the **ECHR Vasilica Mocanu v. Romania of 6 December 2016**[23] o **Gorlov and Others v. Russia of 2 July 2019**[24] the ECHR ruled against the permanent video-surveillance of the interior of detainees' cells by means of closed-circuit television.

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20. And, in this sense, this measure can only be adopted when any of the crimes referred to in Article 579.1 of the LECrim are being investigated and when it is rationally foreseen that the use of the devices will provide essential data of evidential relevance for the clarification of the facts and the identification of the perpetrator.

21. Ruling available at: https://hj.tribunalconstitucional.es/es/Resolucion/Show/26709

22. Our Procedural Law refers to a use linked to communications that may take place in one or more specific encounters of the person under investigation with other persons, the foreseeability of which is indicated by the investigation.

23. Ruling available in French at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-169702%22]}

24. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22vasilica%20mocanu%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-194247%22]}

And in the **STEDH (Grand Chamber) Lopez Ribalda and others v Spain of 17 October 2019**[25] the ECHR legitimises the use of video cameras to record employees when there are indications of criminality or well-founded reasons that make this measure necessary in a democratic state.

VII. GEOLOCATION

The regulation of this investigative measure in the Spanish procedural system has its origin in the relevant **ECHR Uzun v. Germany of 2 September 2010**[26].

EIn that decision, the ECHR declared that the surveillance of a subject's movements for a certain period of time was an encroachment on his/her right to privacy which, in this specific case, was justified by the seriousness of the crimes under investigation.

The current article 588 quinque of the LECrim authorises the use of tracking and tracing devices (beacons) or technical means (positioning data) when there are proven reasons of necessity and the measure is proportionate[27].

As with telephone tapping, this measure will have a maximum duration of three months, extendable for successive periods of the same duration up to a maximum of 18 months.

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25. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22lopez%20ribalda%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-197098%22]}

26. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22uzun%20germany%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-100293%22]}

27. *Utilización de dispositivos técnicos de captación de la imagen, de seguimiento y de localizacion,* García Marcos, Julian in *Investigación tecnológica y derechos fundamentales,* coord. Zaragoza Tejada, Javier Ignacio. Ed. Thomson Reuters. 2017.

When there are reasons of urgency that give rise to the fear that if the technical tracking and tracing device or means is not put in place immediately the investigation will be frustrated, the judicial police may adopt the measure. This measure must subsequently be subject to judicial ratification.

According to STS nº 141/2020 of 13 May 2020 (Rapporteur: Manuel Marchena Gómez), the use of beaconing devices *"has a direct impact on the circle of exclusion that each citizen defines vis-à-vis third parties and vis-à-vis the public authorities is beyond any doubt"* which is why there is no doubt that it must be subject to a prior judicial authorisation regime.

And although our Highest Court is aware of the less invasive nature of the measure, it cannot be interpreted that there is *"a relaxation of constitutional requirements" and "the principles of proportionality, necessity and exceptionality continue to act as conditions of legitimacy, the concurrence of which must be expressly reflected in the enabling judicial decision".*

With regard to the retention and, where appropriate, transfer of geo-positioning data, the recent STS nº 824/2022 (Speaker: Magro Servet) has concluded that, in accordance with Spanish legislation, it is not possible to speak of an indiscriminate and generic retention of data that, as a matter of principle, excludes the legitimacy of its incorporation into the procedure. The judge is the one who, after an adequate weighing of the measure's encroachment on privacy against its benefits for the investigation, assesses whether the crime is serious enough to adopt, if so requested, the intervention measure based on the proportionality of the request for the retained data and the purpose of the investigation.

VIII. EXAMINATION OF MASS STORAGE DEVICES

Although it had already been stated in STS No 342/2013 (Rapporteur: Manuel Marchena) that *"both from the perspective of the right of exclusion from one's own virtual environment, as well as from the constitutional guarantees required for the sacrifice of the rights to inviolability of communications and privacy, the intervention of a computer to access its content requires an enabling jurisdictional act"*, it was not until shortly before the **STEDH in the case of Trabajo Rueda v Spain, of 30 May 2017**[28], where the Spanish Public Authorities were reproached for having accessed, without judicial permission, a computer that was placed at the disposal of the Guardia Civil when there was nothing to warrant an urgent intervention, that the establishment of a legal regime for this type of investigative measures was undertaken.

Disregarding the seizure policy, to which the analysis of devices is necessarily linked, the fact is that the current Article 588 sexies LECrim necessarily requires a judicial authorising order for the examination of mass storage devices.

According to the general principles governing this type of measure, not only must there be no other more moderate means of achieving the proposed aim with equal effectiveness, but the measure must be aimed at the investigation of a specific crime (specificity), it must not be adopted when there is another means of investigating the crime that is less harmful to the fundamental rights and freedoms of the individual (exceptionality) and it must be capable of achieving the proposed objective (suitability).

In line with the jurisprudence established by the ECHR in the **STEDH Vinci and GTM Construction and Engineering Services v. France of 2 April 2005**[29] in which **an indeterminate and motiveless collection of the data contained in telematics devices seized in a lawyer's office is considered as a violation of the Convention,** in the authorising document the judge must express not only the data that can be accessed but also the temporary scope of the agreed measure as well as the precautions that must be adopted to guarantee the integrity of the data and their preservation.

28. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22trabajo%20rueda%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-174221%22]}

29.Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22Vinci%20Construction%20et%20GTM%20G%C3%A9nie%20Civil%20et%20Services%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-153318%22]}

Finally, the measure must be balanced insofar as it derives more benefits or advantages for the general interest than harm to other conflicting assets or values (proportionality in the strict sense).

In cases of urgency in which a legitimate constitutional interest can be appreciated that makes indispensable the measure foreseen in the previous paragraphs of this article, the Judicial Police may carry out a direct examination of the data contained in the seized device[30].

Parallel to this issue, our Procedural Law refers to the duty of cooperation of service providers and owners or users of the computer system for the practice of registration and/or access to the computer system.

Although Article 588 septies expressly excludes the accused from this circle of obliged persons, the recent STS 311/2020 of 15 June (Rapporteur: Porres Ortiz de Urbina) understands that **the transfer of the password to access computer equipment by an investigated person detained without legal assistance does not constitute an infringement of the right to a fair trial.**

30. *El registro de dispositivos de almacenamiento masivo de la información*, Zaragoza Tejada, Javier Ignacio in "Investigación tecnológica y derechos fundamentales", coord. Zaragoza Tejada, Javier Ignacio. Ed. Thomson Reuters. 2017.

IX. PROCESSING OF PERSONAL DATA FOR THE PURPOSE OF INVESTIGATING CRIMINAL OFFENCES AND UNDERCOVER AGENTS "ON-LINE"

Article 18.4 EC: *"The law shall limit the use of information technology in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights".*

The development of the information society has led to an extraordinary increase in the possibility of processing personal data, which has led to the creation of new ways of protecting privacy and personal data[31].

One of the most problematic aspects of the aforementioned protection is the way in which personal data are to be incorporated into criminal proceedings.

In this regard, LO 7/2021 was recently approved and it deals with the protection of personal data processed for the purposes of the prevention, detection, investigation and prosecution of criminal offences and the execution of criminal penalties.

According to this instrument, *"public administrations, as well as any natural or legal person, shall provide the judicial authorities, the Public Prosecutor's Office or the Judicial Police with the data, reports, background information and supporting documents requested by them and which are necessary for the investigation and prosecution of criminal offences or for the execution of penalties".*

This, however, provided that the request was *"reasoned, concrete and specific, and that the judicial and prosecutorial authorities were informed in all cases"[32].*

31. *Cesión de datos personales y evidencias entre procedimientos penales y procedimientos administrativos y tributarios,* Ignacio Colomer Fernandez et al, Ed. Aranzadi, 2017.

32. However, with regard to certain "protected" data, Article 13 states that "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as the processing of genetic data, biometric data intended to uniquely identify a natural person, data concerning the health or sex life or sexual orientation of a natural person, shall only be permitted where strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject" and when certain circumstances are met.

In the case of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership, as well as the processing of genetic data, biometric data intended to uniquely identify an individual, data concerning health or sex life or sexual orientation of an individual, processing shall be permitted only where such processing is strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject and where authorised by law, necessary for the protection of the vital interests of the data subject or of another person, or where it concerns data which the data subject has made public.

STS 971/2022 of 13 December 2022 (Speaker: Pablo Llarena Conde) quashes evidence consisting of the inclusion in the proceedings of medical data of one of the persons under investigation that had been obtained by agents of the Judicial Police without the corresponding judicial authorisation.

The provisions of the Law *"shall not apply (...) when judicial authorisation is legally required to collect the data necessary for the fulfilment of the purposes"* of the Law.

This is the case, by way of example, with the provisions of Articles 3 and 4 of Law 25/2007, of 18 October, on the Retention of Data Relating to Electronic Communications and Public Communications Networks or Article 588 ter j) of the Criminal Procedure Act when they require judicial authorisation to collect data kept by telephone operators and which are linked to communications[33].

The ECHR has handed down countless decisions on this matter. Of particular note is the **ECHR in Robathin v. Austria of 3 July 2012**[34] where the Court concluded that there had been a violation of the Convention because the scope of the examination of documents that were seized from a lawyer's office exceeded what was necessary for the purpose pursued or **ECHR Gaughran v.**

33. Cesión de datos e investigación de infracciones penales: la Ley Orgánica 7/2021 de 26 de mayo, Garcia Marcos, Julian. Diario La Ley, 3 November 2021.

34. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22robathin%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-111890%22]}

United Kingdom of 13 February 2020[35], on the indefinite retention without safeguards of personal data of the data subject originating from a less serious offence.

In relation to the issue we have been analysing, we should mention, lastly, the incorporation into criminal proceedings of data obtained by the police forces from open sources and even in closed groups[36].

With regard to this last intervention, in the Spanish procedural system, there is the figure of the **"on-line undercover agent"** who, according to Article 282 bis LECrim, requires judicial authorisation and is only feasible in relation to certain criminal acts[37].

X. REMOTE REGISTRATION OF COMPUTER RECORDS

Taking as a reference the **ECHR Iliya Stefanov v. Bulgaria of 22 May 2008**[38], in which it was discussed **whether the search of a lawyer's office and of his physical and electronic data entailed an encroachment on the fundamental right to privacy** ("to his private life" in the terms of the Judgment) **and what conditions were necessary for the police intervention to be considered legitimate,** any intervention with the content of a personal computer, even more so if it is not consented to, must have the corresponding judicial authorisation.

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35. Ruling available at: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22gaughran%22],%22documentcollectionid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22],%22itemid%22:[%22001-200817%22]}

36. Closely related to this issue, at the European level, the ENCROCHAT case: https://brill.com/view/journals/eccl/30/3-4/article-p309_006.xml#.Y69cKWrz3W8.whatsapp

37. Art 282 bis. 6: *"The investigating judge may authorise officers of the judicial police to act under assumed identity in communications maintained on closed communication channels in order to investigate any of the offences referred to in paragraph 4 of this article or any of the offences referred to in Article 588 ter a. The undercover computer agent, with specific authorisation to do so, may himself exchange or send illegal files by reason of their content and analyse the results of the algorithms applied for the identification of such illegal files".*

38. Ruling available at: https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-86449%22]}

This is why Article 588 septies LECrim regulates this "surreptitious" form of search of mass data storage devices under specific conditions.

Firstly, unlike other technological investigation measures, recourse to this type of measure is limited to the prosecution of the most serious crimes: a) crimes committed within criminal organisations, terrorism and those committed against the Constitution, treason, and relating to national defence; b) always respecting the principle of proportionality, crimes committed against minors and those who are declared by court to be incapacitated; and, those committed by means of computer, information or telecommunication technologies or communication services.

In this sense, as we have already seen, the measure *"will only be considered proportionate when, taking into account all the circumstances of the case, the sacrifice of the rights and interests affected is not greater than the benefit to the public interest and to third parties resulting from its adoption".*

Secondly, this measure is subject to judicial supervision. It will be the competent judge who, in his decision, must establish *"the scope of the measure, the way in which access and seizure of the data or computer files relevant to the case will be carried out and the software by means of which the control of the information will be undertaken"*, así como *"the precise measures for the preservation of the integrity of the stored data, as well as for the inaccessibility or deletion of said data from the computer system to which access has been gained".*

There are two techniques contemplated in the precept:

1. The use of identification data and codes, that is, using the investigated person's own passwords to access, not only their computer or computer system, but even their email account or their data storage account in the cloud, which is the most feasible.
2. The use of "spyware" (Trojans, keyloggers, etc.) that allow investigators, in one way or another, to access data stored on someone else's system or device, which is very complicated to put into practice.

Finally, the measure may be agreed for a period of one month, extendable for a maximum of three months.

If we take into account that sometimes only the setting up of the software necessary for the implementation of the measure will already require some time, it is possible that this period may seem insufficient.

XI. USE OF ARTIFICIAL INTELLIGENCE TOOLS IN POLICE INVESTIGATIONS

An issue such as this is subject to continuous and unpredictable technical evolution. This is why the European Union is laying the foundations for protecting the fundamental rights of individuals in the face of technical progress.

By way of example, with regard to Artificial Intelligence and the tools used for the biometric identification of persons in real time and in public places, the recent proposal for a Regulation on Artificial Intelligence of the European Commission[39] foresees restrictive measures that start from an initial ban.

However, their use is authorised for the purpose of detecting, locating, identifying or prosecuting persons who have committed or are suspected of having committed an offence for which the law in force in the Member State concerned imposes a custodial sentence or detention order for a maximum period of at least three years.

In this regard, any *"use of real-time remote biometric identification systems in publicly accessible areas"* by law enforcement authorities for the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal offences will have to be authorised by a judicial authority or an independent administrative authority of the Member State where such a system is to be used.

39. Text available here: https://digital-strategy.ec.europa.eu/en/library/proposal-regulation-laying-down-harmonised-rules-artificial-intelligence

The authority must give reasons for its decision by making a proportionality test based on the harm that the use of the system would cause in relation to the consequences that not using the system could have for the rights and freedoms of individuals.

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ACCESS TO JUSTICE

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Magistrate

Summary

"If thou shalt bend the rod of justice, let it not be with the weight of gift, but with the weight of mercy"[1]

I. INTRODUCTION OR WHAT I MEAN BY ACCESS TO JUSTICE

The Roman jurist Ulpian defined justice as *"the constant and perpetual will to give to each one his own right"*; this is why, when addressing the issue of access to justice, we must start from that "each one" which is none other than individuals, communities and families as active subjects of rights within the framework of the legal system of each state and nation, as promoters of laws and endowed with jurisdictional power to judge and enforce what has been pronounced.

Thus, *access to justice* can comprise a series of avenues or means used to request or demand our rights from the state, which can include the protection of victims, the presumption of innocence of the alleged perpetrators, the right to contradiction -or the right to an adversarial process- as well as the right to use relevant evidence in my defence or to challenge evidence that may violate my fundamental rights as an individual.

And this access is also precisely the ways and means of admittance. Thus, access to justice is orality, and in turn, it is also transparency, it is empathy, it is communication, it is understanding and being able to use my own language, regardless of the fact that it is a minority language. And it is motivation and the ability to understand why a decision has been made in a certain way; and, above all, above all, it is equality. Not the supposed equality in the way we are treated under the law, but an equality that configures equal justice for all and does not mean unequal treatment for those who do not have sufficient means to litigate and who in turn are more in need of our protection (immigrants, people with disabilities, women and children who are victims of violence).

1. From "El Ingenioso Hidalgo Don Quijote de la Mancha", chapter 52, Of the advice given by Don Quixote to Sancho before going to govern the island of Barataria.

So, what can we understand by access to justice? A priori and as an introduction, we can consider that it is a clearly transversal concept and that it must have multilevel protection.

It is transversal, because access to justice is so deeply rooted in the basis of what we can consider the administration of justice that, without this access to justice on the part of citizens, the administration of justice itself, as a public service, is meaningless. In reality, therefore, without full access to justice we cannot consider the existence of the system itself, being an ontological requirement due precisely to the multi-functions that such access provides, since this access to justice is, as we have pointed out, equality, the legibility of appropriate decisions, the use of language, motivation, the prohibiting of arbitrariness, the explanation of the reasons why citizens are or are not the incumbents of situations that deserve to be protected.

And multilevel because justice can appear at different levels: state, in accordance with the jurisdictional sovereignty that each state may have as members of the international community; infra-state, in communities of neighbours, families, private law entities to which the state itself recognises a normative and conflict resolution capacity; and at supranational level when, by virtue of international treaties, the state recognises a normative and conflict resolution capacity.

Therefore, the issue of access to justice is a clearly interdisciplinary issue that touches on each and every aspect of our daily lives, both individual and collective, and is of decisive importance in the political organisation of each sovereign state. For this reason, determining the means and instruments that are most effective and necessary to ensure effective access to justice for citizens is a fundamental issue in public political life and forms an essential part of the main objectives of public administrators. This debate, therefore, has a deep political and philosophical significance, because far from raising simple, easily answerable questions, it raises questions with many edges that normally force us to weigh up and choose which rights or interests we intend to sacrifice in favour of others of a higher nature. Thus, we can distinguish different examples such as to what extent we are willing to restrict procedural freedoms or guarantees in the interest of the efficiency of the justice administration system, or to what extent we should or should not limit the use of court-appointed lawyers, or whether such a limitation can have positive effects in terms of increasing the efficiency and the decisiveness of the administration of justice, avoiding delays in deciding disputes brought before it, or whether or not allowing class/collection action, as for example can be done under the Council of Europe's European Social Charter, can be a burden on the effectiveness of individual human rights.

On this path we are taking, it is certain that it will be necessary to present questions and seek answers, without a dogmatic or short-term purpose, with the aim of raising doubts and different issues in order to finally find solutions or, at least, a certain solid structure of principles.

II. ORIGINS OF ACCESS TO JUSTICE. CONCEPT AND SYSTEMATIC TREATMENT

When we talk about access to justice, we must refer to Mauro Cappelleti, a disciple of Piero Calamandrei, who began working in the late 1970s, and distinguished three stages to guarantee it. The first is the public funding of court-appointed lawyers in all types of proceedings. The second is the establishment of collective proceedings such as class action in the USA, and the third is alternative dispute resolution (ADR).

As a result of this systematisation, Professor Segatti identifies two criticisms: firstly, that the evolution over the last 40 years has not exactly corresponded to the evolution marked by Capelleti, and secondly, that Capelleti was too optimistic about alternative dispute resolution methods which has not now identified itself with a majority of the doctrine that is sceptical in the face of such effectiveness.

In any case, Capelleti takes a comparative and interdisciplinary (legal, sociological and economic) approach to law and recent scientific literature approaches it as an extension of the very concept of access to justice, from mere access to understanding it as the ability to use the law to achieve individually and collectively valued objectives. It is thus a protective "umbrella" that can pursue different objectives that entail transformative consequences of a reality deriving from a previous harm or from the claim of a particular petition.

He also points out that there is a link between access to justice and the very concept of the rule of law, and configures this access as instrumental, ensuring an *objetive predictability,* as the reaction of the protective state to the breaking of the law, a breaking

of the law that is clearly subjectively unpredictable (*subjective predictability*), since we can all be potential users of the justice system either as victims or as suspects or defendants (but we do not know if or when we will be).

This is why we can consider access to justice and all that it means, precisely because of the unpredictability of the events that may give rise to the need to access justice and to become users of it, making the configuration of equal access to justice for all people a central point of the rule of law, as each and every one of us may need to have full and absolute powers to access it.

Systematic framing

In this context, we can frame access to justice as one of the *derechos fundamental human rights* that is fully linked to the right to be heard guaranteed in Article 10 of the Universal Declaration of Human Rights[2], which states that *"Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her."* And in turn, because of its cross-cutting nature, it has a direct connection and basis in the enshrinement of the fundamental principles of that declaration in terms of equality before the law (Art 7), presumption of innocence (Art 11), recognition of legal status (Art 6) and the right to a judicial remedy (Art 8).

Along these lines, and at the United Nations level, we also have the International Covenant on Civil and Political Rights, in particular Article 14, which states that *"everyone charged with a criminal offence has the right to be present at their trial and to be defended in person or by legal assistance of their own choosing or through legal assistance at any time when the interests of justice so require, to a fair and public hearing by a competent, independent and impartial tribunal established by law."*

2. Paris, 10 December 1948, Resolution 217.

Thus, we can undoubtedly consider, with all these international instruments of recognition, the "access to jurisdiction" of all citizens as a fundamental human right that has a multilevel dimension both in the international order and in the different national orders.

III. ACCESS TO JUSTICE AT THE INTERNATIONAL LEVEL. UNITED NATIONS. REFERENCE TO THE REGIONAL DIMENSION

Access to justice, as we have noted, allows individuals to protect themselves against the violation of their rights, and to redress both civil and criminal wrongs, being *"an important element of the rule of law that encompasses civil, criminal and administrative law"*[3].

Public international law is, as we know, a normative system of a heterogeneous nature that binds the international community as composed of international subjects of different natures (states, minorities, nations without states, international non-governmental organisations), and which in practice is regulated by common rules: the international covenants, treaties or agreements that bind the regulated bodies. But the particularity of intentional law is, as Professor Gutiérrez Espada pointed out, that there is no central legislative or judicial power, but that the content of the principles has to be developed and specified much more slowly, with the regulated bodies (the states) themselves being the ones who must control compliance with the international order, through the so-called *control of conventionality*[4].

In the international legal system, the main text that expressly recognises it is the Universal Declaration of Human Rights, being protected within this organisation by the Human Rights Committee, and being contemplated in United Nations instruments such

3. *Handbook on European Law on Access to Justice,* (2016), European Union Agency for Fundamental Rights and the Council of Europe.

4. And which, e.g., in Spanish constitutional law has been enshrined by STC 140/2018, of 20 December.

as the *1998 Aarhaus Convention* on access to information and public participation in decision-making and access to justice or the 2006 Convention on the Rights of Persons with Disabilities, as well as the *International Covenant on Civil and Political Rights.*

In addition to these international standards, we can highlight other important instruments:

- **The Standard Minimum Rules for the Treatment of Prisoners,** adopted by the Economic and Social Council in its resolution 663 C (XXIV) of 31 July 1957, and extended by the Council in its resolution 2076 (LXII) of 13 May 1977, according to which a detained person who has not been tried shall be allowed, with a view to his or her defence, to receive visits from his counsel.
- **Principles for the Protection of All Persons under Any Form of Detention or Imprisonment,** Resolution 43/173 which guarantees that all persons in detention have the right to defend themselves or be assisted by a lawyer as prescribed by law.
- **Basic Principles on the Role of Lawyers** which provide that all persons, where they do not have a lawyer, shall be entitled, in so far as the interests of justice so require, to be assigned lawyers with the experience and competence required by the type of crime in question to provide them with effective legal assistance free of charge, if they lack sufficient means to pay for their services (principle 6).
- **Bangkok Declaration on Synergies and Responses:** Strategic Alliances in Crime Prevention and Criminal Justice, which calls on member states to take measures to promote access to justice (paragraph 18).
- **El Salvador Declaration on Comprehensive Strategies for Global Challenges,** recommending that states minimise the use of pre-trial detention and promote greater access to justice and Legal Aid mechanisms.
- **Economic and Social Council resolution 2007/24** of 26 July 2007 on international cooperation for the improvement of access to Legal Aid in criminal justice systems, particularly in Africa.

At the regional level, we can highlight Europe, Latin America and the Arab countries. In Europe, there are two important declarations of rights in which this right of access and assistance is recognised: **The European Convention on Human Rights** signed in Rome on 4 November 1950 (hereinafter ECHR) and, within the framework of the European Union, the **Charter of Fundamental Rights** (hereinafter ECHRFUE). The two texts, however, are of a different nature, although de facto they are meant to complement each other. The first, the ECHR, has the nature of an international treaty, which is binding in principle on the signatory states, members of the Council of Europe (48 states, 47 today without Russia). The European Union, however, has a different status, because as a supranational organisation, it has its own bodies with legislative capacity, and its norms are directly binding on the member states, directly conferring on their citizens the status of *"European citizens"* with the capacity to seek protection directly before the European Court of Justice (CJEU). Also important at the regional level are the **Inter-American Charter on Human Rights**[5] (art 8), the **Arab Charter on Human Rights** (Art 13)[6] and the **African Charter on Human Rights** (art 7)[7].

5. *Inter-American Convention on Human Rights (Pact of San José), adopted in the city of San José, Costa Rica, on the twenty-second day of November, 1969.*

6. League of Arab States on 22 May 2004, affirms the principles contained in the UN Charter, the Universal Declaration of Human Rights, the International Covenants on Human Rights and the Cairo Declaration on Human Rights in Islam. Its Article 13 states that *"Everyone is entitled to a fair trial by a competent, independent and impartial tribunal established by law on any criminal charge against him or her, or in the determination of his or her rights and obligations. Each State Party shall guarantee to those who lack the necessary financial resources legal assistance to enable them to defend their rights. 2. Trials shall be public, save in exceptional cases which may be justified by the interests of justice in a society which respects human rights and freedoms"*.

7. Adopted on 27 July 1981, during the 18th Assembly of Heads of State and Government of the Organisation of African Unity, meeting in Nairobi, Kenya.

The United Nations principles and guidelines establishing minimum standards for the right to Legal Aid in criminal justice systems

Important milestones in the framework of international law include the Declaration of the **High-Level Meeting of the General Assembly on the Rule of Law at the National and International Levels**[8]. The document reaffirms the commitment to the rule of law and its fundamental importance for political dialogue and cooperation among all States, in particular *"to provide fair, transparent, effective, non-discriminatory and accountable services that promote access to justice for all, including Legal Aid"* (paragraphs 14 and 15).

One of the main obstacles to accessing justice, as identified by the UN itself, has been the cost of legal representation and advice. This is why, at the UN level, Legal Aid programmes are a central component of strategies to improve access to justice.

In December 2012, the General Assembly unanimously adopted the **United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems,**[9] the first international agreement on the right to Legal Aid, which aims to establish a standard of access to effective Legal Aid services in criminal matters.

These principles and guidelines begin by inviting member states to *"adopt and strengthen measures to ensure that effective legal assistance is provided"* in line with these principles, taking into account different national laws[10].

Thus, in view of the above, the principles and guidelines are of course an international standard in this area, establishing in turn the need to adopt budgetary policies that make them possible, based on the premise that Legal Aid constitutes a pillar of access

8. In English: Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels; in French: Déclaration de la Réunion de haut niveau de l'Assemblée générale sur l'état de droit aux niveaux national et international, year 2011.

9. Resolution 67/187.

10. Ultimately, the preamble to these principles encourages members to provide more and better legal assistance, calling on UN technical bodies to assist in criminal justice reforms that consider alternatives to imprisonment, restorative justice or the development of Legal Aid schemes.

to jurisdiction, and is therefore a foundation for the enjoyment of other rights, including the right to a fair trial, which in turn is a precondition for the attainment of all rights.

For this reason, we can consider that an effective criminal justice system must have good and sufficient Legal Aid, aiming not only to reduce crime and court congestion, but also to reduce re-victimisation and wrongful convictions, with the undoubted social cost that this entails.

The principles are based on a broad concept of Legal Aid as *"legal advice and legal assistance and representation for persons detained, arrested or imprisoned, suspected or accused of or charged with a criminal offence, and for victims and witnesses in criminal justice proceedings, provided free of charge to those who lack sufficient means or where the interests of justice so require"*(p.8); which also encompasses the concepts of legal training, access to information, alternative dispute resolution mechanisms and restorative justice.

It is important to note that these principles do not endorse a particular model of justice, as states may consider different models (public defenders, private defenders, bar associations or paralegals), but simply encourage the guarantee of *the basic right to assistance in an effective way,* starting from a minimum of necessary international law that can be improved but not worsened by other international standards such as the International Covenant on Civil and Political Rights, the 1989 Convention on the Rights of the Child[11], or the Convention on the Protection of All Migrant Workers and Members of Their Families[12], or the Convention on the Elimination of All Forms of Discrimination against Women[13].

These principles and guidelines can be divided into three groups according to whether they refer to the recognition of the right itself, its effectiveness, its guarantee or means to make it effective, and equal access to justice.

11.The Convention on the Rights of the Child (CRC) is the international treaty adopted by the United Nations General Assembly on 20 November 1989.

12. General Assembly resolution 45/158 of 18 December 1990.

13. CEDAW, Resolution 34/180 of 18 December 1979.

In relation to the recognition of the right, the first principle speaks of the right to legal assistance: It asks the member states to guarantee the highest level of assistance in the framework of a fair trial and with all the guarantees as a basis for effective justice (p.14). Thus, in this **first principle**, providing assistance to the layperson, the non-professional or expert in law, to request what he or she considers appropriate in the event that his or her rights are disputed or contested is clearly configured as a basic principle for any rule of law.

In relation to effectiveness, **principle 2** (P. 14 to 19) establishes obligations for member states in the framework of compliance with international treaties and agreements to enact, promulgate and develop laws, regulations and procedures establishing a comprehensive and effective Legal Aid regime. To this end, it stresses the importance of information, not only to individuals, but also to groups of all kinds and even to nationals of other countries who may travel to those countries. This last provision, in the framework of shaping full access to justice and complete predictability of the applicable legal system, is key to creating a context of legal certainty in today's globalised legal environment.

Also important for the effectiveness of the system, as stated in **principle 3**, is *"Legal assistance to suspects or accused persons"* (p. 20 a 23), establishing the duty of states to guarantee it, specifying that it must be applied to persons detained or arrested for serious offences punishable by imprisonment or the death penalty. In this case, clearly, abstracting from the different punitive systems, it nevertheless underlines that defence and assistance in the case of offences punishable by deprivation of liberty must be provided for with Legal Aid.

It is therefore important here, in the context of these principles, to note that it would be desirable, in the context of respect for these principles, that the possibility of not having the assistance of a lawyer in trials or proceedings for which someone is to be charged with a custodial sentence should be reduced to a minimum to the extent that each national context permits.

Thus, such assistance, in these cases, should be provided regardless of the complexity of the process, or even of the investigative measures being carried out (with compliance with certain requirements), ensuring that it is provided to children, and considering that the authorities must ensure that this is done (Judges, Prosecutors and Police); such assistance being fully effective and prompt according to **principle 7**, which necessarily entails the need to provide assistance by any of the means foreseen in each particular state, guaranteeing the confidentiality of communications and access to the information necessary to prepare

the defence. The latter is closely related to the right to be informed, which is contemplated as **principle 8,** as it not only means knowing the facts about which there is a suspicion or accusation, but also having all the information about the possible means available for the defence of each person, adequately facilitating access to this information.

The principles add certain instruments that contribute decisively to the effectiveness of a system that complies with this UN standard. Firstly, **principle 9** speaks of reparation measures when these minimum standards have not been respected. We are talking about situations in which the measures provided for have not been granted, or the victim or suspect has been deprived of adequate access to justice. Cases for which the means must be provided in the form of compensation or reparation for damages, which may even entail the quashing or repetition of the procedural acts (trials or hearings) carried out without these guarantees. In this field, we must highlight the independence and protection of what are called "the providers" of free Legal Aid, so that they can act without interference of any kind, being able to access, unless otherwise agreed by the competent authority and in a reasoned manner, all possible information related to their defence, and they must have sufficient training and experience and be subject to liability in the event of negligence in the exercise of their profession, as stated in **principle 13**. Finally, **principle 14** entrusts states with the task of recognising and encouraging the contribution of bar associations, universities and civil society to the provision of Legal Aid, and where appropriate, associations should be established for this purpose.

With regard to equality, in the framework of equality and the protection of those most in need, such assistance, as stated in **principles 4 y 5** should be provided to victims and witnesses. It is important, as we will see below, in the case of Europe and even Spain, to always bear in mind that access to justice should not only take into account the possible suspects of having committed a crime, but also the victims. The establishment of a victim's statute, guaranteeing accessibility, accessibility and protection, and ensuring due assistance, is therefore a basic pillar for the implementation of an effective system of access to jurisdiction.

Principe 6 connects Legal Aid directly to equality, and to the provision of Legal Aid over and above any personal status or circumstance. Once again these principles, precisely because they are setting a minimum standard for all UN member states, underline the need not to place obstacles to such assistance on the basis of ethnic or national origin, or any personal or family status or circumstance, which is directly related to **principle 10,** which explicitly urges states to adopt special measures to ensure access to justice for those most in need or in the most difficult circumstances. It lists various groups, among which we can find

women, children, minorities, people with disabilities or physical or mental illnesses that may put them at risk of exclusion from society. One of the cornerstones of any legal system is, of course, *the protection of the most disadvantaged people or those deprived of sufficient means,* including, of course, those people who may be refugees fleeing war situations for humanitarian reasons. It is important to take this perspective into account and to provide the appropriate means for their access on equal terms (for example, by having an adequate translation service and information on their legal status in the host country). A truly recommendable practice, and of which we see examples in the Kingdom of Spain, is to promote campaigns in the media, or on the basis of information leaflets available in the various courts, informing citizens of their respective rights to access to justice and to assistance or to the means of amicable conflict resolution.

Within this equal protection, we find **principe 11** (children), which must of course take into account the Convention on the Rights of the Child and the defence of the *"best interests of the child".*

With regard to the *guidelines,* they develop these principles in more detail and seek to establish more specific guidance on how to give full effect to the above principles. Among them, which we will leave listed for your reference, we can highlight the following ones:

Guidelines on the provision of Legal Aid relating to "livelihood" or insufficient means to obtain Legal Aid (criteria, remedies, urgent assistance, where necessary...), right to be informed or other rights of persons in detention, pre-trial, trial and post-trial assistance to victims, witnesses, women, children, addressing national Legal Aid systems and their funding, human resources, paralegals, regulation and supervision of Legal Aid providers, partnerships, and the need for research, data processing and technical assistance.

Access to justice at the Council of Europe and European Union level

In accordance with European human rights law, we can start from a concept of access to justice or jurisdiction that obliges states to guarantee to all persons the right to appeal both to the courts and alternative dispute resolution instruments when their rights have been violated.

According to the **Handbook on Access to Justice jointly produced by the Council of Europe and the European Union Agency for Fundamental Rights (EU)**[14], the following is necessary as a point of principle in this legal framework: 1) The right of access to justice comprises several fundamental human rights, such as the right to a fair trial under Article 6 of the ECHR and Article 47 of the EU Charter of Fundamental Rights and the right to effective redress under Article 13 of the ECHR and Article 47 CFREU.2) The rights of access to justice under the EU Charter of Fundamental Rights can be equated with those under the ECHR. Therefore, the case law of the ECHR is important for interpreting Charter rights. 3) Although the application of the ECHR and the EU Charter of Fundamental Rights is subject to different regimes, both emphasise that the rights to an effective remedy and to a fair trial must primarily be fulfilled at the national level.

Thus, in this European context, we can summarise the right of access to justice in two main blocks. On the one hand, the right to a *fair and public trial* before an independent and impartial court and other bodies, and on the other hand, the right to an *effective remedy.* Both are therefore the real leitmotiv of a system that aims to implement an effective system that allows for adequate protection of all citizens.

14. VV. AA. European Union Agency for Fundamental Rights and the Council of Europe, Luxembourg, 2016.

The main standards in this context are Art 6 of the ECHR and Art 47 of the CFREU[15],which guarantee the right to a fair trial as a right of access to a court, with the difference that the ECHR refers exclusively to criminal proceedings and the ECHR to all types of proceedings and rights, whether civil, criminal or administrative (before the public administration). This right of access to the courts implies of course the so-called right to effective judicial protection in the aforementioned article of the CFREU as well as in Protocol 7 of the ECHR[16].

All these aspects have been extensively developed by the case law of both the ECHR and the CJEU, and have shaped, together with the specific legislation of the different European countries, the essential features of what should be considered the system of access to justice at the European level.

IV. THE RIGHT OF ACCESS TO JUSTICE FROM A EUROPEAN PERSPECTIVE

Access to justice, from a European perspective and in accordance with international law standards, includes at least the following issues: access to courts, access to a fair and public trial, access to alternative dispute resolution, effective right to remedies and reasonable duration of proceedings.

15. The first states that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide disputes concerning his rights and obligations in a suit at law or the merits of any criminal charge against him", The second states that "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the right to be advised, defended and represented. The equivalent in the Arab Charter of Human Rights, art. 13, which states that "everyone has the right to a fair and public hearing by a competent, independent and impartial tribunal established by law to judge the criminal charge against him or her or to determine his or her rights and obligations. State Parties shall ensure financial assistance to those without the necessary means to pay for Legal Aid to enable them to defend their rights.

16. ECHR Golder v. United Kingdom 4451/70 of 21 February 1975.

Access to the courts

As a premise, this access must be facilitated by bodies that must meet certain requirements of independence and impartiality. It is also important to add that it is sometimes important, and may be in accordance with the minimum requirements of international law, to limit this access through certain instruments, such as the imposition of time limits (for reasons of legal certainty), or even the imposition of court fees that may limit claims that are considered frivolous, which may be justified for budgetary reasons. The only constraint will be not to infringe the very "essence of the law"[17].

In relation to the concept of "jurisdictional bodies", it is important to point out that it is not a recommendable practice to establish a system of access to justice that grants jurisdiction to resolve legal disputes to administrative bodies that do not belong to the judiciary, as these bodies must be previously established by law (the judge predetermined by law as a fundamental right).[18]

In turn, they must meet requirements of independence and impartiality, being able to be appointed by the executive power, but not receiving instructions as to how they should carry out their work and have certain guarantees of non-removability[19], it being advisable practice to establish objective causes to remove judges who are guilty of the same.

17. ECHR Ashindage v. United Kingdom, 88225/78, 28 May 1985.

18. This guarantee in criminal law extends to the principle of criminality, i.e. that no one may be punished for conduct that at the time of its perpetration is determined to be criminal (see art. 7.2 of the African Convention on Human Rights).

19. ECHR Campbell and fell v. United Kingdom 7819/77 and 7878/77 of 28 June 2984 App. 80.

A public and fair process[20]

In order to contemplate an effective system of access to justice in accordance with the international standards we have indicated, the real cornerstone that contains the most essential aspects of this access is the vehicle of the procedure through which the citizen accesses the courts, a process that must have the notes of public disclosure and fairness.

Disclosure, which makes the judiciary subject to scrutiny, by requiring that a person has the right to attend and know the evidence in a given proceeding, that the hearing is public (with exceptions)[21], and that, at least in the most serious criminal proceedings, the accused has to attend the trial.

In relation to the existence of fair proceedings, it depends on multiple factors, including of course the person's capacity to access justice, and the proceedings as a whole must be considered. The main characteristic of fairness is of course based on *equality of arms,* which in turn has multiple facets, one of the main ones being free justice, which we will talk about later, as well as contradiction, i.e. the possibility of discussing and issuing a prior value judgement by means of allegations about all the elements of proof that may have an impact or have transcendence in the final resolution of the litigation, as well as presenting alternatives and having time to analyse them[22]. Also important is the right to be informed as soon as possible of the nature and cause of the accusation made and the need for time to prepare one's own defence (Art 6 paragraphs 2 and 3)[23], with the requirement that the detainee, suspect or investigated person be given a "statement of rights" (according to Directive 2012/13/EU), which in the case of the Kingdom of Spain, is fulfilled with the indications provided for in art. 520 LECrim, which can be an example of compliance

20. Art 6,1 ECHR, Art 47 ECHR, Directive on the right to information in criminal proceedings (2012/13/EU), Directive on the right to interpretation and translation (2010/64), Directive on the right to legal advice (2013/48/EU).

21. Article 6(1) of the ECHR allows for the prohibition of access to the press and the public in the interests of morality, public order or national security in a democratic society; in the interests of minors or the protection of privacy or for reasons of public interest.

22. Article 6(3) of the ECHR provides for the right to "examine or have examined witnesses called against him/her and to obtain the attendance and examination of witnesses who give evidence in his/her favour under the same conditions as witnesses who give evidence against him/her".

23. This right to information is further developed in Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings.

with all international standards in criminal law, as it contemplates the right to information, to communicate, to be assisted by a lawyer, to translation and interpretation, information to consular authorities...

In turn, it is essential for the configuration of a fair process to enable practical and effective access to the courts for victims or persons claiming the protection of their rights, examples of which are the existence of protocols for access to justice for persons with disabilities[24], or a special statute for victims of crimes under Spanish law[25]. It is a matter of adapting the understanding of the proceedings, making the rights known to those who must be protected.

Finally, it should be noted that a fair trial should allow for the correction of errors derived from the undoubted fallibility of justice through an adequate system of appeals and, of course, allow for a system in which the long duration of the proceedings does not impede the effectiveness of the decisions that may be handed down in them.

Alternative channels of access to justice

It is also important to underline that there may be alternative means of access to justice through non-jurisdictional bodies such as national human rights institutions, equality bodies, data protection authorities, trade unions, or even through the figure of the ombudsman. These are institutions, organisations or bodies to which the law of each state, depending on the collective interests they defend, gives them special standing either to go to court or to promote an out-of-court settlement of the conflict in ques-

24. Article 26 of the Charter of Fundamental Rights of the European Union —which in 2019 celebrates 10 years of entry into force— states that "the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in community life". In this provision of the Charter "is found the recognition of the legality of positive measures necessary to ensure their equal opportunities and full integration into society "11. Therefore, in order to protect the rights, satisfy the basic needs and promote citizen participation of persons with disabilities, it is necessary to guarantee the widest possible access to justice for this group.

25. Law 4/2015, of 27 April, on the Statute of the Victim of the Crime.

tion[26]. En este punto destacar que se han detectado prácticas muy positivas como la existencia en países como Italia o España de asesores de igualdad que atienden reclamaciones, prestan asesoramiento e incluso ofrecer servicios de mediación.

Finally, in relation to these alternative channels, it is worth highlighting what is known as ADR (Alternative Dispute Resolution), which is an effective means of satisfying the interests of citizens in relation to the administration of justice and, in turn, from the point of view of the general interest, relieving the courts of cases. It is important to highlight here the European Directive 2008/52 of 21 May 2008 on mediation in civil and commercial matters. This solution has certainly proved to be more effective in civil matters, contracts and family matters (being particularly recommendable in the latter). Finally, we can highlight its application in the social jurisdiction, where conciliation prior to judicial proceedings is compulsory, except in certain cases[27].

V. LEGAL AID AS A KEY ELEMENT OF ACCESS TO JUSTICE: LEGAL AID AND *EX OFFICIO* LEGAL AID

At this point we must highlight two aspects that are distinct: one is the right to legal assistance, which corresponds to all citizens in the framework of legal proceedings, allowing its waiver except in certain cases indicated by law (for example, in criminal proceedings with prison sentences); and the other is the right to free Legal Aid, which is the right granted to certain persons both on financial and substantive criteria.

26. There are many examples that can be found in this area, as in the EU bodies have been created for racial or ethnic equality, and for gender equality in accordance with the Equality Directive 200/43 or even the Data Protection Directive of 2018. In Spanish law, the ombudsman is entitled to bring actions before the Constitutional Court, NGOs in the collective complaints procedure before the European Committee of Social Rights, or certain trade unions can even bring actions on behalf of their members in the framework of the labour jurisdiction, according to Law 36 /2011 of the Social Jurisdiction.

27. Arts 63 a 65 LRJS 36/2011.

In the first case, based on Licoln's statement about the trial of Socrates[28], we can take for granted that there is a universally accepted axiom in relation to the obvious benefits of technical assistance in a trial, compared to self-defence. This is why, based on international standards, in certain cases in which the most basic and fundamental personal rights are at stake, such as in criminal cases with severe penalties, defence and legal assistance is mandatory.

A different, though related, issue is Legal Aid[29], which revolves around the complexity of the case, its importance and the capacity of the persons to represent themselves, not ruling out the possibility that in certain cases certain individuals may have access to it, facilitating it for vulnerable groups, victims and disadvantaged persons.

The Spanish model[30] in line with these principles, is based on certain principles or general lines, which I would like to highlight briefly and in conclusion:

- It is based on the concept of "insufficiency of means to litigate" and refers to the insufficiency of financial means valued according to certain economic parameters (which in the Kingdom of Spain is twice the minimum interprofessional wage).
- It considers the person as a member of the family unit, and examines it according to whether or not they are integrated in a family unit, and also depending on the number of members of the family unit.
- It takes into account special circumstances in granting it.
- It is granted, per se, to certain legal entities, which themselves have the function and objectives of defraying, subsidising or financing certain expenses in order to remove the obstacles that prevent full and effective equality between persons. Thus, social security management bodies enjoy this right in the social sphere.

28. *"He who defends himself has a fool for a client and an imbecile for a lawyer".*

29. This right is regulated at the European level in Articles 6(1) and 6(3)(c) of the ECHR and in Articles 47 and 48(2) of the ECHR, Directive 2002/87/EC and Regulation 604/2013, Article 27(5) and (6).

30. Law 1/1996 of 10 January 1996 on free Legal Aid and Royal Decree 141/2021 of 9 March, approving the Regulation on free Legal Aid.

It uses as a guideline, in turn, the criterion of protection of certain persons to whom the legal system grants an "extra degree of protection" due to certain circumstances, which can be divided into two groups:

– On the one hand, victims of gender-based violence, terrorism and trafficking in human beings in those processes that are linked to, derive from or are a consequence of their status as victims, as well as minors and persons with disabilities in need of special protection when they are victims of certain crimes listed in the following.
– In the field of "employment contract" law (self-employment law in some European legal systems), it grants the weaker party in the relationship (the worker) the benefit of Legal Aid in an objective manner, without requiring additional circumstances.
– It allows, in certain cases, an exemption from this obligation in cases of "untenability of the claim".

VI. CONCLUSIONS

In conclusion, I would like very briefly to draw attention to the vital importance of this set of rules and principles that we have indicated for all legal practitioners. In particular, and in my personal experience, it is crucial to make all members of the judiciary, both judges and prosecutors, aware of the importance of having a justice system that is effective and protective. And this effectiveness, I believe, can only be sustained on the basis of a system in which all citizens have *(as the author mentioned at the beginning said) a predictable protection against the unpredictable,* and that this protection is as complete as possible, in order to minimise the social costs of a possible ineffectiveness of the system manifested through error, delay, lack of information or the impossibility to practice all the necessary evidence.

That is why in our work we must always be modest and dedicated, not only to the full study of cases, but also to ensuring and demanding a particular process in which there can be no objective doubt about our hard work as the organs of conflict resolution in society.

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THE LAWYER AS AN ESSENTIAL ELEMENT OF THE PROCESS

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Summary

I. INTRODUCTION: THE LAWYER AND THE RIGHT OF DEFENCE

In modern societies, lawyers play an essential public role in the proper functioning of the justice service, actively contributing to the achievement of a fairer society.

The lawyer's function is useful to society. He or she is the interlocutor between the authorities and the people, the voice before the courts and the translator of the legislator's message, helping to disseminate the legal culture so that citizens can conduct themselves correctly in their social, economic, family and any other kind of relationships.

The legal profession is also necessary for social peace, as it manages and contributes to conflict resolution through technical advice, responsible counselling and the professional defence of the rights and interests of its citizens, often avoiding legal disputes.

The role of the lawyer is essential to guarantee fair judicial proceedings, in which the person on trial enjoys all the guarantees of defence. Without the intervention of a lawyer, the right to a defence is seriously compromised, which is why it must be obligatory, at least in cases of arrest or provisional detention, and in trials in which the sentence requested is imprisonment or death. Without professional defence, defencelessness may occur, which must be avoided in order to guarantee the right to access to justice and to a fair trial. The lawyer is therefore an essential element in the process.

The recognition of the right to a defence exercised through a lawyer is also obligatory if we want to respect the main human right, which is enshrined in Article 1 of the Declaration of Human Rights of 1948, which is that of the equality of all human beings in dignity and rights.

All persons, including those charged with a crime, have the right to be treated with dignity, and the respect they deserve as human beings demands that they be tried with all their rights preserved during the trial. The result, in the event of a conviction, will entail the deprivation of such fundamental rights as freedom or life (in those judicial systems in which the death penalty exists), so it is only fair that, for the imposition of the sentence resulting from the prosecution, they should be offered (and even obliged) to defend themselves, in quality conditions and with all the guarantees, thus protecting their right to be treated with dignity during the process.

II. THE ORIGIN AND ROLE OF THE LAWYER

Spain and Jordan, like other states in the East and West, share legal roots and a common ancestor: the Roman lawyer, considered by many authors to be the origin of today's legal profession. According to various studies, it is understood that the lawyer, as a person who assumes the defence of a third party, has his/her origin in Roman law (2nd century BC to 6th century AD), where the figure of the lawyer arose. The figure of the *patronus* (empowered to exercise the defence of his protégé on the basis of his personal prestige and high social position) emerged, later displaced by the *orator* (called upon to perform the function of the defence by the power of conviction provided by the skilful use of rhetoric). Both were replaced by the *causdicus* or *advocatus*, following the professionalisation of the practice of defence and its conversion into a profession that required the combination of oratory and legal training, to arrive at the figure of the scholastici, who are lawyers organised in colleges, with their own objectives in defence of an organised and regulated profession.

This is the reason for the emergence of the defence function, the human principle and duty to help the helpless, which is why originally the defence was not a remunerated activity, but an altruistic action carried out by those who, due to their personal situation or their skills in debate, were considered to be fit for the task. In Roman law, the lawyer performed an essential public service for the proper functioning of justice, and required, among other obligations, the qualities of honour, rectitude, brevity, equality between colleagues and dignity. His task was to present the means of proof that would lead to the conviction of the existence of the facts, explaining their purpose and intervening in their practice, and to formulate a persuasive discourse, in order to convince of the justice of the resolution requested for the case in question.

Initially, the exercise of the defence was a free service, but with the professionalisation of the service, the fees (not salaries, but remuneration to honour) that were already being received by some lawyers, became obligatory. Even so, lawyers did not betray their origins and the reason for their function - the duty to help the underprivileged - so they assumed as a deontological principle obligatory legal assistance for those who did not have sufficient economic means to pay for the services of a lawyer, just as they assumed the defence of those who did not have the capacity to bring a case.

In Roman law, compulsory legal aid became a public duty, which Ulpianus conceived as a guarantee of justice for the weak and a means of achieving equality among citizens: *"No one should be oppressed by the power of their adversary, for it is also to the discredit of the ruler to allow anyone to conduct themselves in such a way that lawyers fear to take up the defence against them"* Digest. (Ulpianus, book I. De officio Proconsulis).

Having recognised the right to legal aid in the imperial constitutions (*"A lawyer must be given to those who cannot find one"* Justiniano: *Codex Iustinianus: De postulando*), the praetor was obliged to appoint an advocate if the party did not have one, and the appointed lawyer was obliged to defend, in accordance with his or her ethical principles and the public and social function he or she performed.

The functions of the Roman lawyer were therefore the same as those of today's lawyers, who are called upon, as they were then, to perform a public function essential to the proper functioning of justice.

III. THE RIGHT OF DEFENCE AND LEGAL AID AS CONTAINED IN INTERNATIONAL TEXTS

The States of Spain and Jordan not only have common roots in the history of their respective laws, but also currently share principles and values regulated by international norms which, ratified by both countries, inspire and guide their respective legal systems and the model of their judicial processes.

The common objective of both states is to have an accessible and quality justice service that protects the rights of citizens and guarantees them the right to a fair trial.

The **Universal Declaration of Human Rights** of 10 December 1948, ratified by Spain and Jordan, includes in Article 10 the right of everyone *"to a fair and public hearing by an independent and impartial tribunal, in the determination of their rights*

and obligations and of any criminal charge against them"; and in Article 11 the right of everyone charged with a criminal offence... *"to be presumed innocent until proved guilty according to law in a public trial at which he/she shall have had all the guarantees necessary for his/her defence"*.

The **International Covention on Civil and Political Rights of 16 December 1969**, ratified by Spain and Jordan, states in Article **14.1** that *"All persons shall be equal before the courts and tribunals. Everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge against him/her or of his/her civil rights and obligations. The press and the public may be excluded from all or part of a trial on grounds of morals, public order or national security in a democratic society, or where the interest of the private life of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but all judgments in criminal or contentious matters shall be made public, except in cases where the interests of juveniles otherwise require, or in proceedings relating to matrimonial property or to the guardianship of minors"*

And it states in **paragraph 3** of the same Article 14 that *"During the proceedings, everyone charged with a criminal offence shall be entitled to the following minimum guarantees in full equality:*

d) To be present at the trial and to defend themselves in person or through legal assistance of their own choosing; to be informed, if they do not have legal assistance, of their right to have it assigned to them and, in any case where the interests of justice so require, to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it."

More recently, in 2013, the **United Nations Principles and Guidelines on Access to Legal Assistance in Criminal Justice Systems** were drawn up, which aim to ensure that suspects, detainees, accused and imprisoned persons have access to legal assistance.

Legal assistance includes legal advice and legal support and representation for persons detained, arrested or imprisoned, suspected or accused of or charged with a criminal offence, and for victims and witnesses in the criminal justice process, and should be provided free of charge to those who lack sufficient means or where the interests of justice so require.

Principle 1, concerning the Right to **Legal Assistance**, advocates in paragraph 14, that *"States should ensure the right to legal assistance in their national legal system at the highest possible level, including, where applicable, in the constitution [based on the recognition] that legal assistance is an essential element of an effective criminal justice system based on the rule of law, as well as a foundation for the enjoyment of other rights, such as the right to a fair trial, and an important safeguard ensuring fundamental fairness and public confidence in the criminal justice process"*.

Principle 3. concerning Legal Assistance to Persons Suspected or Accused of a Criminal Offence, paragraph 20 requires States to *"...ensure that any person detained, arrested, suspected or accused of a criminal offence punishable by imprisonment or the death penalty has the right to legal assistance at all stages of the criminal justice process"*.

In an effort to ensure that no one is left defenceless, obligations are included to provide legal assistance, regardless of a person's means, where the interests of justice so require e.g., urgency or complexity of a case, or severity of a possible penalty; access to legal assistance for children on equal or more favourable terms than those applicable to adults; and that it is police, prosecutors and judges are obliged to ensure that persons appearing before them who cannot afford a lawyer or who are vulnerable have access to legal aid-

Principle 10, entitled Equity in access to legal assistance, mandates the adoption of special measures to ensure effective access to legal aid *"...women, children and groups with special needs, such as older persons, minorities, persons with disabilities, persons with mental illness, persons living with HIV and other serious communicable diseases, drug users, indigenous and aboriginal peoples, stateless persons, asylum seekers, foreign nationals, migrants and migrant workers, refugees and internally displaced persons, among others. Such measures should take into account the special needs of these groups and be gender- and age-appropriate"*.

It also obliges States to *"...ensure that legal assistance is provided to persons living in rural, remote and socially and economically disadvantaged areas and to members of economically and socially disadvantaged groups"*.

As recognised in the above-mentioned text, *"legal assistance is an essential element of a fair, humane and efficient criminal justice system based on the rule of law. Legal assistance is the foundation for the enjoyment of other rights, such as the right to a fair trial, as defined in article 11, paragraph 1, of the Universal Declaration of Human Rights, and is a precondition for the exercise of these rights, as well as an important safeguard ensuring fundamental fairness and public confidence in the criminal justice process.*

The guidelines state that states should consider the provision of legal assistance as their responsibility and should establish a comprehensive legal aid system that is accessible, effective, national in scope and available to all without discrimination".

Moreover, Spain, as a member of the European Union, has incorporated into its legal system international European standards that advocate respect for the right to defence and free legal aid:

The 1950 **European Convention for the Protection of Human Rights and Fundamental Freedoms** provides in its Article **6.3.c)** the *"right of the accused to defend themselves in person or through legal assistance of their own choosing and, if they have not sufficient means to pay for it, to be assisted free of charge by a legal aid lawyer when the interests of justice so require"*.

The **Charter of European Rights** of 2000 also includes among the list of rights of individuals the right to defence and free legal aid, which is developed in Article 47, entitled *"Right to effective judicial protection and to a fair trial"* which recognises that *"Everyone shall have the right to be advised, defended and represented. Free legal aid shall be provided to those who do not have sufficient resources, provided that such aid is necessary to guarantee effective access to justice"*.

IV. THE RIGHT OF DEFENCE IN SPANISH LAW

The right to a defence and legal assistance have the status of fundamental rights in Spain, expressly recognised in the Spanish Constitutioni as guarantors, along with others, of the right to a fair trial. The same legal text indirectly recognises the right of defence as an integral part of the right to access to justice, by expressly stating in the regulation of the right to effective judicial protection the prohibition of causing defencelessness. Any deprivation or reduction of the right of defence constitutes a violation of the right to effective judicial protection, so that the right to access to justice cannot be conceived without the right of defence.

The right to judicial protection is linked to the equally fundamental right not to be defenceless, which in positive terms is the right to defence.

It is an equation: without effective judicial protection, no real defence is possible, and without an effective defence, the exercise of real effective judicial protection is unfeasible.

The Spanish legal system extends the obligation to appear in court assisted by a lawyer to the majority of legal proceedings, in all jurisdictional orders, with only small claims or less complex proceedings being exempted from the requirement of legal assistance.

With regard to criminal proceedings -in which, due to their consequences, compliance with all procedural guarantees must be monitored with greater zeal - legal assistance is obligatory in all cases of arrest and provisional detention, as well as in trials in which a custodial sentence is requested. However, the judge may also consider that the party must be assisted by a lawyer in proceedings in which another type of penalty is requested (financial, deprivation of rights, tracking, community service, etc.) if he or she considers that it could cause defencelessness if the party is not defended by a lawyer.

The right of defence, guaranteed through legal aid, is recognised in Spain both for persons detained or provisionally imprisoned, and for those who are accused of a punishable act, even if they are not subject to an arrest or detention order.

Article 118 of the Criminal Procedure Act (Ley de Enjuiciamiento Criminal) recognises the right to a defence of every person to whom a punishable act is attributed.

In order to exercise this right, he/she is authorised to intervene in the proceedings as soon as he/she is informed of their existence, whether or not he/she has been the subject of arrest or any other precautionary measure or has been ordered to stand trial, for which purpose he/she shall be informed, without undue delay, in an accessible manner and in understandable language, of all the rights to which he/she is entitled, all aimed at making the right of defence effective. These rights are:

- To be informed in sufficient detail to enable the effective exercise of the rights of defence.
- To examine the proceedings in due time to safeguard the rights of the defence and in any event, prior to being heard.
- To act in criminal proceedings to exercise their right of defence in accordance with the provisions of the law.
- To freely appoint a lawyer, without prejudicing the conditions for cases of incommunicado detention.
- To apply for free legal aid, how to do so and the conditions for obtaining legal aid.

El derecho de defensa y la asistencia jurídica de la persona detenida o presa provisionalmente se regula en el artículo 520 de la The right to defence and legal assistance of the person arrested or provisionally detained is regulated in Article 520 of the Civil Procedure Act, which recognises the right to appoint a lawyer, without prejudicing the conditions for cases of incommunicado detention, and to be assisted by him or her without undue delay. In the event that, due to geographical distance, it is not immediately possible to be assisted by a lawyer, the detainee shall be provided with telephone or videoconference communication with the lawyer, unless such communication is impossible. The right to apply for free legal aid, how to do so and the conditions for obtaining it are also recognised.

The requirement for legal aid implies that if the detainee does not freely appoint a lawyer (either of his own free will or because he is unable to do so), he will be assisted by an ex officio lawyer.

Detention in Spain may not last longer than the time strictly necessary to carry out the investigations necessary to clarify the facts, and, in any case, within a maximum period of seventy-two hours the detainee must be released or placed at the disposal of the court, for which reason the authority that has the detainee in its custody shall immediately inform the Bar Association of the name of the lawyer appointed by the detainee to assist him or her for the purposes of locating the lawyer and transmitting the professional assignment or, where appropriate, shall inform the lawyer of the request for the appointment of a court-appointed lawyer.

If the detainee has not appointed a lawyer, or if the chosen lawyer refuses the assignment or cannot be found, the Bar Association shall immediately appoint a duty solicitor, who shall go to the detention centre as soon as possible, always within a maximum of three hours from receipt of the assignment.

If he or she does not appear within this time limit, the Bar Association shall appoint a new duty counsel who must appear as soon as possible and always within the time limit indicated, without prejudice to any disciplinary liability that the non-appearing lawyer may have incurred.

The lawyer's assistance shall consist of:

- Requesting, where appropriate, that the detained or imprisoned person be informed of the rights set out in paragraph 2 and, if necessary, to proceed to the medical examination referred to in point (i) thereof.
- Intervening in the proceedings for the statement of the detainee, in the examination of the detainee and in the reconstruction of the facts in which the detainee takes part. The lawyer may ask the judge or official who has carried out the procedure in which he or she has intervened, once it has been completed, to make a statement or expand on the points that he or she considers appropriate, as well as to record for the record any incident that may have occurred during the procedure.
- Informing the detainee of the consequences of giving or withholding consent to the taking of evidence requested of him or her.
- Having a confidential interview with the detainee, even before a statement is received by the police, the public prosecutor or the judicial authority, without prejudice to the provisions of Article 527.

Communications between the defendant or accused person and his or her lawyer shall be confidential on the same terms and with the same exceptions as provided for in Article 118, section 4.

Other jurisdictional orders also provide for the mandatory requirement of defence through a lawyer in proceedings depending on their extent, so that all citizens, whose interests may be affected by a judicial decision, have the possibility of intervening

throughout the process in which it is issued, making the appropriate allegations and proposing the relevant means of proof, and guaranteeing them the rights of hearing, contradiction and equality of arms in the process..

V. THE APPOINTMENT OF A LEGAL AID LAWYER

For the exercise of the right of defence, the parties are free to choose their lawyer, this being the best option as trust is one of the fundamental, if not the main, element of the lawyer-client relationship.

Although the free appointment of a trusted defence lawyer is desirable, this may not always be the case for various reasons. Sometimes a lawyer is not appointed of their own free will due to passivity, disobedience, or a desire to obstruct the work of justice. Another reason could be because no professional wants to take on the defence due to the social alarm caused by the crime, the unanimous reproach of society, the media coverage, or any other circumstance that causes the refusal of someone who enjoys the freedom and independence to refuse the assignment. In both cases, the judge orders the appointment of a "court-appointed" lawyer, whose fees will ultimately be paid by the client if he/she has the means to pay them. For this purpose, there is a special summary court procedure through which the lawyer can claim their fees from the client.

But the most common reason for the appointment of a court-appointed lawyer is the lack of resources to hire a private lawyer. In such a case, the only way in which the State can guarantee the right to a defence is by providing a court-appointed lawyer free of charge. The right to have a lawyer at no cost to the defendant is part of the right to free legal aid, which in Spain also has the status of a constitutional right, as it is necessary to guarantee the right to effective judicial protection to those who lack the economic capacity to hire the services of a lawyer. It is thus enshrined in Article 119 of the Spanish Constitution, which establishes that justice shall be free of charge, when so provided by law and, in any case, for those who can prove insufficient resources to litigate. The right to legal aid is developed in Law 1/1996, of 10 January, on free legal aid, which recognises the benefit to all persons who demonstrate a level of income lower than that determined by the legislator, under which it is considered that it may be excessively difficult -and sometimes impossible- to hire the services of a lawyer.

As in the previous cases, it is the judge who orders the appointment of the court-appointed lawyer, whose work will not be paid by the client, who has the right to be defended free of charge, but will be compensated by the State.

All Bar Associations in Spain have a Legal Aid service, as one of its functions is to organise and manage this service, made up of lawyers who are obliged to defend people who cannot appoint a private lawyer of their trust, either because they lack the financial resources to hire one, or because they cannot find a lawyer willing to defend their case, or because they do not appoint one at all. In all these cases, the appointment of the lawyer is made by the judge, ex officio, by legal mandate (defence by a lawyer is compulsory), but only if the defendant has no income will his services be free of charge, otherwise he will have to pay for them.

VI. THE LAWYER, AN ESSENTIAL ELEMENT OF THE PROCESS

Defence by a legal professional is one of the fundamental guarantees of a fair trial. The defence function in a trial requires legal knowledge, skills and technical abilities. Without them, the party does not have a defence of the quality required in a judicial procedure, where the prosecutorial functions are exercised by highly qualified jurists. Should the defendant not be provided with an equally qualified defence?

The party lacks sufficient knowledge to discern whether a fact is relevant or not for their defence, they do not know what evidence they can use and how they have to present it or how to intervene effectively, nor do they know what law they can provide or what rules they can base themselves on to obtain the decision they are seeking or which is most favourable to them. They may even be unaware of which of the possible solutions may be the most beneficial for them, in view of the consequences of each one, which only with technical knowledge are known and considered.

The citizen does not know how to file an appeal.

The legal professional designs a defence strategy according to the facts and the laws that come into play in the trial, selecting those that are in the best interest of the client's defence. They know the laws and procedures and know how to seek justice in accordance with them, so that the resolution is the most favourable to their client.

Only if the party is defended by a professional will he or she be on an equal footing in the proceedings vis-à-vis the party against whom the accusation is directed.

It is true that the judge, in addition to judging, guarantees that the trial will be in accordance with the regulated procedure and that the decision will be handed down in accordance with the law, but in his or her role as guarantor, he or she cannot replace the defence counsel. The judge is impartial and cannot take sides with the prosecuted party. Only the defence can take sides with the prosecuted citizen, get involved in their case and immerse themselves in it until it finds the facts and evidence on which it can base its defence. The judge cannot ignore or disregard the facts that are detrimental to the accused, nor seek on his or her own those that are beneficial to him or her; it is the lawyer's task to mitigate and conceal what is detrimental and amplify what is beneficial. The judge must remain equidistant from the parties, and stand alone, alongside the law. The judge pursues justice, it is his/her only interest, while the defender's interest is that of their client and their defence.

The judge, from his/her superior position as the person who resolves the litigation, only judges, not defends, and in doing so he/she must preserve, protect and guarantee the dignity of the person he/she is judging. This is done by recognising all the rights the accused person has before sentencing him or her, and when the accused is sentenced, they will be deprived of the rights that the sentence implies (freedom, life...). However, never, neither during the process nor after the sentence, will the accused be deprived of the right to dignified and equal treatment.

All States should include legal aid as an inalienable procedural right, since the intervention of a lawyer as a guarantor of the right to defence raises the quality and fairness of justice, which translates into greater public confidence in the judicial system.

As we said at the beginning of this presentation, the most fundamental of human rights is that of equality in dignity and rights in all areas. Within a judicial process, the citizen's right to dignified and equal treatment must be respected, which means that

the process must have all the guarantees of a fair trial. And it will only be fair if the right to be defended by a lawyer is respected, with the State providing it if the defendant cannot freely appoint one.

It is up to the Judge to apply the law justly and in that task he or she needs the Lawyer, who through the function of the defence, will contribute alongside the judge to ensure that the law is applied equally to all, and all are equal before the law, to put an end to the popular belief that the Argentine poet Jose Hernandez put in the mouth of Martin Fierro (El Gaucho Martin Fierro), a working gaucho victim of social injustice:

"The law is a spider's web,
in my ignorance I will explain it:
the rich man does not fear it,
and neither does the ruler,
for although broken by the big bug
it entangles only the little ones"

THE ROLE AND ETHICS OF THE LAWYER

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Summary

I. INTRODUCTION

The Legal Profession is the only liberal profession in Spain that is expressly mentioned in the text of the **Constitution**. Moreover, it is referred to twice.

First of all, and referring to the set of public rights and freedoms, **Article 17.3**, when speaking of the rights of persons who are detained, states that:

"3. Any person detained shall be informed immediately, and in a manner that is understandable to him/her, of his/her rights and the reasons for his/her detention, and shall not be obliged to make a statement. The assistance of a LAWYER shall be guaranteed to the detainee in police and judicial proceedings, under the terms established by law."

If we continue reading the constitutional text, we can see how **Article 24** enshrines the right to effective judicial protection, stipulating that:

"1. All persons have the right to obtain the effective protection of judges and courts in the exercise of their rights and legitimate interests, without, under any circumstances, being deprived of their defence.

2. Likewise, all have the right to an ordinary judge predetermined by law, to a defence and to the assistance of COUNSEL, to be informed of the accusation made against them, to a public trial without undue delay and with all the guarantees, to use the means of evidence relevant to their defence, not to testify against themselves, not to confess guilt and to the presumption of innocence.

The law shall regulate the cases in which, on grounds of kinship or professional secrecy, there shall be no obligation to testify about allegedly criminal acts."

The right of defence is recognised as a fundamental principle in the Spanish Constitution, but the Magna Carta also proclaims in **Article 119** that judicial protection shall be free of charge *"...when so provided by law and, in any case, with respect to those*

who can prove insufficient resources to litigate", establishing as fundamental the public defender's office and legal aid, which sees its constitutional embodiment as a corollary to the right of defence.

Article 6(3) (c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) of 4 November 1950 and Article 14(3) of the International Covenant on Civil and Political Rights of 19 December 1966 are identical. (d) declares that every accused person has the right to be present at the trial and to defend themselves in person or through legal assistance of their own choosing, to be informed, if they do not have legal assistance, of their right to have it assigned to them and, if the interests of justice so require, to have legal assistance assigned to them free of charge if they do not have sufficient means to pay for it.

Continuing with the role of the lawyer, the **Organic Law of the Judiciary 6/1985**, of 1 July 1985, which is the law that governs judges and courts, dedicates to the legal profession the essential article 542 which says:

"1 The exclusive title and function of lawyer shall correspond to the graduate in law who professionally directs and defends the parties in all types of proceedings, or provides legal advice and counselling.

2. In their actions before the courts and tribunals, lawyers shall be free and independent, shall be subject to the principle of good faith, shall enjoy the rights inherent in the dignity of their office and shall be protected by them in their freedom of expression and defence.

3. Lawyers shall keep secret all facts or news of which they have knowledge via the terms of their professional activity, and may not be compelled to testify about them".

It defines us as professionals who conduct and defend in all kinds of proceedings or provide legal advice and counsel. It also proclaims that in our actions before the Courts we are free and independent; it recognises the dignity of our function and proclaims that the Courts will protect us in our freedom of expression and defence. This article of the Law on Judges ends with the proclamation of the defence of professional secrecy, which I will talk about later, as a pillar on which the ethics and deontology of the legal profession is based, in its dual aspect of rights and obligations. Professional secrecy is a duty and thus states that legal professionals must keep secret all the facts and news relating to their professional activity, but it is also a right, and they

cannot be obliged to testify about those facts or news that they learn by reason of any (or all, let me add) of the modalities of their professional activity, and this right of the legal profession is enforceable before the courts. It is therefore a duty, but at the same time a right, which I will discuss in more detail in the development of the lawyer's ethics.

If we talk about the regulation of the legal profession and its role in the Spain of 2023, we must refer to a regulatory text whose preliminary draft has been approved by the Ministry of Justice and is in the process of approval in the Congress of Deputies, promoted by the General Council of the Legal Profession and especially by our president Victoria Ortega. It is the Law on the Right to Defence, a law that deals solely and exclusively with this right to defence, not as a rule that regulates the profession, as that is what our General Statute is for. It has legal status as it is approved by Royal Decree Law, in this case 1035 of 2021 of 2 March, but neither is it a Code of Ethics, but as an organic law on the right to defence linked to the basic protection of citizens and as the maximum exponent of a democratic State under the rule of law. The Preliminary Draft of the Organic Law on the Right to Defence, which has the highest regulatory rank, was published on 1 September 2022, following its approval by the Council of Ministers on 30 August 2022. According to our Council, it is still an insufficient text, but it must be recognised that it addresses certain demands of the legal profession in a broader manner and reinforces not only the protection of professional secrecy, but also the role of the Bar Associations which, in Spain, 83 in number, are located in the provincial capitals and in some other historic judicial districts and which, together with the Councils of the Autonomous Communities and the General Council, constitute our professional organisation.

Having summarised the role of the legal profession as an exclusive profession to exercise the right of defence in all jurisdictional orders, as well as legal advice and counselling, with the courts respecting the dignity of its function and its freedom and independence, as well as professional secrecy, I will now enter into the ethical aspect of the profession.

II. PROFESSIONAL ETHICS

In Spain we speak of professional deontology, and this is commonly used in all the countries of the world, because in 1889, the philosopher Jeremy Bentham coined this term for the first time in his work "Deontología o Ciencia de la moralidad" (Deontology or Science of Morality).

But the first question posed by the term ethics or morality is whether ethical rules are simply moral duties, understood as inner aspects of our conscience, and we must answer: no. Ethical rules are rules that must be complied with, and failure to comply with them is punishable by a sanction that can sometimes go as far as expulsion from the profession. The lawyer's ethics, therefore, do not regulate conduct that is kept in the intimate or personal sphere, to which we understand morality to refer, but rather regulates the relationships of the legal professional with third parties, that is, with clients, opponents, courts, the Bar and other professionals.

It is worth noting that in the face of attempts by some Ministries of Justice to attribute this sanctioning power to the judges or to leave it in the hands of consumer organisations, in Spain the State grants disciplinary powers to the Lawyer's Office itself.

This attribution of public powers such as disciplinary and sanctioning powers to the Bar Associations and Bar Councils is made clear in the **Judgment of the Plenary of the Constitutional Court 3/2013**, of 17 January 2013 issued in the appeal of unconstitutionality 1893-2002 when it states: *"The reason for attributing to these entities, and not to the Administration, the public functions over the profession, of which professional deontology and ethics and, with this, the control of deviations in professional practice, constitute the main exponent, lies in the expertise and experience of the professionals who constitute their corporate base".*

Is why the jurisprudence of the Constitutional Court lends the rules of professional ethics a strong legal backing, stating that the rules of professional ethics are not a catalogue of ethical or moral duties, but have disciplinary consequences by establishing a series of mandatory duties, which means that they cannot be reduced to advice on desirable behaviour; and that, both in the collegiate tradition and in the jurisprudential doctrine of the Supreme Court, they have the quality of a law for the members, of

a law of obligatory compliance. In figurative terms they are the penal code of the profession, if you infringe the deontological obligations you are sentenced to anything from a warning, which is a verbal or written call to order, to suspension from professional practice for up to two years or, where appropriate, expulsion from the profession.

The European Court of Human Rights in Strasbourg, since the Barthold judgment of 25 March 1985, has also decreed that the rules of professional conduct are mandatory and that non-compliance with them is therefore punishable.

Offending behaviour is sanctioned by the Bar Associations through some Commissions, called Deontology Commissions that, after investigating a sanctioning procedure giving a hearing to the complainant and the accused, decide either to shelve the complaint if it is understood that there has not been any infringement of the rules that regulate the profession or otherwise they impose a sanction, but it is ourselves - the Bar - that is judged and sanctioned. This disciplinary power of the Bar Associations or Bar Councils has nothing to do with what we call in Spain *"bench police"* o *"police in the courtroom"* which gives the judge the power to impose a sanction if there is a lack of good order or correct behaviour during the trial.

No one doubts that lawyers can be disciplinarily corrected for their actions on the witness stand before courts and tribunals, as attested by Articles 552 to 557 of the Organic Law of the Judiciary (LOPJ), and that such corrections must be imposed in the proceedings themselves or in a separate procedure by the judicial authority before which the proceedings are followed (Article 555 LOPJ). However, as has been corroborated by case law, this power is not an obstacle for the Bar Association or Bar Councils to exercise their recognised disciplinary powers with regard to lawyers when appropriate in accordance with their Statutes, without thereby violating the principle of non bis in idem, i.e. being sanctioned twice for the same act.

The Spanish Supreme Court held in its judgment of 16 December 1993 that the *"courtroom"* police are merely an instrument in the hands of the judges to enable the process to fulfil its function, whereas in the collegiate sphere the disciplinary deontological sanctions operate with the aim of contributing to the maintenance of a level of behaviour based on the ethical standards of the legal profession. Therefore, a previous ruling of 3 April 1990 had already assumed immediately that in the latter case the sanction should correspond to the Bar Association even if the offence had been committed in the course of a trial, because they preserve different legal interests: in one case the good order of the trial and in the other the infringement of the ethical rules of conduct

of the legal profession, a doctrine reiterated in numerous judgments, citing as an example the Supreme Court judgment of 12 December 2000.

Through the Deontology Commissions, the Governing Boards exercise the competence of deontological and, if necessary, disciplinary control over the professional conduct of the lawyers, and may also act ex officio if they are aware that an offence has been committed, even if no complaint has been lodged. It is part of the Strategic Plan of the Bar Association to separate the investigation of the proceedings and the sanction that corresponds to the Governing Board, so it is desirable that the Deontology Commissions are made up of lawyers with experience but who do not form part of the decision-making body.

The rules governing the professions are currently receiving a great deal of attention on the international scene. At the European level, for example, EU bodies are promoting the development of codes of conduct by professional bodies. Thus, **Directive 2006/123/EC of the European Parliament and of the Council** of 12 December 2006 on services in the internal market, states in recital 114 that *"Member States should encourage the drawing up of codes of conduct, in particular by professional bodies, associations and organisations at Community level. These codes of conduct should include, bearing in mind the specific nature of each profession (...) rules of professional ethics and conduct for those professions, with a view to guaranteeing, in particular, independence, impartiality and professional secrecy"*.

European professional organisations have been compiling common codes of conduct or principles for several decades. For example, the Code of Conduct for Lawyers in the European Union, drawn up by the Council of the Bar of Europe (CCBE), adopted at the Plenary Session of the CCBE on 28 October 1988 and amended at the Plenary Sessions of 28 November 1998 and 6 December 2002. It also includes an explanatory memorandum of 19 May 2006.

We see, then, this Code of Ethics of the European Legal Profession as a guarantee for society in the defence of its rights, which would not be the case if we did not sanction those who break the rules, and in doing so we become a profession worthy of trust in the eyes of everyone.

As it is a sanctioning power, all the principles of criminal law apply to it. Namely: the principle of legality and typicality by which an offence cannot be imposed if its characteristics are not previously established in the norm, the principle of proportionality,

adjusting the sanction to the specific case and regulating it to the seriousness of the reproach or the principle of the presumption of innocence, that is, no one can be convicted without proof, that is, we are all innocent until proven guilty.

III. MAIN DEONTOLOGICAL OBLIGATIONS

The deontological obligations of lawyers in Spain contain two norms and they are the Code of Ethics, which does not require legal status and which is approved by the Plenary of the General Council of Lawyers, which was ratified on 6 March 2019, repealing the previous one from 2002, a code that is basically a treatise of obligations with an imperative but also didactic character. The institutional legal profession itself tells lawyers what their obligations are towards their clients, their opponents, other lawyers, the Bar Association itself and the Courts of Justice, i.e. it regulates our relationships with third parties, especially with our own clients and with other colleagues in the profession. The Preliminary Draft of the Organic Law on the Right to Defence gives this text an unquestionable value, promoting its permanent dissemination for the knowledge of lawyers.

It lays out the basic principles of freedom, mutual lawyer-client trust, independence from any de facto power, freedom of expression and defence, integrity and respect for the other party, truthful advertising of services in accordance with the high dignity of the profession, truthfulness that extends to the prohibition of translating the qualification into another language if the requirements of that country are not met and advertising that will not incite litigation, nor promise results that depend on the court. Concealed advertising is strictly forbidden, disguising advertising as news or passing it off as a pro bono solidarity campaign, and it is absolutely forbidden to advertise when it affects professional secrecy, even minimally. Advertising directed at recent victims of disaster, pandemic or an event with a high number of victims is severely punished although this does not impede these victims from seeking a lawyer. What is not allowed is offering service to people who are in a situation that makes them incapable of making an informed decision, as has unfortunately happened with COVID 19.

Other offences consist of defending a client's interests that could conflict with those of our opponent, either because the client has previously been our client and therefore has knowledge of information that could be used against him or her, or if the defence involves going against the lawyer's own interests.

A very extensive provision imposes an obligation on the lawyer to inform about the status of the case, the essential steps of the procedure, the cost of the services, the expectations of success, etc. and to identify him or herself so that the client always knows who is defending him/her.

IV. PROFESSIONAL CONFIDENTIALITY

The Statute of the Bar reflects the provisions of the Organic Law of the Judiciary which, as mentioned above, is the law that governs the Judges and which in its article 542.3 imposes the duty to keep secret all the facts or news that he/she knows by reason of any of facet of his/her professional activity and cannot be obliged to testify about them.

It is clear that this is a broad duty because it not only prohibits the disclosure of the client's news and confidences, but also because he/she must keep secret the facts that he/she knows or that refer to his/her professional performance as a lawyer, i.e., if he/she is asked in court whether he/she was in any place whose recognition implies expressly or allegedly revealing information that affects his/her professional performance and may affect the client, he/she is obliged not to testify about these facts.

This duty of confidentiality is most evident in criminal proceedings whose law of criminal procedure states (article 416) that the lawyer of the defendant is exempt from the obligation to testify regarding the facts that the defendant has entrusted to him/her in his/her capacity as defence counsel, and the exemption from the obligation to testify is such that it does not admit any exception, unlike the relatives of the defendant who are also exempt from testifying against him/her but who can do so if they are warned by the judge and insist on testifying. The lawyer can never do this, however.

Moreover, they should not report their clients if they know that a crime has been committed, and thus the obligation imposed on any citizen to inform the police or the judge of a criminal offence, Article 263 of the Criminal Procedure Act for lawyers is a right not to report their client with respect to the instructions or explanations they receive from their clients.

The doctrine raises the question of whether a lawyer should denounce a client who confesses that he/she is going to commit a crime, or whether his/her professional secrecy would prevent him/her from denouncing the client and the crime could end up being committed. In these cases, professional secrecy lapses, firstly because of a weighing of the interests at stake and secondly because the lawyer must keep secret what his/her client tells him/her he/she has done, not what he/she is going to do because, in such a case, he/she would not yet be his/her client because the fact has not yet occurred and is not subject to confidentiality. It is a future fact and facts that have not yet been committed cannot be defended.

In Spain, what is considered professional secrecy includes communications between lawyers. These communications, e-mails, WhatsApps, postal mails are also protected by professional secrecy in the professional ethics texts of the legal profession, which is also generally contemplated in the criminal jurisdiction. Judges in the civil jurisdiction have been admitting these confidential emails between lawyers as valid evidence if one of them presents them in court, without prejudice to their disciplinary sanction by the Bar Associations and Bar Councils. This poses a very serious problem because it removes the protection of the confidentiality of communications between professionals. If a lawyer sends an e-mail to another lawyer, he/she must be sure that it will not end up in court, otherwise, and given the possibility of it being used in court, he/she will not put in it everything related to the matter, which he/she thinks is prejudicial to him/her. For example, acknowledging a debt and offering to pay in instalments, because if this document is brought to court, it will already be an acknowledgement that your client owes the money, without prejudice to any deontological sanction.

Professional secrecy and the confidentiality of communications between legal professionals, the true cornerstone of lawyer's ethics, are extended in the **Preliminary Draft of the Law on Defence** which in **Article 15**, it provides that:

"1. All communications between a legal practitioner and his or her client shall be confidential and may only be intercepted in the cases and under the conditions expressly provided for by law..

2. The communications maintained exclusively between the defence counsel of the parties on the occasion of litigation or proceedings, regardless of the time at which they take place or their purpose, are confidential and may not be used in court, nor shall they have probative value, except in cases in which they have been obtained in accordance with the provisions of the Criminal Procedure Act or in which their provision or disclosure has been authorised in accordance with the professional regulations in force."

This is very important because it establishes that, if a communication between lawyers is presented at trial, the judge will not take it into account as unlawful evidence, to which is added the following paragraph of the article:

"3. Documents, whatever their medium, which contravene the above prohibition shall not be admissible unless their production has been expressly accepted by the legal practitioners concerned or the communications in question have been made with the express and explicit warning that they may be used in court".

V. SPECIAL REFERENCE TO THE TESTIMONY OF THE LAWYER

It is strictly forbidden for a lawyer to call another lawyer as a witness to testify about acts or documents relating to the lawyer's professional activities. If this is done, the lawyer who proposes it commits a breach of professional ethics.

Thus the **General Statute of the Bar,** in its **Article 59** entitled *"Duties towards other professionals of the Bar" regulates in section e: "Refrain from requesting the testimony of the professional of the Bar of the opposing party or of other professionals of the Bar who have had any professional involvement in the matter"*.

Article **11. 12** of the **Code of Conduct** states that *"It shall be compulsory to refrain from requesting a witness statement from a lawyer on facts related to his or her professional activities"*.

And again, the **General Statute of the Legal Profession** sanctions as a serious offence in **Article 125 VII:** *"The summoning of a professional lawyer as a witness of facts related to his professional activity"*.

VI. INTERCEPTION BY THE JUDGE OF CONFIDENTIAL LAWYER-CLIENT INTERVIEWS. THE SENTENCING OF BALTASAR GARZÓN

The Second Chamber of the Supreme Court handed down judgment 79/2012 on case 20716/2009 initiated with the complaint filed by the lawyer Ignacio Peláez against Judge Baltasar Garzón. These proceedings were opened for the continuous offence of judicial malfeasance and the offence committed by a public official of using listening and recording devices in violation of constitutional guarantees, regarding conversations held between pre-trial detainees and lawyers in the prison's call centres.

Subsequently, the private accusations of others investigated by the magistrate joined the proceedings.

The Supreme Court sentenced National Court Judge Baltasar Garzón to eleven years' disqualification from holding the post of judge or magistrate as the perpetrator of a crime of misconduct, because there was no evidence of criminal activity on the part of the lawyers.

Returning to the essential role of the right to defence, the aforementioned Supreme Court ruling assigns it the status of a core element in the configuration of the criminal process of the rule of law as a process with all the guarantees. It is not possible to build a fair trial if the right of defence is totally eliminated, so that any possible restrictions must be especially justified.

The High Court makes a criminal legal assessment of two decisions of the judge who, directly affecting the right to defence by suppressing confidentiality, agreed to listen to and record the communications between the accused prisoners and their defence

lawyers, without there being any data of any kind to indicate that the lawyers mentioned in the proven facts were taking advantage of the exercise of the defence to commit new crimes. And it says:

"The confidentiality of relations between the accused and his defence counsel, which must naturally be based on trust, is an essential element (ECHR Castravet v. Moldova, 13 March 2007, p. 49; and ECHR Foxley v. United Kingdom, 20 June 2000, p. 43). 43) In the ECHR of 5 October 2006, Viola v. Italy (61), it was stated that *"...the right of the accused to communicate with his/her lawyer without being heard by third persons is among the elementary requirements of a fair trial in a democratic society and derives from Article 6.3 c) of the Convention. If a lawyer could not meet his/her client without such supervision and receive confidential instructions from him/her, his/her assistance would lose much of its usefulness (S. v. Switzerland Judgment of 2 November 1991, Series A no. 220, p. 16, nr. 48)".*

The Chamber reiterates its doctrine (STS nº. 245/1995, of 6 March and STS nº. 538/1997, of 23 April, and also, although as *obiter dicta*, la STS nº 513/2010, explains that communications between inmates and their defence lawyers or those expressly called in relation to criminal matters can only be agreed in cases of terrorism and following an order from the competent judicial authority, and never when there is no data that could minimally indicate, in a reasonable assessment, that the status of counsel and the exercise of the right of defence are being used as an alibi to facilitate the commission of further crimes.... causing totally unjustified and hard to repair damage to the rights of defence of the accused and, to a certain extent, to the rights of the lawyers affected, especially to the right and duty to professional secrecy as essential for a correct defence.

In the **ECHR** of 5 October 2006, **Viola v. Italy** (61), it was stated that *"…the right of the accused to communicate with his/her lawyer without being heard by third parties is one of the elementary requirements of a fair trial in a democratic society and derives from Article 6(3) (c) of the European Convention on Human Rights. If a lawyer could not meet his/her client without such supervision and receive confidential instructions from him/her, his assistance would lose its usefulness."*.

VII. ETHICS IN THE LEGAL AID SYSTEM

The ethical or deontological obligations of the legal profession become more demanding when we are dealing with a case in which the client is a beneficiary of the legal aid system, to the point that the Constitutional Court of Spain created jurisprudence based on an Order of 19 July 2006 **(ATC 284/2006)** which declared that the commission of a serious or very serious misconduct in the legal aid system entailed the exclusion of the service in perpetuity, says the Constitutional Court: *"It is a matter of ensuring that no person is left procedurally defenceless due to lack of resources to litigate"* (for all, STC 187/2004, of 2 November, FJ 3).

The Constitutional Court, responding to a question of unconstitutionality raised by a judge who considered that excluding a legal aid lawyer in perpetuity for having committed a serious or very serious breach of professional ethics in the performance of that appointment was excessive, bearing in mind that the lawyer was also disciplinarily sanctioned with suspension from the practice of the profession for days or months, resolves that, given that legal aid is available to the most economically vulnerable, who therefore do not have the possibility of hiring a private lawyer, one must be particularly demanding, admitting the possibility of exclusion in perpetuity, as there is no place in this service for negligent lawyers, nor for those who violate professional ethics. Moreover, the appointment of legal practitioners for free legal aid is made by the Bar Associations, which assume subsidiary liability in the event of harm to the defendant.

The new **General Statute of the Bar** mitigates the time of exclusion and it is no longer in perpetuity, except in the case of serious deontological infractions. Thus, **Article 127.4** of the Statute states that:

"The sanctions imposed for serious or very serious infringements related to actions carried out in the provision of legal aid services shall entail, in all cases, the exclusion of the legal professional from the said services for a minimum period of six months and less than one year if the infringement is serious and between one and two years if it is very serious."

Infringements specific to free legal aid as very serious, which, in addition to exclusion from the service, would also entail suspension from the exercise of the profession for a period of more than one year and less than two years or expulsion, are those of art. 124. j of the EGAE *"Undue receipt of fees, rights or economic benefits for services derived from the Law on Free Legal Aid."*

With regard to serious infringements, **Article 125.k** punishes as an infringement specific to the duty to provide legal aid *"Unjustified failure to comply with the assignment contained in the designation made by the Bar Association in matters of free legal aid."*

It is also considered a minor offence in **Artcle 127.g** *"Failure to attend with due diligence to matters arising from the Duty Solicitor's Office, when non-compliance does not constitute a serious or very serious offence."*

In addition to this, the Bar Associations have a set of Regulations for the Legal Aid Service which sanction behaviour which, without constituting a deontological infraction, hinders the service. For example, not picking up the telephone terminal to answer calls from detention centres, not communicating substitutions, etc.

VIII. LIST OF BREACHES OF PROFESSIONAL ETHICS FOR LAWYERS

These offences, which are in accordance with the principle of criminalisation as set out in Article 121 of the General Statute of the Bar, are divided into very serious, serious and minor offences.

Thus, **Article 124** defines **very serious** infringements as follows:

"a) Conviction by final ruling for intentional crimes, in whatever degree of participation, as a consequence of the exercise of the profession.

b) Conviction by final ruling of severe penalties in accordance with Article 33.2 of the Penal Code.

c) Exercising the profession in violation of final administrative or judicial decisions of disqualification or prohibition of professional practice.

d) Aiding or concealment of professional intrusion.

e) Exercising the profession while incurring a cause of incompatibility.

f) Breach of the duty of professional secrecy where the specific offence is not specifically criminalised.

g) Waiver or abandonment of the defence entrusted to him or her when the client would be rendered helpless.

h) Unjustified refusal to carry out the professional interventions established by law, as provided for in Article 17 of these General Regulations.

i) The defence of interests conflicting with those of the legal professional himself/herself or with those of the law firm of which he/she is a member or with which he/she works.

j) Undue receipt of fees, rights or economic benefits for services derived from Law 1/1996 of 10 January 1996.

k) Withholding or misappropriation of amounts belonging to the customer and received for any reason whatsoever.

l) The appropriation or retention of documents or files relating to clients of the firm of which he/she was previously a member, unless expressly authorised by the client.

m) Violation of the sanctions imposed.

n) Advertising professional services in breach of the requirements of Article 20.2.c) of this General Statute."

Article 125 lists the **serious offences** of the legal profession, which are:

"a) Infringement of ethical duties in the following cases:

i. Infringement of the duties of confidentiality and of the prohibitions protecting communications between professionals under the terms established in Article 23 of these General Statutes.

ii. Failure to comply with the commitments formalised between colleagues, verbally or in writing, in the exercise of their professional duties.

iii. The lack of due respect or the making of personal allusions of contempt or discredit, in the exercise of the profession, to another professional lawyer or to their client.

iv. The unjustified inducement of the client not to pay the fees accrued by a colleague in the event of substitution or change of legal professional.

v. Withholding documentation from a client against his/her express instructions.

vi. Failure to send the corresponding documentation to the legal professional who replaces him/her in the handling of a case.

vii. The summoning of a professional lawyer as a witness of facts related to his or her professional performance.

b) Advertising professional services in breach of the requirements of Article 20 of this General Statute, except as provided for in Article 124.n), in conjunction with Article 20.2.c).

c) Failure to comply with the duties of identification and information set out in Articles 48 and 49 of this General Statute.

d) Failure to comply with the grievance obligations set out in Article 52 of these General Statutes.

e) Failure to show due respect for those involved in the administration of justice.

f) Failure to pay collegiate fees, without prejudice to the cancellation of membership of the College for that reason.

g) The lack of due respect or unjustified non-appearance to the summons issued, under warning, by the members of the corporate or governing bodies of the Bar in the exercise of their functions.

h) Failure to perform their duties as members of corporate governance bodies that prevents or hinders their proper functioning.

i) A firm criminal conviction for the commission of intentional minor offences as a consequence of the exercise of the profession.

j) The defence of interests in conflict with those of other clients of the lawyer or law firm of which he/she is a member or with which he/she collaborates, in violation of the provisions of Article 51 of this Statute.

k) Unjustified failure to comply with the assignment contained in the designation made by the Bar Association in the area of free legal aid.

l) Failure to comply with the obligation to communicate the substitution of the professional management of a case to the colleague being substituted, under the terms provided for in Article 60 of these General Statutes.

m) The relationship or communication with the opposing party when he he/she is aware that he he/she is represented or assisted by another legal professional, except with his/her express authorisation.

n) Abuse of the circumstance of being the sole legal practitioner involved by causing unfair injury.

ñ) Unjustified failure to attend any judicial proceeding, provided that it causes prejudice to the interests of the person whose defence has been entrusted to him/her.

o) The payment, collection, demand or acceptance of commissions or any other type of compensation from another legal professional or any other person, in breach of the legal rules on competition or those regulating professional ethics.

p) Refusal or unjustified delay in rendering an account of the professional assignment or in making the corresponding settlement of fees and expenses demanded by the client.

q) Offsetting fees against client funds that have not been received as a retainer, without the client's consent.

r) False attribution of a professional assignment.

s) Drunkenness or drug abuse when it affects the exercise of the profession.

t) Failure to take out insurance or a guarantee when the obligation to have such a guarantee scheme to cover liabilities arising out of the professional practice is provided for by law.

u) Any other acts or omissions that constitute a serious offence to the dignity of the profession and the rules governing it, in accordance with the provisions of this General Statute and other legal provisions".

And finally, in **Article 126, minor infringements:**

"a) Giving slight offence in any private oral or written communication to the legal practitioner of the opposing party, provided that the offence has not been made public.

b) Compromising, in their communications and statements with the lawyer of the opposing party, the client himself/herself with comments or statements that may cause him/her disrepute.

c) Repeatedly and unjustifiably contesting the fees of other legal practitioners.

d) Failure to attend with due diligence to visits, written or telephonic communications from other legal professionals.

e) Failure to notify the College in a timely manner of a change of professional address or any other personal circumstance affecting their relationship with the College.

f) Failure to state his or her identification, the College of which he or she is a member and his or her membership number in the first document or action.

g) Failure to attend with due diligence to matters arising from the Duty Solicitor's Office, when non-compliance does not constitute a serious or very serious infringement".

These infringements are punishable by the **penalties** set out in Article **127 of the EGAE:**

"1. For the commission of very serious offences, in accordance with criteria of proportionality, expulsion from the Bar or suspension from the practice of law may be imposed for a period of more than one year but not exceeding two years.

2. For the commission of serious infringements, the sanction of suspension from the practice of law for a period of more than fifteen days but not exceeding one year or a pecuniary fine of between 1,001 and 10,000 euros may be imposed.

3. For the commission of minor offences, the sanction of a written warning may be imposed, or suspension from the practice of law for a period not exceeding fifteen days, or a financial fine of up to 1,000 euros.

4. The sanctions that are imposed for serious or very serious infringements related to actions carried out in the provision of the in-court representation services shall entail, in any case, the exclusion of the professional lawyer from the said services for a minimum term of six months and less than one year if the infringement is serious and between one and two years if it is very serious. In the case of minor offences, the exclusion of the professional lawyer from the said services may also be imposed for a period not exceeding six months. Once a disciplinary file has been opened as a consequence of a complaint made by a user of the free legal aid services, when the seriousness of the alleged fact makes it advisable, the precautionary removal from the service of the professional lawyer allegedly responsible for a maximum period of six months may be agreed until the disciplinary file is resolved".

In conclusion, I would like to bring **Nielson Sánchez Stewart**: *"As Alan Dershowitz wrote, no profession is more concerned with its good work than the legal profession, despite the bad reputation that has always dogged it."*

And a reflection of my own that I included in the presentation of the **Code of Ethics**: *"A profession, in this case the legal profession, cannot demand the recognition of society without publicly displaying a code of ethics that constitutes a guarantee for citizens, standards whose ethical foundations have become the main reference point for advanced societies.*

Deontology as the key and foundation of the existence of the profession and the survival of the institutional legal profession. Without disciplinary powers, the role of the Bars and Bar Councils would be devoid of content. If they are to continue to be necessary, they must be mounted on the mighty steed of ethics and professional deontology."

LEGAL AID AS AN ORGANISATION IN SPAIN

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Summary

I. LEGAL AID IN SPAIN: GENERAL ISSUES

Data on legal aid at European level

The European Commission conducts an annual study called "The Evaluation of European Judicial Systems" for the Council of Europe's Efficiency of Justice (CEPEJ). This study analyses the judicial systems of 44 European countries and three observer states (Israel, Morocco and Kazakhstan). The report shows that Spain is the European country with the highest number of Legal Aid cases per 100,000 inhabitants: 3,379 compared to an average of 734. Spain allocates only 6.9% of its justice budget towards Legal Aid, compared to the European average of 8.8% (Norway spends 31%, for example). On the other hand, Spanish investment in the judicial system, at 0.37% of GDP, is higher than the European average of 0.30%. Per capita, Spain invests 87.9 euros in justice, compared to the European average of 64.5 euros.

These figures show the scope of the legal aid system in Spain, albeit with a budgetary shortfall for its maintenance. Nevertheless, the system functions efficiently and with a high degree of citizen satisfaction. The fact that investment in the judicial system in Spain is higher than in other European countries is perhaps indicative of the effort that the government has been making in recent years, especially in the implementation of telematics and digital tools to process judicial matters, as well as in the modernisation of judicial offices. In any case, according to the **"EU Justice Scoreboard":**

"Efficiency, quality and independence are essential parameters of an effective judicial system, regardless of the model of the national judicial system or the legal tradition on which it is based" (p3).

"Effective judicial systems that uphold the rule of law have a positive economic impact. When judicial systems ensure that rights are protected, credit is more likely to be extended, firms are discouraged from opportunistic behaviour, transaction costs are reduced and innovative firms are more likely to invest. The positive impact of well-functioning national judicial systems on the economy has been noted in various studies and academic publications, notably by the International Monetary Fund, the European Central Bank, the OECD, the World Economic Forum and the World Bank" (p5).

This is evidence of the importance of well-functioning judicial systems in States, with Legal Aid being another factor to consider.

European and Spanish frameworks

Legal Aid is a fundamental right in the European Union under the *Charter of Fundamental Rights of the European Union* (article 47.3), as well as being recognised by the Council of Europe in the European Convention on Human Rights. (article 6.2.c).

In Spain, citizens' access to the courts of justice and to legal defence are rights with constitutional status (Article 24 of the *Spanish Constitution* of 1978, this precept being included among the *fundamental rights and public liberties* which are afforded special protection). Furthermore, Article 119 of the Spanish Constitution expressly contemplates the provision of Legal Aid for all types of proceedings, not only criminal ones, and is intended for those who can prove they have insufficient resources to be able to litigate.

Law 1/1996, 10 January 1996, on Free Legal Aid, regulates this institution. It was, and is, the only legal regulation of the Spanish constitutional period in this area.

The objective of Legal Aid

The right to free Legal Aid is defined as a public service provided by the Spanish State, entailing an activity consisting of making available to citizens the necessary means to make the right to effective judicial protection and the right to be defended by a lawyer real and effective.

As litigants in Spain do not have to pay court fees (with the exception of companies and only in certain proceedings), the costs of litigation are limited to the professionals involved, essentially lawyers and experts or expert witnesses who have to provide specialised technical or scientific data. As stated above, Legal Aid is not only available to citizens for criminal proceedings, but also for litigation in all spheres or jurisdictions, and even for appeals.

Organisation

This Law designed the Legal Aid system in the right way, irrespective of the fact that, in Spain today, it should be revised due to the social and regulatory changes that have taken place in the 26 years it has been in force.

The legal aid system relies on two government bodies responsible for its organisation and implementation:

- On the one hand, the State Administration (the Ministry of Justice and the Ministry of Public Administration, the latter of which is responsible for the organisation of State civil servants).
- On the other hand, the General Council of Spanish Lawyers and the 83 Bar Associations.
- It should be added that the courts can in any case inspect the Administration's actions in order to ultimately supervise the decision-making process on the granting or refusal of legal aid.

The State Administration is responsible for the recognition or refusal of the benefit of Legal Aid (through provincial authorities). The Bar Associations are responsible for prior information to citizens, for the preparation of the dossier of documents containing the data of the citizen requesting Legal Aid, as well as for the organisation, implementation and control of the legal services provided to the beneficiaries of the system. In addition, the Bar Associations are responsible for providing up-to-date legal training for lawyers providing Legal Aid services.

The compulsory nature and extent of legal aid services

Legal Aid, by legal imperative, is a compulsory and unpaid service for the legal profession, although, with regard to the latter, financial recompense is contemplated for professionals and the Bars by way of compensation.

The compulsory nature of the services provided by the Bar has an important nuance: if there are sufficient volunteers in the Bars to ensure the efficient and sustained provision of services, these services are covered by volunteer lawyers.

Currently, all Bar Associations in Spain cover their services with volunteer lawyers. This is in line with the historical tradition in our country, as from time immemorial the legal profession has provided support and advice to sectors of the population with financial or other hardships.

The allocation of each judicial process to the lawyers who provide these services is done in strict order through the lists of volunteer lawyers that each Bar Association draws up annually. In other words, it is done via a rota system.

Given the large number of lawyers registered, as well as the fact that they are appointed on a rotational basis, the impartiality and professionalism of the defence services is fostered: the Bar Associations and the General Council of Lawyers are responsible for and control the training and development of the practitioners, as well as for ensuring their professional independence.

The services covered by the legal aid system are:

1. Free advice and guidance prior to judicial proceedings, including information on out-of-court alternative means of dispute resolution.

   This advice is provided by the Bar Associations on a daily basis by specialised staff.

2. Legal assistance to people in custody, in prison or under investigation, if they have not appointed a lawyer of their own choosing. Likewise, assistance and counselling for women subjected to violence by their husbands or partners.

   This assistance to the detainee is provided from the moment of arrest by the police authority and, of course, when the person in custody is brought before the court.

   Assistance and counselling for women who are victims of violence is provided before they even file a complaint.

   For these services, the Bar Associations organise a permanent standby system, in which a certain number of lawyers are available to the authorities, police and judiciary, every hour of the day and every day of the year.

3. Defence and representation in all types of legal proceedings in which the law requires the intervention of a lawyer or, in other cases, when the Bar Association is requested by a judge to do so as s/he deems it to be appropriate or convenient.

   Appointments of lawyers to hear legal proceedings are made by the Bar Association on a pre-determined rota, as indicated above.

4. Interventions by experts or consultants.

5. Reductions in other costs related to court proceedings (court fees, publications in official journals, notary and registry fees).

Many years ago, the Spanish Bar Association developed a computer application for the management of Legal Aid cases by means of an electronic file, which is used by most of the State Bar Associations. The commitment of the Spanish Bar Association to this initiative has proved to be a success.

Moreover, for decades the experience of the Bar Associations in the organisation and provision of agile and efficient Legal Aid services means that the Legal Profession as it is now is irreplaceable.

Financial support from the State

Legal Aid services are financed by the State, although not all services provided by the legal profession are covered.

As previously mentioned, the State financially compensates lawyers who provide the services, both for legal assistance to the detainee or prisoner and to women who are subjected to violence by their husbands, as well as for the handling of the legal proceedings assigned to each lawyer.

These payments are limited in amount as they are not in line with the prices that lawyers would charge to other clients in their normal course of business.

The State also compensates for the infrastructure costs incurred by the Bar Associations and the General Council of Spanish Lawyers, which, as mentioned above, are responsible for organising the system and providing the services.

Lastly, the fees of experts or consultants are also paid.

II. CRITERIA FOR GRANTING LEGAL AID TO CITIZENS

It is worth noting that Spanish procedural legislation is one of the most guarantee-oriented, especially in criminal jurisdiction, and the regulation of Legal Aid is a sign of this.

As a general rule, Legal Aid is granted to individuals, and the Law establishes economic scales per family unit depending on the number of family members. However, it is possible that this right may be recognised in other cases in which special circumstances are noted, even if these scales are exceeded.

This provision extends to all types of legal proceedings, not only criminal, and where our procedural laws make it compulsory for litigants to be defended by a lawyer (which is the majority of proceedings).

Currently, the financial limitations for the recognition of this right are 1,158.04 €/month for persons who do not constitute a family unit, i.e. who live alone; 1,447.55 €/month for family units with up to 3 members; and 1,737.06 €/month for families with 4 or more members.

This means that, at a European level, Spain is considered to be one of the countries that grants the most Legal Aid services (Report "Justice Scoreboard", 2018, prepared by the European Commission, highlighting the accessibility and quality of the Legal Aid service in Spain).

However, there are specific cases in which, irrespective of the financial situation, this allowance is available in any event:

- Workers and Social Security beneficiaries, in legal proceedings in the labour and administrative jurisdiction
- Victims of gender-based violence, terrorism and human trafficking, as well as minors and persons with intellectual impairment or mental illness when they are victims of abuse or mistreatment
- Victims of accidents resulting in severe disability when filing for compensation
- Associations for victims of terrorism

Law 1/1996 also provides for special protection for persons in situations of vulnerability or family commitments:

– Depending on the applicant's family circumstances, number of dependent children or relatives, financial obligations or other similar circumstances, Legal Aid may be granted to the applicant even if the standard financial limits are exceeded.

– Applications from people with disabilities (Law 51/2003) or their dependants are treated in the same way.

Commercial companies and other public and private institutions, public utility associations and foundations, are not eligible for this scheme, with the exception of the Social Security (the state entity providing services to workers), Public benefit associations and foundations.

III. THE ROLE OF THE SPANISH LEGAL PROFESSION IN LEGAL AID. THE PROVISION OF FREE LEGAL AID AND DEFENCE IN OTHER VULNERABLE SOCIAL AREAS

Other free services for citizens

The Spanish legal profession was the driving force behind Law 1/1996. The defence of citizens lacking the financial means to bring a case to court has been, and continues to be, a tradition maintained by our profession since time immemorial, as has previously been stated.

It can also be asserted that the Spanish Bar has been an initiator of other free Legal Aid services for citizens that go beyond the cases established by the current Law and that, in fact, it is a rational and updated expansion of these services.

Thus, for more than three decades, several Bar Associations have been providing free legal counselling services to sectors of the population at risk or marginalised and who, in addition, lacked sufficient financial resources.

In this way, and without any legal cover or recognition by government administrations at the time, prison legal counselling services for inmates were introduced. In the same way, a Legal Aid service for migrants and refugees was launched. These programmes gradually spread among the different Bar Associations in Spain until, at present, some Public Administrations have come to recognise and even support and finance, totally or partially, some of these services.

Special mention should be made of the initiatives of the Spanish Bar in the defence of equality between men and women, and in the fight against violence against women. By the same token, it was the lawyers' initiative in these matters years ago that led to the creation in several Bar Associations of comprehensive legal advice and counselling services for women.

In 2004, the Spanish legislator published Organic Law 1/2004, 28 December, on Comprehensive Protection Measures against Gender Violence.

As can be seen, Spanish lawmakers did not respond until some time after the Spanish legal profession's initiatives in these matters were adopted.

Monitoring of the system: "Free Legal Aid Observatory"

On the other hand, and in order to have a more accurate view of the situation of Legal Aid in Spain, more than two decades ago the General Council of the Spanish Legal Profession created the so-called "Observatory of Legal Aid" which annually issues a comprehensive report analysing the work carried out by the 83 Bar Associations in Spain (processing more than 7,500 records) as well as making proposals for improvement prepared by a Committee of Experts, most of whom are not part of the Legal Profession. Additionally, the opportunity is taken to gauge the state of opinion of both lawyers and citizens through surveys carried out by specialised companies.

These reports have become not only a national reference but are also in demand by governmental bodies in other European countries, especially France.

The 2022 report contains significant findings such as the following, which are mentioned to illustrate this point:

- Of the approximately 4,000 million euros that we can calculate that the Spanish State has allocated to the Justice Administration in recent years, only 284 million euros were dedicated to Legal Aid in 2022.
- The legal profession handled around 1,920,000 cases (not only court cases). The investment per citizen was €6/year.
- A total of 988,072 applications for Legal Aid were received by the Bar Associations, of which 785,520 were sent to the Authorities on the grounds that it was considered appropriate to grant aid (87% were confirmed by the Authorities).
- Of the 144,642 lawyers in Spain, 43,696 —around one third of the legal profession— were registered with the various legal aid services: 48% are women.

  The average profile of the Legal Aid lawyer is a professional of around 41 years of age and with more than 13 years' professional practice.
- The total number of complaints received by the Bar Associations arising from these services was 5,234. Of these, only 297 were justified, which led to the initiation of as many disciplinary proceedings. In percentage terms, around 0.67% of the total number of lawyers assigned to the Legal Aid Service were prosecuted.
- The average remuneration received by lawyers was around €147 per case.

Likewise, the Spanish Bar Association regularly carries out a survey of public opinion on this system, through companies specialised in this area, whose conclusions are also published in the report of the Observatory on Legal Aid. The results of this survey are highly positive, revealing a high degree of satisfaction among citizens, especially those who have made use of the services.

Significantly, 82% of those who have made use of Legal Aid services give a positive evaluation, with an average score of 7.1 out of 10.

IV. ADDED VALUE OF THE SPANISH LEGAL PROFESSION IN LEGAL AID

According to the opinions of experts —especially those outside the legal profession— which are recorded annually in the Observatory of Free Justice, it is clear that this system is also very satisfactorily valued. The organisational framework of the General Council of the Spanish Bar and the Bar Associations can guarantee the constitutional right to defence and access to justice in an effective and reliable way.

This work is done regardless of the budgetary constraints of the authorities responsible for paying for these services.

Maintaining an efficient and agile Legal Aid service produces a peaceful social climate and, above all, results in citizens' confidence in Justice and its institutions. This Justice is not only a power of the State or one of the guiding principles of our Law, already more than enough, but it is also a prerequisite for the dignity and respect that citizens deserve. The Spanish Bar has always cooperated in this task in a decisive and responsible manner.

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ACCESS TO JUSTICE FOR VULNERABLE GROUPS

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Summary

I. INTRODUCTION: THE RIGHT OF DEFENCE

The Universal Declaration of Human Rights[1], hereafter UDHR, which was proclaimed by the United Nations General Assembly in Paris on 10 December 1948 in its Resolution 217 (III) A[2], is the common standard of achievement for all peoples and nations, and thus the yardstick by which to measure the degree of respect for and implementation of international human rights standards. Since 1948, the Universal Declaration has been the source of inspiration for all national and international efforts to promote and protect human rights and fundamental freedoms and has been reflected in various universal Declarations and international Covenants.

The UDHR was born in the aftermath of the horror of the Second World War and constitutes an achievement of the human condition that establishes, for the first time, the establishment in a systematic way of the fundamental human rights that must be protected throughout the world in order to achieve peace, both between nations and between their citizens. The projection of the UDHR is the common framework for the adoption of more than seventy directly applicable human rights treaties, which are nowadays applied on a permanent basis at the global and regional level.

The UDHR embodies the will of nations and their governments to promote social progress and better standards of life for all people, framed within a goal of freedom, justice and peace. (Virginia Declaration: liberty, equality, happiness; French Revolution: liberty, equality and fraternity).

This requires *"recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family"*, as reaffirmed in the Charter.

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1. Declaración Universal de Derechos Humanos: spn.pdf (ohchr.org)

2. Resolución 217 (III) A de la Asamblea General de las Naciones Unidas en París, el 10 de diciembre de 1948: NR004682.pdf (un.org)

Based on the foregoing, the right to defence is flagged up as a sine qua non, i.e. a means rather than an end on the road to freedom and justice, and therefore peace, and is interwoven throughout its articles until its clear and determined configuration.

Firstly, the UDHR is based on two rights intrinsic to the human being: the right to life and freedom, which has its projection in the safety of the person, and the right to equality, constituted as an absolute right in which no distinction can be made on any grounds (race, colour, sex, language, religion, political or any other opinion, national or social origin, economic status, birth or any other condition…).

Article 3 proclaims the right to life, freedom and safety of the person, a right essential to the enjoyment of all other enunciated rights.

It has its projection in Articles 4 to 21 which set out the other civil and political rights, including the right not to be held in slavery or servitude; the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an effective judicial remedy; the right not to be arbitrarily detained, imprisoned or exiled; the right to a fair and public hearing by an independent and impartial tribunal; the right of everyone to be presumed innocent until proved guilty; the right of everyone to be free from arbitrary interference regarding one's privacy, family, home or correspondence; the right to freedom of movement and residence; the right to asylum; the right to a nationality, the right to marry and form a family; the right to property; freedom of thought, conscience and religion; freedom of opinion and expression; the right to peaceful assembly and association; the right to take part in the government of one's country and the right of equal access to public service in one's own country.

Of particular relevance among them is the right to defence, which is enshrined in Articles 8, 10, 11, 12 and 28. 8, 10, 11, 12 and 28, insofar as they guarantee: (a) the right to effective remedy, (b) the right of everyone to a fair and public hearing by an independent and impartial tribunal, in the determination of one's rights and obligations or of any criminal charge against one, (c) the right to be presumed innocent until proved guilty, according to law in a public trial at which one has had all the guarantees necessary for his defence; (d) the right to protection of the law against arbitrary interference with one's privacy, family, home or correspondence; y e) the right to effective judicial protection.

Finally, Art.7 advances the right to equality, enacting a right "without distinction" to equal protection of every individual before the law, thus introducing the right to free legal aid for all persons lacking financial means or those who, as we shall see below, are in a special situation of vulnerability recognised by law.

From the normative projections provided by the foundations of the UDHR, the International Bill of Human Rights was born, encompassing also the International Covenant on Civil and Political Rights[3] (ICCPR) with its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights[4] (ICESCR), which entered into force in 1976. Both Covenants elaborate on most of the rights recognised in the Declaration, making them effectively binding on the States that have ratified them. Together with the Declaration, the Covenants comprise the International Bill of Human Rights. Specifically, Jordan ratified the ICCPR on 28-05-1975, focusing mainly —for the purposes at hand— on the inherent right to life, freedom, effective judicial protection, equality before the law and justice, the presumption of innocence and the right to defence.

One of the essential characteristics of these declarations is the universal nature of the UDHR. International human rights treaties have focused on different social groups that are particularly vulnerable and require special protection and awareness-raising. Racial discrimination, torture, enforced disappearances, persons with disabilities, and the rights of women, children, migrants, minorities and indigenous peoples are clear examples of this.

This vocation of universality is rooted in national legislative bodies at the ratification stage of international human rights treaties, and in this way states undertake to incorporate the duties and obligations inherent in these treaties into the domestic legal system. This is why the Report of the Secretary-General of the Security Council of 3 August 2004 (S/2004/616)[5] emphasises that in the "Rule of Law" all persons, institutions and entities, public and private, including the state itself, are subject to the laws,

3. Pacto Internacional de Derechos Civiles y Políticos | ACNUDH (ohchr.org)

4. Pacto Internacional de Derechos Económicos, Sociales y Culturales | OHCHR

5. Informe del Secretario General del Consejo General de las NNUU, de 3 de agosto de 2004, S/2004/616

publicly enacted, under the principle of equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legality, non-arbitrariness, and procedural and legal transparency.

At EU level, the right to defence in general terms is enshrined in Article 6 of the Rome Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms (ECHR)[6] and in Articles 47 and 48 of the EU Charter of Fundamental Rights[7], which guarantee the right to a fair trial and to an effective remedy, as interpreted by the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU), respectively[8]. Subsequently, Directive 2013/48/EU further elaborates on the right to legal counsel in criminal proceedings.

In criminal proceedings, the right to an effective defence has been established. Understanding the term "effectiveness" is key, since the reference to "effectiveness" implies that, although Art. 6 of the ECHR introduces the right of any person accused of a crime to be assisted by a lawyer or to opt for self-defence, the latter option must be interpreted under the criteria of limiting self-defence in the interests of justice. Thus, a suspected or accused person's guarantee of protection of rights, or the requirement of representation for the effective administration of justice are, among others, limiting elements of self-defence.

In this sense, it follows from STEDH, Galystan v. Armenia, nº 26986/03, of 15 November 2007, that the lack of intervention by the judicial system in the face of the refusal of legal assistance by a detainee subjected to deception, threats or physical violence, to that end, would constitute a violation of the ECHR.

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6. Convenio para la protección de los derechos humanos y de las libertades fundamentales (CEDH) (Romas, 4 de noviembre de 1950) - Fundación ACCIÓN PRO DERECHOS HUMANOS (www.derechoshumanos.net)

7. Carta de los Derechos Fundamentales de la Unión Europea (boe.es)

8. Manual sobre el Derecho europeo relativo al acceso a la justicia (coe.int)

The effectiveness and universality of the right to defence is embodied in the access of all citizens to the right to free legal aid, which constitutes an essential guarantee to prevent the lack of financial means from constituting a social gap of inequality in the right to defence.

Access to a lawyer must also be effective and practical, as in any police or judicial proceedings where the accused is entitled to his or her assistance, the accused must be able to contact and communicate with his or her defence counsel, including of course in cases where legal aid is available, where the lawyer is appointed by the system (see e.g. ECHR, Salduz v. Turkey, no. 36391/02, 27th November 2008, from which it follows that it constitutes a violation of Art. 6 ECHR, the deprivation of the right of initial access to a lawyer, in particular while the suspect remains in police custody).

In this context, the right to consult and receive instructions confidentially with the lawyer becomes particularly relevant, otherwise the right to defence loses the effectiveness of its very nature or may even be completely undermined (e.g. ECHR, Lanz v. Austria, No. 24430/94, 31 January 2002, declaring a violation of Art. 6 ECHR —right to communicate with the defence lawyer free from interference by third parties— CJEU, C-305/05, Ordre des bareaux francophones et germanophone and others v. Conseil des Ministres, 26 June 2007, noting that lawyers could not satisfactorily perform their functions of advising, defending and representing their clients if they were obliged to cooperate with the authorities by passing on to them information obtained in the course of providing legal advice).

In civil proceedings, the right to a defence is not absolute, but the right to a fair trial includes the right of access to a court, and it is the legal profession that has the necessary knowledge and skills to guarantee the correct defence of the defendant. Therefore, except in restricted proceedings due to justified reasons of cost and importance of the lawsuit or lack of prescriptiveness, the State must provide free legal aid to persons who, in need of technical defence, lack the financial means to do so.

In this sense, we find the ECHR, Airey v. Ireland, no. 6289/73, of 9 October 1979. Ireland, nº 6289/73, of 9 October 1979, which concludes that the possibility of acting in person before the High Court does not provide the applicant with an effective right of access and that, therefore, there has been a violation of Article 6(1) of the European Convention on Human Rights.

The right to defence of victims of crime deserves special attention.

In general terms, a victim is any person who has suffered loss, injury or damage as a result of an act or omission constituting a crime, and as a consequence of which he or she suffers harm. This concept would also extend to *other material or moral injured parties, direct or indirect, such as family members, heirs, the company, its members and creditors, etc*.[9]

Beyond the international protection of victims whose rights have been violated, there are several areas that have been developed and which have given rise to specific Conventions that oblige the States that have ratified them to consider as victims those persons who have suffered the consequences of a crime, defined according to national criminal law.

The adoption of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime[10], aims to place crime victims at the centre of the criminal justice system and to strengthen their rights so that each victim can have the same level of rights, regardless of their nationality, the place where the crime was committed or their residence status.[11]

The support provided to victims must have the same status as that already mentioned for the defence, i.e. its effectiveness, including legal advice and access to free legal aid. The main purpose of criminal proceedings is the identification of an act or omission that has violated a legal right relevant to society —in the universal condition— if it is clear from the international treaties already mentioned, with correct application of the criminal law, which will lead to social reproach articulated in the imposition of a penalty on the person responsible for the crime and the restitution of the social order that has been broken. Such restitution would be sterile and futile without the incorporation of the participation of the victims in the criminal process in order to contem-

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9. Diccionario Panhispánico del español jurídico.

10. BOE.es - DOUE-L-2012-82192 Directiva 2012/29/UE del Parlamento Europeo y del Consejo, de 25 de octubre de 2012, por la que se establecen normas mínimas sobre los derechos, el apoyo y la protección de las víctimas de delitos, y por la que se sustituye la Decisión marco 2001/220/JAI del Consejo.

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plate ethical reparations —in the restitution of their dignity— and economic reparations for them, all of this through appropriate legal defence.

These supports are also provided for minors, people with disabilities, women, older people, ethnic groups and immigrants.

Specifically: the Convention on the Rights of the Child of 29 August 1990, ratified by Jordan on 24 May 1991; as well as its Optional Protocols on the involvement of children in armed conflict of 6 September 2000 (ratified by Jordan on 23 May 2007) and on the Rights of the Child on the sale of children, child prostitution and child pornography of 6 September 2000 (ratified by Jordan on 4 December 2006), respectively.

The Convention on the Rights of Persons with Disabilities, adopted by the United Nations General Assembly on 13 December 2006, ratified by Jordan on 31 March 2008.

And the Convention on the Elimination of All Forms of Discrimination against Women of 3-12-1980, ratified by Jordan on 1 July 1992.

The obligation of States to guarantee human rights, such as the right to life or the prohibition of torture and inhuman and degrading treatment, entails the adoption of protective, preventive and punitive measures to deter the commission of such crimes, until they are eradicated. Moreover, in the struggle for the correct application of the law, the technical support of a lawyer is necessary.

The controversy between the right to defence of the accused and the scope of the right to defence of the victims has slowed down the adaptation of national regulations to the rights of victims until recent years, but quoting **Mario Spangenberg,** Dean of the Faculty of Law and Human Sciences at the Catholic University of Uruguay, *"Criminal law must not only ensure the guarantees of the accused. It must also be able to protect the victims and ensure peaceful coexistence. That, and no other, is the solution of a modern constitutional democracy".*

Finally, in relation to the situation in Spain, it should be noted that based on Articles 24 and 119 of the Spanish Constitution and Law 1/1996, of 10 January, on Free Legal Aid, the following vulnerable groups may access the benefit of legal aid:

- **art. 2e.** Contentious-administrative proceedings and prior administrative proceedings: foreign citizens with insufficient resources to litigate in proceedings that may lead to their refusal of entry into Spain, their deportation or expulsion from Spanish territory, and in all asylum proceedings.

- **art. 2h.** Irrespective of resources for litigation:

  1. Victims of VIGE (gender-based violence), terrorism and trafficking in human beings
  2. Minors and persons with disabilities, victims of crimes of homicide, injury (149, 150 CP), habitual abuse (173.2 CP), crimes against liberty, crimes against sexual freedom and indemnity, crimes of trafficking in human beings.
  3. The same counsel is retained in the different proceedings that may be initiated as a result of the victim's status, provided that this guarantees the victim's right of defence.
  4. Those who, as a result of an accident, have lasting repercussions that totally prevent them from carrying out the tasks of their usual occupation or profession and require the assistance of other persons to carry out the most essential activities of daily life, when the object of the litigation is the claim for compensation for personal injury, pain and suffering.

- **art. 5.** Exceptional recognition of the right:

  taking into account the applicant's health circumstances and the persons with disabilities indicated in paragraph 2 of Article 1 of Law 51/2003, of 2 December, on equal opportunities, non-discrimination and universal accessibility of persons with disabilities *("persons with disabilities are those who have long-term physical, mental, intellectual or sensory impairments which, in interaction with various barriers, may prevent their full and effective participation in society, on equal terms with others", and in any case "those who have been recognised as having a degree of disability equal to or greater than 33 percent")*, as well as their dependents when acting in a proceeding on their

behalf and in their interest, provided that the proceedings are related to the circumstances of health or disability that give rise to this exceptional recognition.

II. PEOPLE WITH DISABILITIES

According to data published by the World Health Organisation, an estimated 1.3 billion people (i.e. 1 in 6 people worldwide) suffer from a major disability, and the ageing of the population and the increase in chronic diseases is seen as a multiplier effect of this data.

This is a group that throughout history has been hidden, rejected, persecuted, mistreated and even exterminated by society, with the acquiescence and complicity of governments. It was not until the beginning of the 20th century, after the large number of young people who returned from the First World War with serious physical and psychological consequences, that some movements for the protection of people with congenital or acquired disabilities emerged strongly.

The Universal Declaration of Human Rights of 10 December 1948 established the full recognition of the equality of all persons before the law and to be protected by it against discrimination. It seems that this should have been sufficient to guarantee the enjoyment and social inclusion in all aspects of life of persons with disabilities; however, socially ingrained customs and lack of awareness, knowledge and, ultimately, concern about the reality and needs of persons with disabilities continued to be their real obstacle to developing and achieving a full life. It could be argued that it is government policies and society itself that disable people with disabilities.

– **Art 6. DUDH:** *Every human being has the right to recognition everywhere as a person before the law.*

  In this scenario, several International Human Rights Covenants and Declarations on the Rights of Persons with Specific Disabilities began to give content to the principles established by the Universal Declaration of Human Rights. And in 1982, the UN approved the World Programme of Action concerning Disabled Persons, recognising that physical and so-

cial barriers place these men and women in a clearly disadvantaged situation, and introducing the objectives of equality and full participation in society.

All this generated certain signs of social awareness, but the prism through which the protection or legal guarantee of fundamental rights and principles was offered to the collective was tinged with a paternalism that once again moved away from the spirit of full equality recognised in the Universal Declaration of Human Rights.

It was the Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations General Assembly on 13 December 2006, which marked a turning point in the approach to this group, highlighting the following two issues in particular.

In an absolutely innovative way, Art. 12 has a special impact on substantive law by fully considering persons with disabilities as *"subjects with rights"* and not as *"mere objects of treatment and social consideration";* it recognises their legal personality with full capacity to exercise all their rights, and provides for the adoption of the support measures that may be necessary for this purpose, with absolute respect for their inherent dignity.

The articles also promote the obligation of Member States to promote, protect and ensure the full enjoyment of the human rights of persons with disabilities on full and equal terms.

It is not necessary to go deeper into the **Convention** to see clearly that disability is a human rights issue: *"Art. 1. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity".*

Jordan ratified the Convention on 31 March 2008, making it a full part of its legal system, so its content, which must inspire and reinterpret any normative provision, is key to an understanding of the rights of persons with disabilities.

Focusing on the right to access to justice, enshrined in Article 13, the States Parties or Treaty States must ensure that persons with disabilities have access to justice on an equal basis with others.

By now it has been internationally recognised that the origin of the inequality of people with disabilities is none other than the barriers imposed by the system and society itself. Architectural barriers are not the only thing I am referring

to. We have made normal what is useful or sufficient for the full movement of people who do not have special needs. But if we go back to the statistics, if 1 in 6 people in the world have a disability, what is normality? Surely this concept deserves an inclusive review. Although the easiest example is the need to establish accessible architectural elements to access the courts, the courtrooms, what about blind people, or deaf or deaf-mute people, or people with intellectual disabilities? How are we going to ensure that their passage through a judicial procedure is EQUAL to that of the rest of the people?

The Convention shows us the way in **Article 13** with the introduction of procedural adjustments:

"1. States Parties shall ensure that persons with disabilities have access to justice on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, to facilitate the effective role of persons with disabilities as direct and indirect participants, including as witnesses, in all legal proceedings, including at the investigative and other preliminary stages.

2. In order to ensure that persons with disabilities have effective access to justice, States Parties shall promote appropriate training for those involved in the administration of justice, and that includes law enforcement and prison personnel".

Individualised procedural adjustments, appropriate to the age and specific needs of persons with disabilities participating in legal proceedings, whatever their role, in all jurisdictional channels —civil, criminal, contentious-administrative, labour... — and at any instance, including the police phase. The aim is to ensure that their intervention in the proceedings is effective, not only for the judicial system but also for the individual. The intervention of people with disabilities in a procedure would be biased if they could not communicate —understand and be understood— or know the purpose of the procedure and the importance of each of the proceedings in which they intervene or know the scope and meaning of the sentence and its execution and its phases.

We must not overlook the great importance of guaranteeing the right of access to justice for victims and witnesses with disabilities, who are included in the aforementioned precept in an absolute manner. The loss of rights of any party to the proceedings because of their disability is unacceptable and constitutes a failure of the judicial system. It is essential

to overcome the stereotypes, stigmas and prejudices that are entrenched in society, which are nothing more than other discriminatory barriers that prevent them from enjoying a full life to the fullest extent, including the administration of justice.

This paradigm shift requires specialised training for all legal operators, from judges and magistrates, prosecutors, lawyers, forensic doctors, administrative staff, police and prison staff. The States Parties that have formally committed themselves to adopting the necessary measures to do so, must make them effective. We must train ourselves in disability.

In Spain there has been an important legislative reform through Law 8/2021 of 2 June, which reforms civil and procedural legislation to support people with disabilities in the exercise of their legal capacity.

This law integrates the mandates of the CRPD into domestic law, and fully adopts Article 12, guaranteeing the legal capacity of persons with disabilities. It develops the mechanisms for the provision of the necessary support for decision-making in the exercise of the principle of autonomy and free choice, reserving the cases of representation only for when necessary, all in accordance with the principle of proportionality and minimum intervention by the judicial authority. Thus, the previous welfare model of protection is replaced by a new social model, based on empowerment and respect for the will of persons with disabilities on an equal footing with others.

From the point of view of material law, it is a substantial and at the same time transversal reform, since it not only modifies our Civil Code, but also the Law on Notaries, the Mortgage Law, the Law on the Protection of the Assets of Persons with Disabilities, the Law on the Civil Registry and the Law on Voluntary Jurisdiction.

As far as procedural law is concerned, it introduces Article 7 a) to the Civil Procedure Act, concerning procedural adjustments for persons with disabilities. Under the umbrella of the right of all persons with disabilities to understand and be understood in any action to be carried out, it establishes the obligation to make the necessary adaptations and adjustments to guarantee their participation under equal conditions, in all phases and procedural actions that may be necessary, including acts of communication. Its purpose is to ensure communication, understanding and interaction with the environment of persons with disabilities.

In terms of Communication, it requires the use of clear, simple and accessible language in all communications, whether oral or written, taking into account the personal characteristics and needs of the person concerned, using means such as "easy reading" (using simple and direct language, expressing a single idea per sentence, avoiding technical terms, abbreviations and initials, structuring the text in a clear and coherent manner...). This system does not exclude any other system that may be more appropriate to the specific needs of the person, such as pictograms. In addition, where appropriate, the possibility of communication through the person who provides disability support is envisaged.

In order to enable the person with a disability to make himself/herself understood, provision is made for the necessary assistance or support, including interpretation in legally recognised sign languages and means of oral communication support for deaf, hard of hearing and deafblind persons.

It also allows for the participation of an expert professional who, as a facilitator, carries out the adaptation and adjustment tasks necessary for the person with a disability to understand and be understood.

Finally, it offers the possibility for the person with a disability to be accompanied by a person of their choice from the first contact with authorities and officials.

The establishment of procedural adjustments represents a qualitative and exponential leap in the right of defence of persons with disabilities.

Beyond the right of all persons under investigation (which, of course, includes people with disabilities) to appoint a public defender for their defence —with some exceptions for minor offences— in the event that they do not have a lawyer of their trust or lack the financial means to hire one, the Spanish legal system confers the absolute right to free legal aid to persons with disabilities who have been victims of homicide, injury (149, 150 CP), habitual abuse (173. 2 CP), crimes against liberty, crimes against sexual freedom and indemnity, crimes of human trafficking. And also to litigate in proceedings related to the circumstances of health or disability of the person concerned.

Notwithstanding the above, and in relation to the latter procedures, we must clarify that, in the field of Voluntary Jurisdiction, the intervention of a lawyer is not mandatory in the initial (non-contentious) proceedings for requesting

support measures for persons with disabilities, which is why, barring exceptions expressly endorsed by the judge, it is not possible to make an ex officio appointment.

In view of this, the General Council of Spanish Lawyers, together with the main entities of the third sector, calls on the legislator to consider the lack of legal advice and assistance as the first barrier to the right of access to justice for people with disabilities, demanding that their intervention be mandatory and, therefore, the possibility of defence for people without financial resources.

We must not forget that the group of people with disabilities, due to the problems of access to professional or higher education and to the labour market, to low pay or to the small amount of public allowance they may be entitled to, and to the costs they incur for certain necessary treatments or therapies, is a sector in a situation of extreme financial vulnerability for which it is mostly impossible to hire private lawyers.

Finally, in compliance with the second additional provision of the aforementioned Law 8/2022, of 3 June, on Training in support measures for people with disabilities in the exercise of their legal capacity, we can indicate that the General Council of the Spanish Bar has been providing specialisation courses in Disability Law for lawyers throughout Spain since 2020.

ACCESS TO JUSTICE FOR MIGRANTS, FOREIGN NATIONALS AND DISPLACED PERSONS

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Summary

I. THE RIGHT OF DEFENCE IS KEY TO THE RULE OF LAW

In Spain, Article 1 of the Constitution enshrines a social and democratic state based on the rule of law. The rule of law must be based on essential pillars, one of the main ones being the right to defence, which must be exercised freely and independently, and must be fully guaranteed in the legal system. Article 24 of the Spanish Constitution enshrines the right to defence as a fundamental right, in line with international texts declaring and protecting human rights.

In order for all citizens to have access to the right to defence, it must be guaranteed that those who lack financial means, or for any other reason have not appointed a private lawyer in certain areas, such as criminal jurisdiction, will be assigned a public defence lawyer paid for by the state, with the corresponding compensation. The Spanish Constitution establishes in **Article 119** that *"justice shall be free of charge when so provided by law and, in any case, for those who can prove insufficient resources to litigate".*

Other pillars of the rule of law are the right to effective judicial protection with all the guarantees that entails, including the right to an ordinary judge predetermined by law and the right to due process, subject to the principles of contradiction, transparency and parity of arms between the Prosecutor and the Lawyer.

Equally essential and indispensable is the fundamental right to the presumption of innocence, which can only be overridden by a conviction following a trial with full respect for due process, and where criminal responsibility has been established by the production of lawfully obtained evidence against the accused.

Judges must be independent, and in carrying out their work they must be strictly professional and not subject to influence or manipulation.

Another fundamental right that is also a hallmark of the rule of law is the full adherence of all citizens to the law.

II. THE ESSENTIAL ROLE OF THE LEGAL PROFESSION IN THE DEFENCE OF MIGRANTS' RIGHTS

In Spain, in order to practise as a lawyer, in addition to passing a university degree in law, it is necessary to take a Master's degree leading to the profession of lawyer, in which specific training and practical work experience is provided, and finally, to pass a state examination that qualifies you to practise as a lawyer. Once qualified, it is compulsory to be registered with a Bar Association in order to practise law. In Spain there are 83 Bar Associations, which in turn make up the main body of the Spanish legal profession, the General Council of Spanish Lawyers (Consejo General de la Abogacía Española, CGAE).

The Spanish legal profession, through the CGAE and the Bar Associations[1], y, and fundamentally with the work that thousands of lawyers carry out on a daily basis, has been working intensively for years in the defence of migrants, guaranteeing their legal support and protecting their rights. To this end, through pro bono services specialising in migration and international protection matters, it is guaranteed that no person entering Spanish territory is left without legal services.

Guidelines have been issued by the Council and proposals have been drawn up by the CGAE's Subcommittee on Immigration and International Protection for the organisation of these duty shifts and that, for example, the right to defence is guaranteed by limiting the number of persons to be attended by the lawyers on duty, so that they can provide the best support and do so with dedication. Numerous courses and conferences have been organised to ensure the continuous training of lawyers. Forums for debate and learning have been held, where experiences are shared to improve the quality of the legal services provided. One such is the National Conference on Immigration and International Protection, which is organised annually by the CGAE. Legal Aid protocols have been approved and published for the different situations that arise as a result of migratory movements, which are more intense in our country due to its geographical location.

1. In some of Spain's Autonomous Communities there are also Autonomous Bar Association Councils.

It is the goal of the CGAE to work to provide mechanisms that help, facilitate and support the fundamental right of the defence of migrants, and that this is developed in the best possible way and, indeed, that it aims for excellence. That horizon should motivate and guide us, and that legal support should be of quality.

We work in the field of migration law, protecting the rights of migrants and intervening in the defence of people who are subject to deportation or expulsion orders.

We know the essential role that the right of defence plays in the rule of law; one of its essential pillars. We know that we lawyers are entrusted with this function. Besides, we know that in this area we are dealing with particularly vulnerable people and that the first hand that migrants will reach for in order to receive refuge and judicial protection is that of lawyers. For this reason, the Spanish Bar Associations must accurately organise international protection, assistance and Legal Aid services for foreign nationals, whilst foreseeing the different contingencies or circumstances that may arise e.g., mass entries by land or sea etc., so that an immediate response is given and all persons are guaranteed the right to defence.

III. THE WORK OF THE SPANISH LEGAL PROFESSION IN THE FIELD OF INTERNATIONAL PROTECTION

In addition to working in the area of foreign affairs, assistance in the area of international protection (asylum and subsidiary protection) is also of particular importance, as it has its own identity and requires specific training. Moreover, the development of international protection has become indispensable in recent years due to massive displacements of people as a result of conflicts in many parts of the world or all kinds of persecution.

It is clearly evident that we are living through historic times with the mass exodus of thousands and thousands of people fleeing violence, massacres, misery and persecution. UNHCR's annual report[2], shows that a record 89.3 million people were displaced by the end of 2021. This is the highest figure ever recorded by UNHCR.

For this reason, the CGAE's Subcommittee on Immigration and International Protection carries out continuous work not only in the narrow field of migration but also in the field of international protection, as is done in the different Bar Associations through their specialised legal aid offices.

To cite one example, the Melilla Bar Association worked with the Ministry of Interior (Home Office) to set up Asylum Offices at the Beni Enzar border, Spain's main crossing point with Morocco from Melilla[3]. They started operating in November 2014.

The Melilla Bar Association also played an important role in the creation of the premises - it supported their creation from the outset - and participated in meetings with the local authorities for this purpose. To this end, the specialised Legal Aid office was reorganised in order to facilitate legal support for those seeking international protection. The Bar Association has continued to set the guidelines for the organisation of shifts, in order to adapt them to the needs that have arisen, such as the creation of this Asylum Office at the Beni Enzar border.

The number of asylum applications that have been processed is described below, corresponding to the Asylum Office, those listed in the section "At the border":

2. UN refugee agency

3. Melilla has been a Spanish city since 1497, located in North Africa and bordering Morocco.

Border asylums

	2014		2015		2016		2017	
	AT THE BORDER	ON SPANISH TERRITORY	AT THE BORDER	ON SPANISH TERRITORY	AT THE BORDER	ON SPANISH TERRITORY	AT THE BORDER	ON SPANISH TERRITORY
JANUARY		0	406	4	194	37	149	18
FEBRUARY		2	296	7	76	45	132	28
MARCH		0	575	11	98	12	175	34
APRIL		0	805	12	148	24	125	20
MAY		0	516	23	164	17		
JUNE		3	603	11	83	22		
JULY		3	410	15	162	11		
AUGUST		9	457	7	311	2		
SEPTEMBER	4	23	582	29	256	21		
OCTOBER	28	30	561	78	279	19		
NOVEMBER	134	7	591	65	237	27		
DECEMBER	238	30	245	65	191	11		
TOTAL	**404**	**107**	**6.047**	**327**	**2.199**	**248**	**581**	**100**

As can be seen, more than nine thousand asylum applications were processed with the assistance of lawyers in just over two years at the new Asylum Office, the vast majority of whom were people coming from the conflict in Syria.

By 2 April 2014, the Bar Association had submitted a report to the CGAE to be forwarded to the Justice Ministry requesting authorisation to increase the number of lawyers on duty daily to a total of five, which was authorised[4].

Since September 2014, when foreign citizens, mainly Syrians, began to come to our border seeking asylum, the Melilla Bar Association has had five lawyers on duty every day, with 24-hour availability, as well as five substitutes. There is also a register made up of more than one hundred lawyers for cases in which their assistance is necessary because we are faced with a massive influx of foreign nationals. It should be borne in mind that each lawyer can only provide legal assistance to six migrants per day in order for them to be able to devote attention to each case.

In addition, there are permanently two coordinating lawyers who are members of the Governing Board. They coordinate the provision of these services, support the lawyers in their daily routine, maintain direct contact with the institutions with responsibility in this area (Courts, Public Prosecutor's Office and State Security Forces), and deal on a daily basis with any incidents that may arise in order to resolve them.

This legal service is devoted, as stated above, to providing assistance in all international protection cases (asylum and subsidiary protection). In these proceedings, the attendance of a lawyer is mandatory under the provisions of Article 16 of the Asylum Law[5].

The CGAE signed a cooperation agreement with UNHCR, through which international protection support teams, consisting of a lawyer and an assistant who provide legal guidance and support to asylum seekers, are also set up in Bar Associations.

4. On 20 March 2014, the Governing Board of the Bar Association agreed to request that the CGAE and the Ministry of Justice increase the number of lawyers on daily duty for legal assistance in migration matters to five.

5. Law 12/2009, of 30 October 2009, regulating the right to asylum and subsidiary protection, published in BOE 263/2009 of 31 October 2009. Article 16. 2. In order to exercise this right, applicants for international protection shall have the right to health care and free legal assistance, which shall extend to the formalisation of the application and to the entire processing of the proceedings, and which shall be provided under the terms provided for in Spanish legislation on this matter, as well as the right to an interpreter under the terms of art. 22 of Organic Law 4/2000. The legal assistance referred to in the previous paragraph shall be mandatory when the applications are formalised in accordance with the procedure indicated in art. 21 of this Law.

Spanish lawyers have supported and continue to support people who arrive in our country in mass displacements as a result of persecution or conflict in their home countries. Thus, for example, many Venezuelan citizens have relocated to Spain because they are victims of political persecution, or because they are suffering from the political and financial crises that the country has undergone in recent years. In February 2019, the Spanish authorities publicly announced the launch of a programme to grant residence on humanitarian grounds for the purpose of affording international protection to Venezuelan nationals who had applied for asylum in Spain after 1 January 2014 and had not been granted it. These people have received legal support from the Spanish legal profession.

Another recent case occurred after the invasion of Ukraine by Russia and the aggression against that country, in which the Spanish Bar reacted by showing its full solidarity with the victims and its legal support for the displaced persons from Ukraine.

In this case, the European Union (EU) activated the Temporary Protection Directive 2001/55/EC[6], which establishes minimum standards for the granting of temporary protection in the event of a mass influx of displaced persons from third countries who cannot return to their country of origin, and to encourage an equal effort among EU Member States to receive such persons and to shoulder the consequences of receiving them. This Directive obliges countries to set up an extraordinary system for the recognition of work and residence permits.

In Spain, regulations[7] have been enacted to grant this temporary protection to refugees from Ukraine and to provide them with residence and work permits.

6. It was incorporated into Spanish law through the Regulation on the temporary protection regime in the event of a mass influx of displaced persons, approved by Royal Decree 1325/2003 of 24 October 2003.

7. Order PCM/169/2022 of 9 March, developing the procedure for the recognition of temporary protec-tion for persons affected by the conflict in Ukraine.

Order PCM/170/2022 of 9 March, publishing the Agreement of the Council of Ministers of 8 March 2022, extending the temporary protection granted under Council Implementing Decision (EU) 2022/382 of 4 March 2022 to persons affected by the conflict in Ukraine who may find refuge in Spain.

IV. LEGAL SERVICES OF LAWYERS IN THE AREA OF MIGRATION LAW

In addition to the work carried out in the area of international protection, Spanish lawyers work to provide legal advice and protect the rights of migrants. We are referring to the field of migration law, which regulates the rights of people who enter our country and are neither asylum seekers nor eligible for international protection. We are dealing with those who move in search of a better world that offers them a chance in life, and many others who are simply looking for a way to survive.

Regardless of all the work carried out by the legal profession in the processes of obtaining residence permits for these people, work authorisations, or family reunifications, among others, it is also responsible for providing legal assistance to foreigners in situations of refusal of entry, deportation, expulsion from the country, as well as in sanctioning procedures.

From the moment a foreigner enters Spanish territory in an irregular manner, they have the right to a lawyer who will assist them in the deportation or expulsion proceedings that may be directed against them by the Authorities.

This advice is provided by the Legal Aid office specialising in migration matters, which is organised by the Bar Associations in the same way as described above. Lawyers are on duty 24 hours a day.

As these are specialised public defender's offices, lawyers must take specific courses on migration law, infringements and penalties in order to join them.

In the Bar Associations, training is continuous, with seminars, workshops and conferences, often in cooperation with the UNHCR for training on asylum law (international protection).

Work has been carried out on the protocols of action for the right to defence of migrants, and these have been made available to the entire legal profession. To this end, these protocols were approved by the CGAE and sent to the Bar Associations, coordinated by the Subcommittee on Foreign Nationals and International Protection. They have been devised with the aim of facilitating and speeding up legal assistance in the different jurisdictions in which the professional practice is deployed, specifically in administrative and criminal matters, foreigners in prison and unaccompanied minors.

In recent years, the CGAE has also focused part of its work on the development of digital platforms that ease the work of lawyers and serve to provide a better service to citizens.

V. THE RIGHT OF MIGRANTS TO FREE LEGAL AID AND LEGAL SUPPORT FROM LAWYERS

In Spain, all migrants have right of access to the courts, i.e. the right to effective judicial protection. They also have the right to lodge appeals against administrative measures that affect them, such as in the case of administrative decisions to return or expel them. To this end, they are also entitled to free Legal Aid under the provisions of Articles 2(e) of the Free Legal Aid Act[8] and 22 of the LOEx[9].

8. Article 2. Law 1/1996, of 10 January, on free legal aid: Under the terms and with the scope provided for in this law and in the international treaties and conventions on the subject to which Spain is a party, the following shall have the right to free legal aid:

e) In contentious-administrative proceedings, as well as in prior administrative proceedings, foreign nationals who can prove insufficient resources to litigate will have the right to legal assistance and free defence and representation in proceedings that may lead to the denial of their entry into Spain, their return or expulsion from Spanish territory, and in all asylum proceedings.

9. Article 22 Organic Law 4/2000 of 11 January 2000 on the rights and freedoms of foreigners in Spain and their social integration.
1) Foreigners in Spain have the right to free legal aid in proceedings to which they are parties, regardless of the jurisdiction in which they are subject, under the same conditions as Spanish citizens.
2) Foreigners who are in Spain have the right to legal assistance in administrative procedures that may lead to their refusal of entry, return or expulsion from Spanish territory and in all procedures relating to international protection, as well as to the assistance of an interpreter if they do not understand or speak the official language being used. This assistance will be free of charge when they lack sufficient economic resources according to the criteria established in the regulations governing the right to free legal assistance.
3) In contentious-administrative proceedings against decisions that put an end to administrative proceedings in matters of refusal of entry, return or expulsion, the recognition of the right to free legal aid will require the appropriate application made under the terms set out in the rules governing free legal aid. The express statement of the wish to file the appeal or exercise the corresponding action must be made in accordance with the provisions of Law 1/2000, of 7 January, on Civil Procedure, or in the event that the foreigner may be deprived of liberty, in the manner and before the public official that is determined by regulations.

For the purposes provided for in this section, when the foreigner is entitled to free legal aid and is outside Spain, the application for legal aid and, where appropriate, the expression of the wish to appeal, may be made to the corresponding diplomatic mission or consular office.

Article 39.4 of the Spanish Constitution declares: "Children shall enjoy the protection provided for in international agreements that safeguard their rights".

Article 2 of Organic Law 1/1996 of 15 January 1996 on the Legal Protection of Minors, which provides that "every minor has the right to have his or her best interests assessed and considered as paramount in all actions and decisions concerning him or her, both in the public and private spheres".

As outlined above, this assistance is provided through the Legal Aid offices organised by the Bar Associations.

As well as these rights, many others are recognised in the Spanish legal system, including, for example, the right to freedom of movement, the right to education, the right to work and the right to health care.

Our legal system guarantees that all migrants arriving in our country can receive legal assistance. This assistance requires a personalised and private preliminary interview between the lawyer and the person receiving legal counsel, and with the use of an effective translation service.

Every person who enters Spanish territory is entitled, as we have explained, to the right to defence recognised in the Constitution and developed in domestic legislation. This is also recognised in international treaties and regulations. The Bar Association Legal Aid Services specialising in migration and international protection play a fundamental role in fulfilling this right and are essential for the early detection of individualised needs for special protection of persons in a situation of heightened vulnerability: refugees, victims of trafficking and unaccompanied minors.

In the effective practice of the right to defence, lawyers must try to identify persons in need of international protection, persons subject to persecution in their countries of origin for political or gender reasons, among others. They should also try to ascertain if they are victims of human trafficking and, of course, if they are dealing with migrant minors[10] as they are treated differently in law as highly vulnerable persons in need of special protection.

The effective exercise of the migrant's right to defence also requires that there be infrastructures and public facilities that allow lawyers to conduct the mandatory personalised and private preliminary interviews, and that translation services be provided to enable communication with the migrant in his or her language of origin.

Legal support from lawyers is essential if the rights of all migrants are to be protected.

10. La Constitución Española en su artículo 39.4 declara: *"Los niños gozarán de la protección prevista en los acuerdos internacionales que velan por sus derechos".*

Article 2 of Organic Law 1/1996 of 15 January 1996 on the Legal Protection of Minors, which provides that *"every minor has the right to have his or her best interests assessed and considered as paramount in all actions and decisions concerning him or her, both in the public and private spheres".*

VI. THE QUALITY AND SUPPORT SERVICE OF THE CGAE'S SUBCOMMITTEE ON FOREIGN NATIONALS AND INTERNATIONAL PROTECTION

A "Quality and Support Service" has been created within the CGAE Subcommittee, the purpose of which is to monitor the quality of the Bar Associations' migration and international protection services in those cities where there are large numbers of immigrant arrivals. This standardises the quality criteria to be taken into account in legal services in the area of migration and detects deficiencies in the assistance provided to immigrants in free Legal Aid (court appointed legal aid).

This service visits the Bar Association to examine the organisation of the legal aid offices for foreigners. It meets with those responsible for this area, with the coordinators of the migration shift and with other legal professionals. In this way, the situation is monitored with the aim of channelling from the General Council of Lawyers the necessary support systems for the provision of legal assistance with full guarantees.

VII. CONCLUSION

The lawyers who work in this area of migration and international protection are characterised by their dedication and daily commitment to the defence of the people most in need of protection, and by their constant commitment to the defence of human rights.

Migration will not cease as long as there is great economic inequality in the world. When a country is devastated by war, as has been the case for example in Syria and recently in Ukraine, its population will need international protection.

In the face of migration flows, displacement will be constant, and all those affected will need support and solidarity.

The legal profession, through the Legal Aid service specialising in migration and international protection matters organised by the Bar Associations with the support of the CGAE, expresses its support for and solidarity with the constant and professional work it carries out in providing legal assistance to migrants.

In the important social function entrusted to the legal profession of supporting and aiding disadvantaged and financially deprived persons, thus safeguarding the right of defence for all persons, the area of foreigners and international protection receives special attention and dedication. The Bar Associations, as public law corporations, have the competency and obligation to organise the Legal Aid service specialising in these matters. This organisation must be aimed at ensuring that the services are provided with the utmost diligence, and that they are attended to as quickly as possible. Also, that the people who provide these services are fully qualified and trained to do so, and that this training is on-going.

ACCESS TO JUSTICE AND THE RIGHT TO DEFENCE

FREE LEGAL AID MODEL IN SPAIN AND QUALITY CONTROL OF THE SERVICE

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Summary

I. ACCESS TO JUSTICE, THE RIGHT TO A DEFENCE AND LEGAL AID

The main purpose of this paper is to highlight the importance of an adequate system of free legal aid in order to guarantee effective access to justice and the right to a defence, as fundamental rights of every person. Also, on this basis, to analyse the main characteristics of this system in the Spanish legal framework, considered to be at the forefront in the international arena.

To this end, we must start from the fact that, although the **rights of access to justice and defence are closely related to the right to legal aid, with which they are clearly connected, they cannot be confused,** in the sense that:

1. When we speak of **Access to Justice and the Right to Defence**, we are referring to the rights of all persons, **whether or not they have financial resources,** which have **different universally accepted manifestations,** such as: the right to have effective access to the Courts of Justice; to freely present their claims and exercise their right to defence, also in an effective manner; to have procedures, mechanisms and procedural instruments and assistance that make this possible; the principle of legality and application of the most favourable law; to have a decision issued by an impartial judge that is congruent and founded in law; that this decision is complied with in its terms...
2. When we talk about **Free Legal Aid (hereinafter, FLA),** we are specifying that **access to justice and the right of people who lack financial resources,** as an instrument that makes it possible for them to be effective: that they have real access to justice; that they are guaranteed the right to a defence; that they can do so on equal terms with those who have resources; or against the State, etc. This is what some authors have called *"the right to the law",* in such a way that without FLA, those who lack resources cannot exercise these rights. In short, avoiding Ovidio's famous and classic aphorism *"curia pauperibus clausa est"* (the courts are forbidden to the poor), is a way of avoiding a situation in which those who do not have resources cannot exercise those rights.

In short: different but closely related concepts. An FLA system that makes access to justice and the right to defence compatible with the lack of resources.

II. PRINCIPLES ON ACCESS TO JUSTICE AND THE RIGHT TO DEFENCE

There are a number of principles and manifestations of the right of access to courts and the right to defence, which are internationally consolidated, among others, in the following frameworks:

Universal Declaration of Human Rights

In particular, and among others, its **articles 7 to 11** make clear references in this regard: it establishes the equality of all persons before the law (art. 7); the access to an effective remedy before the courts (art. 8); the prohibition of arbitrary arrest or detention (art. 9); the right to be heard by an independent and impartial tribunal in the exercise of one's rights or before a criminal charge (art. 10); or the presumption of innocence, the principle of legality and the application of the law most favourable to the accused (art. 11).

Arab Human Rights Charter

This has been in force since 16/03/2018 and ratified among other countries (16), by Jordan. It recognises **individual rights,** such as the right to life (arts. 5, 6, 7); freedom from torture, inhuman or degrading treatment (arts. 8, 9, 18, 20), and slavery (art. 10); the right to security of person (arts. 14 and 18), etc.

In terms of norms on Justice, it is worth highlighting **Articles 11 to 20,** which establish, in similar terms to the aforementioned Universal Declaration of Human Rights: equality before the law and the courts, their independence and the right to remedies (Arts. 11 and 12); in relation to effective equality of all rights (Arts. 3.2 and 3.3); the right to due process and a fair trial (Art. 13); the principle of legality and the application of the most favourable law (Art. 15); the presumption of innocence (Art. 16), with reference, among others, to the following rights: 1) to be informed of the accusation; 2) to have time to prepare the defence and

to contact relatives; 3) to have a judge and **to have legal assistance; 4) to the FLA if one does not have the means to pay for the defence** and to have an interpreter; 5) to have witnesses; 6) not to testify against oneself, etc.

It also enshrines the right to liberty and not to be deprived of liberty without a fair trial, to be informed of the reason for detention in one's own language, to a doctor, to a judge, etc. (art. 14); to a special regime for minors (art. 17, in relation to the special protection of children (arts. 3 and 34); to avoid imprisonment for debt (art. 18); to not be tried twice for the same offence and to be compensated in case of acquittal (art. 19); to dignified sentences of deprivation of liberty (art. 20).

European Sphere

The **European Charter of Fundamental Rights** establishes, inter alia, the right to an effective remedy and to a fair trial (art. 47); the presumption of innocence and the rights of the defence (art. 48); the principles of legality and proportionality of criminal offences and penalties (art. 49); and the right not to be tried or punished twice for the same criminal offence (art. 50).

The **European Convention on Human Rights** underlines, in Art. 6, the right to a fair trial and, in particular, in paragraph 3: a) the right to be informed of the accusation in a language which he/she understands; b) to have time to prepare a defence; c) *"to defend himself/herself in person or through legal assistance of his/her own choosing and, if he/she has not sufficient means to pay for it, to be assisted free of charge by a Legal Aid Lawyer, when the interests of justice so require;"* d) to be assisted by witnesses; e) to be assisted by an interpreter.

Spanish Legal Order

The Spanish Constitution

Stablishes, in its "innermost core", as fundamental rights (subject to appeal to the Constitutional Court): equality of citizens before the law (art. 14); legal assistance to the detainee in police and judicial premises **(art. 17. 3),** with such legal assistance being obligatory, in such a way that the detainee can freely designate a lawyer and, if he/she does not do so, he/she will be appointed one from the public defender's office, which he/she will follow, in principle, throughout the criminal proceedings (see **art. 520 and concordant LECrim.** on detainee's rights); as well as the right to effective judicial protection and to avoid defencelessness; the right to defence and to a trial with all guarantees **(arts. 24.1 and 24.2).**

All of these are directly linked to the **right to legal aid for those who lack sufficient resources to litigate,** which is expressly enshrined in **art. 119.**

Law on Free Legal Aid (Law 1/96 of 10 January of FLA)

It is within this framework of the development of access to justice and the right to defence that the FLA Law is situated. The law dates back to 1996 and with more than 26 years in force, it has only undergone a few specific reforms. It establishes a model that still remains fully in force, without prejudice to the need to adapt some issues or to overcome some shortcomings detected during these years of application.

In any case, it is a **law common to the entire state and applicable in all jurisdictional areas; not only criminal, but also civil, labour and administrative.** It should be noted that prior to Law 1/96, each procedural law had its own regulation on FLA.

The current Spanish FLA system is based on the following general lines in terms of the procedure for recognition and provision of the service, among other relevant aspects which are highlighted below:

III. FLA RECOGNITION PROCEDURE

Before Law 1/96, the courts processed and resolved the FLA right, examining whether or not the applicant fulfilled the financial requirements for it. The system did not work well due partly to the high number of applications, the lack of human and material resources, as well as the lack of access to the economic data of the affected party, etc.

With Law 1/96 FLA, the processing and resolution is carried out **in an administrative, not judicial, sphere;** the latter being reserved **for a later phase relating to the eventual challenge or revocation of the previous administrative decision.** Thus:

Administrative Phase

Although it is the **state** which, by constitutional mandate, is ultimately responsible for guaranteeing access to justice for those who lack financial resources, it **delegates** a very important part of its management and organisation to the Bar Associations. In Spain, the legal profession has long assumed its **social function** and as such it has developed a long tradition (there are references in the 13th century – Las Partidas, 1263; 14th century - Alcalá ordinance, 1348; 15th century - Madrid ordinances 1495 etc).

There is a well-established structure of 83 Bar Associations which, in this field, have a **wide autonomy in their functioning,** according to the needs of their territory, geographical dispersion, number of lawyers, population, etc. This is based on common rules and criteria, both in the FLA Law and Regulations, as well as through the Spanish Bar Council, which brings them all together.

This administrative phase is, in turn, **divided into two distinct moments and bodies:**

1. **Legal Orientation Service (LOS):** the body that exists in each Bar Association, normally staffed by a team of lawyers (in offices either in the Bar Association itself or in the Courts) where the citizen who wishes to apply for the FLA is attended to. He/she is informed and assisted in making the application and the appropriate processing of the application is carried out. As an exception, in the criminal field and in the case of a detainee, it is the Lawyer who assists him/her who processes the application and also presents a report on his/her forecast in this respect. At this initial stage, t**he FLA is provisionally recognised or denied;** it can also be rejected if the claim is manifestly unsustainable.

   Most of these procedures are carried out by means of an **electronic file** that allows access to the applicant's financial data (income, vehicles, property, bank accounts...) recorded in the different public registers (Tax Office, Social Security, Traffic...), thus avoiding the applicant's "pilgrimage" through all of them.

2. **Provincial Commission for Legal Assistance (PCLA):** this is an administrative body made up of State officials, the Public Prosecutor's Office and the Bar Association, which makes **a final decision on the granting or denial of the right to legal aid.** The vast majority confirm the provisional decision of the LOS.

Regarding the jurisdiction of the courts, it refers to the challenge (appeal) against the decision that has granted or denied the right to the FLA (art. 20); and to the possible revocation of the right (art.19).

1. **a) Regarding the challenge to the decision,** it can be raised by *"those who have a legitimate interest"* in the outcome; the intervention of a lawyer is not obligatory; there is a period of 10 days to make allegations and the judge can agree to hold a hearing. Fines are possible if it is contested in a reckless manner or with abuse of rights and there is no appeal against this decision.

2. **b) Revocation of the right: if the court** hearing the case finds **abuse of rights, recklessness, bad faith or fraud,** it can revoke the FLA right and impose the costs of the proceedings. The PCLA can also revoke it if it finds that there is an **erroneous declaration, falsification or concealment of data** and the beneficiary loses the benefits of the FLA and must pay the lawyer or others.

Spanish Legal Aid

Spanish FLA system is one of the most comprehensive at the international level in terms of its coverage, both from an objective and subjective point of view:

Objective: in which procedures it can be granted

The FLA covers all jurisdictional areas: not only criminal, but also civil, labour and administrative. In principle, whenever the intervention of a lawyer is compulsory, which is the case in the vast majority of legal proceedings (in the Spanish legal system it is only in a few minor cases or those of low complexity that a lawyer may not be compulsory).

In this way, in the criminal field, **no one can go to prison without prior legal assistance** and their right to defence is guaranteed **throughout the entire procedure** (detention, investigation, trial, appeal...), covering all types of criminal proceedings (Juries, summary, abbreviated, fast-track trials...). It includes the appointment of a lawyer to prosecute, even if the Public Prosecutor also prosecutes. Only in minor offences (with penalties of fines or community service) is legal assistance not obligatory.

Even in these proceedings in which the intervention of a lawyer is not mandatory, it can be requested before the judge if it is considered that the parties may be defenceless or unequal. The judge usually agrees to this.

In addition, there is special protection for vulnerable groups (minors, victims of gender-based violence, trafficking and terrorism, foreigner nationals, people with disabilities, etc).

Regarding the **content of the law:** the FLA beneficiary has the right to a free lawyer, but also to expert witnesses, no court fees and no court costs, among other benefits.

Subjective: who can access the right of FLA

There are a number of groups that have the **right to FLA *"ex lege"*,** regardless of their economic situation: e.g. workers and social security beneficiaries or victims of gender-based violence, trafficking and terrorism.

In general, there is an **income scale** (based on a price index called IPREM), according to the number of members in the family unit (initially, no distinction was made between this aspect and the number of members of the family unit).

Currently: if the unit is only 1 person (2 IPREM = 15,061 EURO = approx. 11,239 JORDANIAN DINAR); 2-3 members (2.5 IPREM = 18,826 EURO = approx. 14,049 JORDANIAN DINAR); 4 or more members (3 IPREM = 22,591 EURO = approx. 16,858 JORDANIAN DINAR); 3 IPREM = 22,591 EURO = approx. 16,858 JORDANIAN DINAR).

In the case of exceptional circumstances (special family responsibilities, disability, etc.), this can be increased to 5 IPREM = 37,653 EURO = approx. 28,099 JORDANIAN DINAR.

There have been proposals for partial recognition by income brackets so that the applicant would have to make some financial contribution according to their income, even if they did not reach these limits, but these have not been successful. There is no limit on the number of applications per person (there was also a proposal to this effect that was not approved).

General statistics: merely by way of illustration, to appreciate the dimension that Legal Aid has reached in Spain (population approx. 47.4 million inhabitants), in 2021 - a year in which 2019 levels were equalled, after 2020 and the most serious incidence of COVID - almost 1 million applications were processed (988,072) which gave rise to almost 2 million cases (1,923,183, compared to 1,996,669 in 2019). Almost one third of them concern legal assistance to the detainee (657,166).

The total cost of legal aid in 2021 was EURO 284.3 million (about JD 212 million); of which more than 60% went to the criminal field.

IV. PROVISION OF THE LEGAL AID SERVICE

If we have said that the **state** has the ultimate responsibility to guarantee access to justice to those who do not have financial resources and that a large part of the management is delegated to the Bar Associations, the service is provided by **Free and Independent Lawyers.**

These are Lawyers who have their own private office and their own clients and who, in addition, **are registered in the Public Defence Service;** hence we call them **"Legal Aid Lawyers".** They are not, therefore, a different category of Lawyer:

- They are not *"public defenders"*, or civil servants of the State. Given the aforementioned scope of legal aid in Spain, its implementation in each and every territorial demarcation, in all jurisdictional areas, every day of the year *("24 hours a day/365 days a year")* would be very costly, etc.
- It is not provided by NGOs: very different from each other, without a common structure. Apart from the fact that they may have their own legal services in relation to the specific field in which they operate, they do not provide legal services.
- Nor can it be considered a *"pro bono"* system, as there is remuneration, even if it is much lower than the usual remuneration of a private Lawyer.

Service provision: compulsory or voluntary?

In principle, the wording of the Law establishes its compulsory nature (arts. 1, 22, 23), although the Law, in turn, provides for the possibility **for the Local Bar to waive this obligation,** provided that the provision and continuity of the service is guaranteed.

This is why, **in practice, it is voluntary** since, given the high number of practising lawyers in Spain, there are more than enough registered with the Public Defence Service to provide the service correctly (if in some cases, in some small demarcation, in holiday

months or other similar situations, there were not enough lawyers, the Bar Associations could take measures to guarantee the provision of the service...).

In this regard, it should be noted that almost **1/3 of the lawyers are also public defenders: in 2021,** 43,696 out of 144,692, which represents 30.2%; of which 52% would be men and 48% women; a percentage which, in the area of gender violence, becomes (46% - 54%).

Entry requirements: who can become a public defender?

Firstly, of course, **the general training requirements for all lawyers:** a university degree in Law and a Master's degree in Law.

And, in addition: i) having more than **3 years of professional practice; ii) having an office operating (sole or main) in the territorial demarcation** in which the service is provided; iii) completing **Training Courses required by law** (e.g.: gender violence, minors...) or, where appropriate, by the professional associations.

Who appoints the public defender

The Duty Solicitor is always appointed by the Bar Association, according to a previously established list of Duty Solicitors: he or she can be requested by the citizen (in the LOS), the Court, if the intervention of a lawyer is compulsory and the interested party does not appoint one (e.g. criminal trial) or the Police (detainee who does not appoint a private lawyer).

Duty counsel will not always be free of charge. This shows that, although they are very similar concepts, Legal Aid and Free Justice are not the same thing, thus:

– some people apply for legal aid because they do not have the financial means: if their situation is recognised, the Lawyer will be free of charge
– there are those who ask for FLA and are denied and yet are awarded it: it will not be free
– some people ask for a Lawyer without even applying for FLA (e.g. because they do not know a Lawyer or they do not take the case (e.g. against a lawyer). The lawyer will be assigned, but he/she will not be free of charge either.

How the legal aid lawyer is appointed for each individual case

As the term itself indicates, it is assigned **"in turn",** by means of a previously established order (by seniority, alphabetical...). That is to say, no hand-picked or "a dedo" appointments, as we say colloquially in Spain. A specific lawyer is not assigned according to the case when it arrives. Neither the Police can appoint one, nor the Court (they can only request it).

These are **public lists,** which can be checked and verified and are forwarded to detention centres and the Duty Courts.

There are **lists by territory,** each Bar Association divides them by demarcation **and lists by subject,** by jurisdictional orders, criminal, civil, labour, administrative and with a greater or lesser degree of specialisation (depending on the size of each Bar Association, its number of lawyers, needs) e.g. in civil matters (general, family...), in criminal matters (general criminal, fast-track trials, gender violence, minors), etc.

There used to be a "serious turn or shift" throughout Spain for cases of more than 6 years' imprisonment, reserved for Lawyers with more than 5 years' seniority (although this general provision no longer exists, it is maintained by some Bar Associations).

The Criminal Court has the speciality of lists for assistance to detainees, which foresees (normally on a monthly basis) the intervention of lawyers every day.

In cities, they are 24-hour shifts, 365 days a year for general criminal cases, gender violence and fast-track trials. In smaller towns, they are appointed on a case-by-case basis by the Bar Association on a first-come, first-served basis.

It is important to highlight the **unity of the defence:** the same lawyer handles the entire criminal process, from assistance to the detainee though all subsequent proceedings, trial, appeals and so on.

Moreover, the Law 1/96 FLA, in articles 27 and 28, allows the **option for the beneficiary of FLA to appoint their own Lawyer and to keep the rest of the benefits of the law** (experts, costs...etc); this Lawyer is not paid by the Administration, but by the citizen (unless the Lawyer waives the fee).

Who pays the legal aid lawyer and how he or she is paid

In most cases, the legal aid lawyer is paid by the **administration** on the **basis of a scale, according to the type of procedure** in question (much lower than the cost of a private lawyer. For instance, in a "standard" procedure (criminal, divorce), the State pays around (200/250 eur = 150/190 Din).

There are a number of exceptions (art. 36 Law 1/96) in which the legal aid lawyer is not paid by the administration, but by the beneficiary of FLA himself/herself (if he/she makes a profit in the proceedings or comes into *"better fortune")* or by the opposing party (if he/she is ordered to pay the costs of the trial).

Requirements and procedure for payment to the legal aid lawyer

First of all, the administration only pays the legal aid lawyer if there is recognition of the legal aid (if there is no recognition of the legal aid, the applicant would pay the legal aid lawyer).

The legal aid lawyer has to justify his/her actions to the Bar Association and the latter to a Higher Bar Council, which, in turn, does so to the Administration, which controls what is justified, currently with a high degree of exigency. One only pays for what is accredited (lawsuit, defence, defence or accusation, judgement...), except for guard duty, which is accredited by the fact of doing it.

A major problem that occurs in practice is that sometimes FLA is refused, the administration does not pay and then the lawyer cannot collect FLA from the applicant.

On the other hand, the **Administration** pays the Local Bars some **infrastructure costs** (for staff, facilities and so on), sometimes per file (30 euro/file = approx 22.3 DIN) or for a % of the total Public Defence Service bill of that Bar (around 6.5%).

Quality Control

It falls, first and foremost, to the Local Bar.

In addition to what has already been indicated regarding their responsibilities in organising the legal aid service, they also have competence in the initial and continuous training of the professionals who provide the service in order to guarantee its quality, as well as in the processing of any incidents or complaints that may arise in the course of the service. The Bar Associations have a deontological or disciplinary Commission for this purpose.

This Commission can receive complaints: i) from the beneficiary of FLA - the professional does not act, does so late, does not respond appropriately - the FLA Law establishes, for example, that charging fees improperly is a very serious offence which entails expulsion from the service ii) from the Court or the Police e.g. the Lawyer does not attend to assist the detainee or does not attend the trial iii) and the Association itself can intervene directly if it is aware of an improper action.

If the Lawyer does not attend to assist a detainee, another lawyer shall be notified so as not to delay the detention. This is without prejudice to any disciplinary liability that the Lawyer may incur.

The quality of a plea or court action itself is not analysed, unless there is an express complaint that it is particularly defective, involves a clear error, etc.

Once the complaint has been received, a contradictory file is opened, with allegations and evidence from the parties and the corresponding resolution is issued by the Local Bar Association, against which an appeal may be lodged with a higher body of the Local Bar itself, whose resolution puts an end to the administrative proceedings, and the judicial review of the decision remains open for appeals against it.

In general, complaints are few and mostly minor.

There are Local Bars that carry out quality surveys and although there were proposals to do so in general, they have not been successful so far. The SBC also periodically carries out MACRO-SURVEYS of professionals and service users, with a good general assessment of the service.

Waiver of the FLA beneficiary to the designated professional

Law 1/96 allows the FLA beneficiary the possibility of refusing the designated professional if there is a *"justified cause",* opening a case in this respect at the Bar Association, with an objection procedure for the professional, appointing a different one if deemed justified (art. 21a), introduced in the reform of 2018, with the overlap of a directive on the European Investigation Order).

Resignation of the legal practitioner

On the other hand, there is also the *"excuse"* of the professional that is provided for, in principle, only in the criminal order and when there is a *"personal and just"* reason. It must be submitted within a period of 3 days from the receipt of the case and is resolved by the Dean of the College.

However, in practice, it has been accepted in courts other than criminal courts, when there may be conflicts of interest, professional secrecy is at risk or there are any other circumstances that affect the principles of professional ethics.

Unsustainability of the claim

The professional may also *"withdraw"* from the case if, once the case has been analysed, he/she considers that the claim is not viable (arts. 32 et seq. Law 1/96): it must be a very clear question and normally it is not admitted with respect to the defendant because it is understood that his/her rights must be guaranteed during the procedure, including enforcement if convicted. The Bar Association and the legal aid lawyer must report and if both confirm it, the request is closed; if one of them rejects it, a second lawyer is appointed to compulsorily handle the case.

It can also be raised in view of a possible appeal (art. 35 Law 1/96), as the claim may be initially sustainable, but not after the trial.

There is no basis for claiming unsustainability of a criminal defence, or for appeals by the convicted person.

In summary, these are some of the most notable aspects of the Spanish system of free legal aid, recognised in comparative law for its broad scope and dimension, as well as for its level of effectiveness in guaranteeing access to justice and the right to defence, particularly for people who lack sufficient financial resources to assert their rights before the courts.

RIGHT TO DEFENCE AND FREE LEGAL AID IN SPAIN

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Summary

I. THE RIGHT TO DEFENCE

Different international instruments set minimum standards for recognising the basic rights and fundamental freedoms of all human beings, thus establishing the obligations that states must fulfil.

Among them, the Universal Declaration of Human Rights of 10 December 1948 sets out basic principles that are reiterated in numerous international conventions, declarations and resolutions. Articles 10 and 11 regulate the right to defence, stating that "everyone is entitled on fully equal terms to a fair and public hearing by an independent and impartial tribunal, in the determination of his/her rights and obligations and of any criminal charge against him/her", and goes on to state that "everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he/she has had all the guarantees necessary for his/her defence".

Article 14.3 of the International Covenant on Civil and Political Rights regulates the right to defence of persons accused of having committed a crime in the following terms:

"During the proceedings, everyone charged with a criminal offence shall be entitled, on an equal basis, to the following minimum guarantees:

a) To be informed promptly, in a language which he/she understands and in detail, of the nature and cause of the accusation made against that person.

b) To have adequate time and facilities for the preparation of their defence and to communicate with a defence counsel of their own choice.

c) To be tried without undue delay.

d) To be present at the trial and to defend himself/herself in person or through legal assistance of his/her own choosing; to be informed, if he/she does not have legal assistance, of his/her right to have it assigned to him/her and, if the interests of justice so require, to have legal assistance assigned to him/her free of charge if he/she does not have sufficient means to pay for it.

e) To examine or have prosecution witnesses examined and to obtain the attendance and examination of witnesses on their behalf, under the same conditions as prosecution witnesses.

f) To be assisted free of charge by an interpreter if he/she does not understand or speak the language used in court.

g) Not to be compelled to testify against oneself or to confess guilt".

In European law, the European Convention on Human Rights, signed in Rome on 4 November 1950, was the first instrument to give concrete and binding force to the rights set out in the Universal Declaration of Human Rights.

The need to recognise and protect the rights and freedoms of every person, as well as to prevent and sanction any violation of these rights and freedoms, led several European Union countries to sign the Convention and to create the European Court of Human Rights to monitor the compliance of States with their obligations, allowing citizens to bring their claims against a State when their rights and freedoms have not been respected.

Article 6 of the European Convention sets out the right to a fair trial, listing the minimum rights to be afforded to every accused person, including, as provided for in point 2(c), the right to defend himself or herself or to be assisted by legal assistance of his or her own choosing and, if he or she does not have the means to pay for it, to be assisted free of charge by a legal aid lawyer, where the interests of justice so require.

Spain ratified the European Convention in 1979, recognising the rights and freedoms defined therein for all persons under its jurisdiction.

Based on these international norms, the domestic legal systems of each country should provide the main protection of human rights and ensure that they are not violated, establishing mechanisms to prevent violations and guarantee their effective exercise.

The right to defence is defined in Spain, following international procedures, as a fundamental right, recognised in art. 24 of the Spanish Constitution, which guarantees effective judicial protection to all citizens and thus equal access to the courts.

This right guarantees that the parties to a proceeding are in a position to defend their respective stances with identical weapons, without limitations or restrictions that could lead to defencelessness, in any jurisdictional order in which they need to litigate.

It is definitely in the criminal courts that the defence of persons under investigation in judicial proceedings is at its best.

The Spanish Constitution imposes a special degree of protection when it comes to safeguarding the rights of those who appear as defendants, establishing in its Article 24 that:

1. *"All persons have the right to obtain the effective protection of judges and courts in the exercise of their rights and legitimate interests, without, in any case, there being any possibility of defencelessness.*
2. *Likewise, everyone has the right to an ordinary judge determined by law, to a defence and the assistance of counsel, to be informed of the charges against them, to a public trial without undue delay and with all the guarantees, to use the means of evidence relevant to their defence, not to testify against themselves, not to confess guilt and to the presumption of innocence. The law shall regulate the cases in which, on the grounds of kinship or professional secrecy, there shall be no obligation to testify about allegedly criminal acts".*

In order to exercise of this right, any person under investigation in criminal proceedings may intervene in the proceedings, as soon as he or she is informed of their existence, has been the subject of arrest or any other precautionary measure or has been ordered to be prosecuted, for which purpose he or she shall be informed, without undue delay, in an accessible manner and in understandable language, of the rights to which he or she is entitled, among which are:

- To be informed of the facts attributed to him or her, as well as of any relevant change in the subject matter of the investigation and the facts under investigation. This information shall be provided in sufficient detail to enable the effective exercise of the right to defence.
- To examine the proceedings in good time and, in any event, prior to the taking of evidence.
- To act in criminal proceedings in order to exercise their defence in accordance with the provisions of the law.

- To freely appoint a lawyer.
- To apply for free Legal Aid, the procedure for doing so and the conditions for obtaining legal aid.
- To free translation and interpretation.
- To remain silent and not to give evidence if he/she does not wish to do so, and not to answer any or some of the questions put to him/her.
- Not to testify against oneself and not to confess guilt.

Established as a fundamental right of citizens, safeguarding it is a task in which the main operators of the criminal process (judges, prosecutors, lawyers, law enforcement agencies) must cooperate, but it is a task undoubtedly led by lawyers.

The person under investigation in criminal proceedings has the right to freely choose and appoint the lawyer by whom he/she wishes to be defended, and if he/she does not do so, he/she will be appointed by the court-appointed lawyer.

The intervention of the lawyer is required from the very moment of the arrest and his/her presence is obligatory throughout the judicial proceedings, so that legal assistance must be real and effective, which is why he/she must be allowed to speak privately with his/her client from the very first moment, with the guarantee of the secrecy of these communications, in which there must be no interference or limitation of any kind, neither in number nor in duration.

Its purpose is to ensure the effective realisation of the principles of equality of the parties and of contradiction, which impose on the judicial bodies the positive duty to avoid imbalances between their respective procedural positions or limitations in the defence that could generate for any of them the defencelessness prohibited by the Spanish Constitution.

The requirements in this area do not change even when the intervention of a lawyer is optional since, although not compulsory, it constitutes a right for the citizen, who is free to decide whether or not to make use of a legal expert to defend his or her interests.

In order to make this effective, judicial bodies must pay special attention to the application of the rules on legal aid, avoiding situations of defencelessness and agreeing to the suspension of procedural steps and the appointment of a lawyer in order to prevent the violation of the right to effective judicial protection.

The lack of financial resources to meet the costs of legal proceedings cannot be an obstacle or a limitation to the right to a defence. To prevent this circumstance from causing defencelessness, Article 119 of the Spanish Constitution establishes that: *"Justice shall be free when so provided by law and, in any case, with respect to those who can prove insufficient resources to litigate".*

II. FREE LEGAL AID

The guarantee of this fundamental right to those who lack the financial resources to meet the cost of appointing a lawyer and, in general, of the judicial process, is provided through the system of Free Legal Aid.

This institution is designed as a benefit entitlement, obligatory for public administrations and developed in an ordinary Law (Law 1/96 of 10 January on Free Legal Aid) which aims to determine the content and scope of the right referred to in Article 119 of the Spanish Constitution and to regulate the procedure for its recognition and effectiveness.

The provisions of the Free Legal Aid Act apply to all types of legal proceedings, including constitutional appeals, as well as pre-trial counselling.

This rule establishes:

– The personal scope of application: which citizens it applies to and with what coverage depending on the judicial procedure.

- Requirements to be fulfilled: financial factors are generally required, but property and other external signs are also valued.
- Content of the right: this covers the benefits to which the applicant will be entitled in the legal proceedings; the interested party decides which of them he/she wants, having the possibility of waiving any of them.
- Extent of the entitlement: to the entire judicial procedure, including subsequent proceedings.
- Jurisdiction to process and decide on applications for legal aid.
- Application requirements and processing of dossiers.
- Organisation of legal aid and legal defence services.
- Shift distribution.
- Appointment of a duty solicitor.
- Lawyers' obligations.
- Handling of citizens' complaints and grievances.
- Disciplinary rules for lawyers.
- Compensation for legal aid professionals.
- Public subsidy management.

Whenever a citizen has to resort to legal proceedings to defend his or her rights and interests, regardless of the legal matter in question, he or she has the possibility of applying for the right to free Legal Aid, and thus for the appointment of a court-appointed lawyer.

While it is true that the largest number of proceedings for which this right is requested are within the criminal jurisdiction, this does not mean that the right to defence is limited to these situations alone; its protection covers any situation of legal controversy in which a person may find themselves and whatever their position in the proceedings.

Focusing on the criminal jurisdiction, one of the basic benefits provided for in the Law on free Legal Aid is assistance to detained or imprisoned persons, from the moment of detention and defence in legal proceedings when the intervention of a lawyer is mandatory, or when the equality of the parties in the proceedings must be guaranteed and is requested by the Court.

This defence is the exclusive function of the legal profession. This is why the Law delegates the management of the public service of free Legal Aid to the Bar Associations and it is the lawyers who give effect to the right to defence.

III. THE ROLE OF THE LOCAL BARS

The Local Bars Associations are responsible for processing applications for free Legal Aid, completing the files, verifying compliance with the requirements of the Law and issuing a provisional decision, with the appointment of a duty solicitor, if applicable.

They are also responsible for organising the in-court representation service, which manages the appointment of lawyers to defend citizens who do not appoint their own lawyers.

The Local Bars are legally obliged to guarantee the following:

1. **Establish permanent duty rota systems/shifts for free legal assistance to detainees and victims**

   This is a 24-hour service, 365 days a year, from which the lawyers attend to all persons who are detained and have not freely appointed a lawyer. They also attend to victims of gender-based violence from the moment they request it.

   The lawyers who form part of this service are included in the corresponding list, in order of entry and are assigned a 24-hour duty when it is their turn, with the obligation to be available and contactable to go within a maximum period of three hours to the detention centre indicated by the Bar Association.

   Such action by lawyers must guarantee the following rights:

– That the detainee is informed of his or her rights, ensuring that he or she understands the scope of these rights and their consequences, and request, if appropriate, a medical examination of the detainee.
– Intervene in the statement of the detainee, expanding or clarifying the points that he/she considers necessary.
– To interview the detainee in confidence, even before a statement is received.

2. **Organise pre-trial counselling services (Free Legal Aid Services)**

These are citizens' advice points provided by practising lawyers to guide and give free legal aid to citizens on any questions they may have in relation to the defence of their rights and interests.

Ensuring access to justice requires that citizens know that they have certain rights that they can exercise, which can be summarised as follows:

– The right to obtain generic legal information.
– The right to legal advice for a specific case.
– Technical assistance to initiate an action or to oppose an action brought against him/her.
– Information on the possibility of using mediation or other out-of-court means of dispute resolution.
– Information on entitlement to free Legal Aid, the scope of the legal aid, as well as the documents needed and where to obtain them.
– Help in filling in the legal aid forms.

3. **The Processing of Free Legal Aid files**

– The procedure for the recognition of the right to free legal aid is initiated by filling in the forms approved in the regulations and submitting them to the competent Bar Association.

– The College that receives the application must check that it is duly completed and signed, including the personal details of the interested party, the financial details that he/she alleges and the details of the legal defence that he/she is seeking.

– The application must be accompanied by documents attesting to the personal and financial circumstances invoked, as well as those relating to the legal proceedings being sought and for which the application is being made.

– The Bar Association must register the application, check that it meets all the requirements and, if there are any deficiencies, requires the interested party to remedy them within ten days.

– Once the free legal aid application has been processed, the Bar Association shall provisionally decide on the application and, if necessary, appoint a duty counsel to defend the applicant.

4. To organise and manage the professionals who form part of free the legal aid system

The Law on Free Legal Aid expressly establishes that the free Legal Aid service is compulsory and the Plenary of the Constitutional Court upheld the constitutionality of this precept, stating that it arises from the need to ensure the right recognised in article 119 of the Spanish Constitution.

Consequently, all Local Bars must guarantee the provision of the service under the terms established in the Law, and although all of them have established, in general, that the assignment of lawyers is voluntary, some of the Associations expressly recognise that the incorporation of lawyers is only voluntary as long as there is a sufficient number to cover the provision of the service.

This rule also states that the Local Bars shall establish systems of objective and equitable distribution of the different shifts and methods for the appointment of legal aid professionals, which obliges the Local Bars to draw up lists of lawyers and to follow a strict order in the distribution of cases, so that, except for duly regulated exceptions, all lawyers have the same cases, whenever possible.

The organisation of professional bodies for the provision of these services varies according to the following factors:

– The number of citizens demanding the benefit.
– The level of litigation.
– The number of lawyers assigned to the service.
– Public funds made available to them.

In order to be admitted to the free legal aid office, lawyers must meet the general minimum requirements established in the legal regulations, as well as the specific requirements demanded by each Bar Association in its internal regulations.

The minimum general requirements are set out in the Regulation under Law 1/96 of 10 January 1996 on Free Legal Aid, Article 32, and are mandatory for all Local Bars:

– Three years of professional practice.
– He/She must have passed the courses or tests for access to the services.
– He/She must have a professional office within the area of competence of the Bar Association where the service is to be provided.

Certain services which require specialised defence, such as the defence of minors, victims of gender-based violence, victims of human trafficking, etc., and for the defence of certain criminal proceedings involving serious penalties, require lawyers to undergo specific training and accredit additional seniority in the practice of the profession. They are also required to have more seniority and additional training to act before the Constitutional Court, the Supreme Court and the National High Court.

Laws such as the Comprehensive Protection against Gender-based Violence or the law regulating the criminal responsibility of minors establish the obligation for legal professionals who are going to defend before the competent Courts in these proceedings to be duly trained.

In general terms and provided that there is a sufficient number of lawyers to provide the free Legal Aid service, the Local Bars do not automatically include all their members in the in-court representation service, but allow voluntary registration. Therefore, the lawyer must make an express request for registration, accompanied by documentation proving compliance with the requirements. Verified by the Bar Association, if the application is accepted, the lawyer is included in the service in order of entry.

The Local Bars draw up different lists according to the subject matter, special shifts, jurisdictional order, and territories of action, where appropriate, following the distribution of cases either in alphabetical order or according to the order of entry of the lawyers on each list.

The Law does not provide for the free choice of lawyer by the beneficiary of the right to free Legal Aid, although he/she may waive this benefit and appoint the lawyer of his/her choice for his/her defence, whose specific cost will not be compensated by the administration.

The duty solicitor is a **legal professional** who is entrusted, **by virtue of a legal mandate**, with the **defence** before the judicial bodies of those who lack the resources to litigate. In the exercise of his or her work, he or she enjoys freedom and independence of judgement, which may be defined as the right to decide and exercise freely, without any kind of interference, the technical decisions affecting the defence of the matter assigned to him or her, without any limits other than those provided for by law and by the rules of professional ethics.

The lawyers who form part of the legal aid service do not constitute a group with a category outside the status of lawyer. Therefore, the **deontological rules** and **ethical rules** governing the practice of the profession shall apply to the full extent of the law.

The most frequent cases in which the technical review of legal proceedings takes place are the following:

– Non-compliance with procedural deadlines. Procedural actions must be carried out within the time limit established for each of them. If the parties fail to carry out the action within the time limit set for it, the non-compliance results in the preclusion of the action without the possibility of carrying it out at a later date. The aggrieved party may claim the appropriate liability.
– Obvious and manifest legal error. Ignorance or lack of knowledge on the part of the professional of the regulations applicable to the specific case.
– Passiveness or idleness of the professional resulting in the expiry or prescription of the actions claimed. This derives from the failure to pay timely attention to the assignment. The lawyer who neglects his or her duties and causes the interested party to see his or her right forfeited as a result of his/her inaction.

They are therefore governed by the same rules established in general for the exercise of these professions, but to these obligations must be added the provisions contained in the Law on Free Legal Aid and in the regulations governing the legal aid office of each professional association.

The first limitation affects the lawyer's freedom to accept or reject the handling of the case or to withdraw from the case. The legal aid mandate that the lawyer receives binds him/her to the effective exercise of the action entrusted to him/her and he/she is obliged to exercise his/her role of assistance and representation in a real and effective manner until the end of the proceedings.

The lawyer is obliged to assume the defence of the interested party in the proceedings for which he/she has been assigned, in the first instance and in the successive appeals, proceedings and incidents that may arise, and in the phase of enforcement of the Ruling, and under no circumstances can he/she leave the citizen in danger of having no legal defence. This means that if for any reason the lawyer is unable to continue the defence at any stage of the proceedings, in the appeal against the Ruling, or in its enforcement, he/she must notify the Bar Association as well as the Court which is hearing the proceedings, requesting the suspension of any time limits that may exist until his/her replacement is appointed.

In order to excuse themselves from the defence, they must give a personal and justified motive, which must be assessed by the Dean of the College, and only when this reason is accepted will the mandate entrusted to them cease to exist.

On the other hand, the citizen is also allowed to request the substitution of the lawyer who was assigned to him or her by the duty solicitor. The request must be made in writing and duly justified to the Bar Association, which studies it, processes the appropriate file and resolves the matter in writing.

By virtue of the legal mandate just described, the Local Bars must process any complaints or grievances made by users of the service, regardless of the resolution that may be adopted. In the exercise of their functions, lawyers are subject to civil, criminal and/or disciplinary liability that may arise from negligent professional conduct.

Lawyers, for their professional activities in the public defender's office in defence of the beneficiaries of free Legal Aid, receive the compensation established in the regulations from the public administration. This provides for an amount depending on the legal proceedings in which the professional has worked.

The lawyer's fees are paid once they have been verified by the Bar Association, which records and certifies the amounts resulting from the supporting documentation provided, submitting the settlement on a monthly basis to the Public Administration responsible for payment. The documentation submitted by the lawyers must be filed by the Local Bars and made available to the Public Administration for verification.

IV. PUBLIC ADMINISTRATIONS: MINISTRY OF JUSTICE AND REGIONAL GOVERNMENTS

The Local Bars have a fundamental and obligatory role in the Free Legal Aid system, as they manage, organise and provisionally resolve the files and designate the legal aid lawyers. However, it is up to the public administrations to decide on the recognition of the right, to supervise the work of the Bar Associations, and to subsidise the service by providing the necessary funds to cover the legal actions and the cost that case management entails for the Bar Associations.

They can also establish the parameters for the management of the legal assistance service for detainees and victims, establishing the number of lawyers on duty, the number of visits to be carried out by each of them, on-call arrangements according to the characteristics of each College and its territory (daily or weekly shifts), etc.

The Free Legal Aid Commissions are the administrative bodies responsible for resolving the Free Legal Aid files that are provisionally qualified by the Bar Associations, by means of a reasoned resolution that recognises or denies the right. They depend on the Ministry of Justice or the Autonomous Communities, although one of their members is the Dean of the Bar Association.

In addition to issuing decisions recognising or denying the right, the Commissions must verify the accuracy and genuineness of the data provided in the file, and are also the bodies responsible for maintaining direct communication with the Professional Associations, which must periodically send them a list of the lawyers who form part of the legal aid service, as well as the results of the management of the services by means of regular statistics.

It verifies the management of the Bars and channels complaints or grievances made as a result of actions related to free Legal Aid services.

The public administration approves an annual amount within its budget for the payment of free Legal Aid services, in order to periodically make the appropriate settlements for the work accredited by the lawyers, both in the actions carried out by the court-appointed representative, as well as for on-call services. These settlements are made through the Bar Associations, who are the ones who finally pay the professionals.

The cost generated by the management of free Legal Aid to the Bar Associations is financed by the public administration, with a fixed amount per free Legal Aid file processed.

V. CONCLUSION

The fundamental right to defence, linked to the equally fundamental right to effective judicial protection, requires clear and unequivocal regulation by the States for its recognition and protection, guaranteeing the objective conditions for it to be effective in conditions of equality for all citizens.

The Courts and other legal operators must assume the commitment to ensure that these rights are respected for all citizens, providing information and ensuring the presence of a lawyer from the beginning of the judicial procedure and even from the moment of detention.

Free Legal Aid is a right inherent to the constitutional system of justice, and should be configured as a public benefit, through which citizens who can demonstrate insufficient financial resources can intervene free of charge in legal proceedings and obtain legal guidance prior to the same, adapted to the social reality it is supposed to serve.

The organisation responsible for the management of the Free Legal Aid service is obliged to carry out the quality controls necessary for a sound and proper provision of the service.

The intrinsic connection between the right to a defence and the right to a lawyer is clear from all international and European texts, which means that the legal profession is closely linked to the right to a defence.

Lawyers exercise the right and duty of defence in order to make judicial protection effective and the other rights of citizens a reality, in such a way that they are not compromised in any situation. The State, through the Administration of Justice and all its members, must recognise and respect the dignity of the lawyer and the free and independent exercise of his or her function.

It is also essential to guarantee the strict observance by the lawyer, within his/her freedom and independence, of the rules of professional conduct, through institutions such as the Bar Associations. These Associations likewise, must exercise control over the lawyer's actions, within the process, vis-à-vis the client, the other parties, other lawyers and professionals and the court.

VI. BIBLIOGRAPHY

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