



# Spanish criminal procedure examined: successes, opportunities and failures in the adaptation to EU requirements

María Luisa Villamarín López<sup>1</sup>



Accepted: 12 January 2022 / Published online: 27 January 2022  
© The Author(s) 2022

## Abstract

This paper examines at what stage of the process of adaptation to European requirements the system of criminal justice in Spain finds itself. First, it focuses on its major achievements regarding the rights of suspects and accused (in particular, the reinforcement of the following guarantees: the right to information, the right to interpretation and translation, the right to legal assistance, the right to legal aid and personal data protection rules) as well as the protection of victims, as reinforced by the promotion of restorative justice. Secondly, the author reflects on areas requiring improvement on which the Spanish legislator might focus its attention in the short term: the protection of children who are accused in criminal proceedings, the legal treatment of internal complaints (and whistleblowers) and, finally, the presumption of innocence. Thirdly, it highlights some failures in the Spanish process of adaptation to European requirements: namely, delays, non-compliance with EU obligations and the lack of resources needed to implement required changes.

**Keywords** Spanish criminal procedure · European standards · Suspects and accused rights

“The idea of rights is nothing other than the idea of virtue introduced into the political world (...). There are no great men without virtue; without respect for rights there is no great people: it can almost be said that there is no society; because what is a meeting of rational and intelligent beings in which force is the only relationship?”

Giussepe Chioventa

---

✉ M.L. Villamarín López  
mlvillamarin@der.ucm.es

<sup>1</sup> Professor of Procedural Law, Universidad Complutense de Madrid, Madrid, Spain

## 1 Introduction

Not so very long ago, Europe took the path of violence to resolve its controversies and paid a high price for this. As Robert Schuman pointed out, “A united Europe was not achieved and we had war.” Having regard to these circumstances, since the end of the Second World War, Europe has tried to organise an adequate system of guarantees that will serve to overcome conflicts peacefully. In the field of criminal procedure, what stands out especially is the work of the Council of Europe, which has been establishing minimum standards of protection in the criminal area of jurisdiction that States have assumed progressively as their own in their national systems. For example, the European Court of Human Rights’ jurisprudence has had a double impact in Spain. First, it has inspired the reform of numerous legal rules that formerly compromised the citizen’s fundamental rights. This was the case, for example, with the regulation of communications interception (as seen in *Prado Burgallo v. Spain*<sup>1</sup>), which was so poorly regulated in the Spanish Criminal Procedural Law (namely Art. 579 of the Spanish Criminal Procedural Law, dated 1882) which did not adjust to the European parameters set by the Court in famous cases such as *Kruslin v. France*<sup>2</sup> or *Huvig v. France*.<sup>3</sup> Secondly, it has promoted a new reading of various existing Spanish laws in accordance with criteria established by the European Court of Human Rights. Particularly noteworthy is the recent judgment of the Spanish Constitutional Court regarding the interpretation of Art. 294 Spanish Organic Law of the Judicial Power, which refers to the procedure for requesting compensation for undue provisional detention. In accordance to European Court of Human Rights jurisprudence on the presumption of innocence, the Spanish Constitutional Court declared the article null and void because they found it unreasonable to draw any distinction based on the grounds of an acquittal (be it by reason of a complete lack of evidence or by reason of proof of the innocence of the accused), as had been customary since 1985.<sup>4</sup>

Even with this considerable step forward in combination with the recognition of a high level of protection of fundamental rights in the Spanish Constitution in 1978 (in particular, under Art. 24 of the Constitution), there was still a long way to go, and in this the growing regulatory activity of the European Union has played a very important role.

Let us remember that this activity proceeded slowly. The EU legislator’s first step did not consist of the direct implementation of basic procedural guarantees in the field of criminal justice. First of all, important instruments were approved and then implemented (with more or less difficulty in each country) such as the Framework Decisions on the European arrest warrant (2002/584/JHA, of 13 June 2002), on joint investigation teams (2002/465/JHA, of 13 June 2002), on confiscation orders (2006/783/JHA, of 6 October 2006), on financial penalties (2005/214/JHA, of 24 February 2005), on the exchange of information on criminal records among EU

---

<sup>1</sup>ECLI:ECHR:2003:58496/00.

<sup>2</sup>ECLI:ECHR:1990:11801.

<sup>3</sup>ECLI:ECHR:1990:11105.

<sup>4</sup>ECLI:ES:TC:2019:85, already applied by the Supreme Court among others, in ECLI:ES:TS:2019.

countries (2006/960/LHA, of 18 December 2006) and on recognition of judgments (2008/947/JHA, of 27 November 2008), among others. Only once all these necessary tools, guaranteeing mutual recognition in judicial cooperation among Member States, were developed and implemented, was a second step undertaken. This occurred because, when strengthening mutual recognition through use of these varied tools, important barriers were encountered, many of them due to unequal existing national standards of procedural rights in criminal proceedings. To overcome these obstacles, work was started on the harmonisation of criminal procedural guarantees, using the roadmap set by the EU Council Resolution of 30 November 2009.<sup>5</sup>

In this second stage, the European legislator does not seek to implement a single European criminal procedure, but rather a series of basic rules that are to serve as a common minimum standard for all European legal systems. Nevertheless, at the end of the day, the truth is that, although each country continues to maintain its singularities, a deeper harmonisation has been achieved in criminal procedural matters (in the words of the Council, the systems are now more “equitable”), in such a way that little by little the differences among the different Member States are becoming blurred.

Three aspects define, in my opinion, this harmonisation process: (i) reinforcement of the essential guarantees of suspects and accused; (ii) more participation on the part of parties in the criminal procedure and (iii) special protection for the most vulnerable, especially victims and minors.

Before moving to the core of this article, it should be recalled that the compromise reached by the European Union in the protection of fundamental rights in the criminal field is especially remarkable considering the trend followed by several western democracies in recent years, particularly since the terrorist attack that took place in New York in 2001. This drift has generally led to a cutback in fundamental rights for the security purposes and has even influenced in recent years the European Court of Human Rights case law. An example of this is given by the decisions taken by the Court in *Murray v. United Kingdom*,<sup>6</sup> in which it opted for a restrictive interpretation of the right to silence to facilitate the conviction of those accused of terrorism.

## 2 Successes implementing European standards in the Spanish procedure

Although the Spanish model of criminal procedure has not been changed – in principle – by virtue of these European breakthroughs, its characteristics have been gaining in clarity in step with the advances by the European legislator. Focusing on the successes in implementing European guarantees in Spain, the great majority of the changes can be categorised into two groups: (a) changes regarding the rights of suspects and accused; and (b) changes concerning the protection of victims and the promotion of restorative justice.

<sup>5</sup>C-295/1. Available on: <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:295:0001:0003:en:PDF>.

<sup>6</sup>ECLI:ECHR:1991:18731.

## 2.1 Safeguarding the rights of suspects and accused<sup>7</sup>

In accordance with the guidelines given by the Council Roadmap in 2009, the European legislator has been gradually addressing the protection of the rights of suspects and accused “step by step”<sup>8</sup> - although to date the list of Directives is already so comprehensive that, in my opinion, practically all possible necessary guarantees for a fair criminal procedure are covered. Let us look then at the way these rules been implemented in the Spanish legal system.

### 2.1.1 Information on rights in criminal proceedings (Directive 2012/13/EU, of May 22, 2012, transposed in Spain by the Organic Law 5/2015 and the Law 13/2015)

Even though the Spanish regulation provided considerable guarantees prior to 2015, the transposition of Directive 2012/13/EU, which involved reforming Arts. 118, 520 and 775 of the Spanish Criminal Procedural Law, improved greatly the protection of those deprived of liberty. Among other changes, since then, such persons have to be informed in a clear and understandable way and it has to be done immediately. The catalogue of their rights that must be communicated and the way to do so has considerably improved; the duty to hand over a letter of rights in writing has been imposed. The right of access (not the right of delivery, as stated by the Directive) to the so-called “essential elements” of the case,<sup>9</sup> required to prepare a defence and to challenge the arrest, is now fully guaranteed.

### 2.1.2 Right to have a third party informed upon deprivation of liberty and to communicate with a third person or consular authorities while deprived of liberty (Directive 2013/48, of October 22, 2013, transposed by Law 13/2015)

Arts. 520.2.e and 520.3 of the Spanish Criminal Procedural Law fully recognise these rights (with no exceptions) in a way similar to that provided for in Directive 2013/48: suspects or accused persons have the right to inform a relative (or a person they decide upon) about their situation and about the place where they are detained or in custody and they can make a call to a third party in the presence of a police officer or similar authority appointed by the judge. If the person is a foreigner, these rights include informing and communicating with their consular authorities.

### 2.1.3 Right to interpretation and translation (Directive 2010/64/EU, of October 20, 2010, transposed into our legal system by LO 5/2015, of April 27)<sup>10</sup>

The adaption of Spanish law to European requirements has led to considerable improvement in this field, at least on paper (see Arts. 123 to 127 of the Spanish Criminal

<sup>7</sup>See with more detail on this issue, Arangüena Fanego [2], pp. 6-38, and De Hoyos Sancho [4], pp. 53-87; also (in English) Jimeno Bulnes [13], pp. 1-20 and Valbuena González [18], pp. 50-54.

<sup>8</sup>See about this progressive evolution, Aguilera Morales [1], p. 8, reminding one of Jean Monet’s words.

<sup>9</sup>The concept of “essential elements” has been extensively discussed by the Spanish courts, finally being clarified by the Constitutional Court in its Judgment 21/2018, of March 5 (ECLI:ES:TC:2018:21).

<sup>10</sup>For a more detail study of this issue, see Campaner Muñoz [3], pp. 87-104, and Fernandez Carron [6].

Procedural Law). Access to translation and interpretation has been incorporated as one of the instrumental guarantees of the right of defence, as an authentic right of the defendant within the list of guarantees under the new Art. 118 of the Spanish Criminal Procedural Law.<sup>11</sup> It is also recognised at the earlier stages of proceedings, even at police headquarters: from the first interrogation or in previous conversations with the lawyer, being guaranteed throughout the course of the procedure, including all investigative activities and, of course, the oral trial. In particular, with regard to translation, the obligation is foreseen of translating all documents that are “essential” to guarantee the right of defence (with some exceptions)<sup>12</sup> and to do so within a reasonable period, the applicable procedural deadlines being suspended in the meantime. The right to these translations is waivable, unlike the right of interpretation (under Art. 126). It is also worth mentioning that the provision of these two services is to be free of charge with the costs borne by national administrations regardless of the outcome of the proceedings. Finally, although this step came late, a single Register of Sworn Translators and Sworn Interpreters has been created (see Art. 13 of the Spanish Royal Decree of 4 August 2020<sup>13</sup>), following the indications of the Directive.

#### **2.1.4 Right to legal assistance (provided for in Directive 2013/48, of October 22, 2013, mentioned above and transposed by Law 13/2015)<sup>14</sup>**

This guarantee is one of those which has been most strengthened in Spanish law as a result of European influence, even though before 2015 it had already enjoyed extensive recognition, including the general rule of mandatory provision of legal assistance (excluded only in cases of minor offences). The most outstanding consequence may be the express recognition of the right to a confidential interview with a lawyer even before making a statement at the police station or before being taken to the prosecutor or to the judge (Art. 520.6.d of the Spanish Criminal Procedural Law). Other appreciable changes are the reduction of the time within which legal aid must be provided *ex officio* to a detainee (from 8 to 3 hours), the express recognition of the confidential nature of their communications (as to which see Art. 520.7 of the Spanish Criminal Procedural Law) and the setting of the requirements as well as the cases in which the waiver of this right is allowed – for example, in cases concerning road safety – (as to which see Art. 520.8 of the Spanish Criminal Procedural Law).

<sup>11</sup>Ortega-Herráez & Hernández Cebrián [16], p. 109, in a study also about the transposition of the Directive in Austria, Belgium and Italy.

<sup>12</sup>The Spanish Supreme Court has interpreted this requirement set in the Directive in a different (and restrictive) way, so that in order to consider a violation of the right of defence it is necessary not only the lack of translation of an essential document but also that this defect produces a material self defencelessness to the accused person (ECLI:ES:TS:2016:18 and ECLI:ES:TS:2019:471, among others). See more in detail about this issue, Vidal Fernández [19], pp. 88 and ff.

<sup>13</sup>Spanish Royal Decree 724/2020, 4 August (BOE núm. 212, 6 August). See on: <https://www.boe.es/buscar/act.php?id=BOE-A-2020-9271>.

<sup>14</sup>With more detail see Gavara de Cara [9], pp. 71-118.

### **2.1.5 Right to legal aid (provided for in Directive 2016/1919, of October 26, 2016, transposed by Law 3/2018, of June 11, which modifies the Spanish Legal Free Aid Act)**

In this writer's opinion, the most outstanding novelty in Spanish law is the commitment to guarantee effective assistance *ex officio*. This does not end with the mere designation of a lawyer: as has been stated for years by the European Court of Human Rights, "mere appointment does not guarantee the effectiveness of their assistance" (*Kamasinski v. Austria*<sup>15</sup>). Thus any beneficiary of this right can request the replacement of the designated professional if they believe that this is justified (Art. 20 of the Spanish Legal Free Legal Aid Act). The coverage of this right has been extended to minor crimes, provided certain legal requirements provided are met, and the protection of the most vulnerable has been reinforced (see Art. 1 of the Spanish Legal Free Legal Aid Act).

### **2.1.6 Personal data protection in criminal proceedings (Directive 2016/680, of April 27, transposed by Organic Law 7/2021, of May 26)**

The new Spanish law passed recently in May 2021 effected a considerable level of homogenisation of guarantees, facilitating a high level of protection of natural persons insofar as concerns the management of personal data handled in criminal proceedings, in particular from increasingly common security threats in national or transnational contexts. In line with the requirements provided for by the Directive, after setting out the principles that govern the processing of personal data (Art. 8), the new law has established the procedure and time limits for storage and review (Art. 6) and has recognised the rights of the data subject (as to which, see Arts. 20 to 26: governing information, access, rectification, erasure and certain exceptions in the exercise of these powers).

## **2.2 Protection of victims and promotion of restorative justice (Directive 2012/29, of October 25, 2012, transposed by Law 4/2015, of April 27, which approves the Spanish Statute of the Victim<sup>16</sup>)**

Although - exceptionally in Europe - in Spanish criminal procedure, the victim already had the option of intervening as a private accuser, enjoying a number of numerous powers,<sup>17</sup> the Spanish Statute of the Victim represents a very significant advance in the protection of this right, by offering a comprehensive treatment of their status. Starting from a broad concept of a victim (with special attention being paid in this regard to the most vulnerable – see Art. 2), the new text provides a list of rights (see Arts. 4 to 10) and regulates victims' participation in criminal procedures, extending the powers they enjoyed traditionally as private accusers. Out of all of the novelties,

---

<sup>15</sup>ECLI:ECHR:1989:168:A.

<sup>16</sup>This push to restorative justice has also been promoted by the Committee of Ministers of the Union in its Recommendation of 3 October, 2018 (CM/Rec (2018) 8). See also in the same sense, Recital XXVII of the Preliminary Draft of the Spanish Criminal Procedural Law of November 2020.

<sup>17</sup>Vid. Gascón Inchausti & Villamarín López [8], p. 609.

let us give here just a few examples. First, victims' participation in the enforcement stage (as to which, see Art. 13), in which they may be informed of the resolutions taken during the procedure, depending on the type of crime and on whether they had previously requested it. Second example: their power to request certain measures be taken regarding individuals released on parole in order to guarantee their safety or to subsequently facilitate later civil liability issues.

The new Statute also boosts restorative justice in solving conflicts between victim and offender (see Art. 15 of the Spanish Statute of the Victim). Several characteristics are attributed to criminal mediation in this Law: voluntariness (to the point that a victim can revoke consent to participation in mediation at any time – see Art. 15.3), respect for the rights to defence, confidentiality and for the need for prior recognition of the facts by the offender. Intrajudicial criminal mediation in Spain has shown good results in practice, as is shown by data from the General Council of the Judiciary on this issue (dating from 2015): from 1881 mediations held, 79.2% ended with an agreement.<sup>18</sup> Despite the general scope given to the criminal mediation, Spanish Law proscribes it in certain cases:<sup>19</sup> in particular, in the field of “gender violence” in criminal procedures for adults (under Art. 87ter.5 of the Spanish Organic Law of the Judicial Power). This exclusion complies with the requirements set by EU Framework Decision 2001/220/JAI as confirmed by the European Court of Justice in Case C-483/09 *Gueye and Salmerón Sánchez v Spain*.<sup>20</sup>

### 3 Opportunities to adapt our criminal procedure to European requirements

Having analysed major achievements, let us now focus our attention on possible areas of improvement on which the Spanish legislator could work in the coming years so as to accommodate the Spanish criminal justice system to recent European Directives. We could mention, in particular, the following four areas: the protection of juveniles, internal complaints, the presumption of innocence and the decision to entrust the pre-trial stage to the Public Prosecutor.

#### 3.1 The protection of juveniles

Although the essential guarantees implemented recently in the Spanish Criminal Procedural Law (in particular, in Arts. 118 and 520 of the Spanish Criminal Procedural Law) – in accordance with the European requirements – also apply in procedures concerning juveniles (regulated by the Spanish Organic Law on Juveniles 5/2000, of 12 January 2000), given its subsidiary nature, some changes could be effected to improve the current regime in conformity with Directive 2016/800/EU, of May 11 on

<sup>18</sup>Véase en: <https://www.poderjudicial.es/cgpj/es/Temas/Mediacion/Datos-mediacion-intrajudicial/Mediacion-intrajudicial-en-Espana-datos-2015>.

<sup>19</sup>With the opposition of the great majority of the doctrine: see, among others, Fernández López [7], p. 370 and Manzanares Samaniego [15], p. 131.

<sup>20</sup>ECLI:EU:C:2011:583.

procedural safeguards for children who are suspects or accused persons. In particular, it would be desirable to reinforce the following rights of the minor: (a) their right to information, adapting it to the needs of minors (guaranteeing, among others, more accessible and friendly language and the intervention of qualified personnel to attend to their needs); and (b) their right to be heard throughout the course of the process. It would be appropriate if the aforementioned Organic Law also expressly recognised (a) their right to translation and interpretation; and, finally, (b) their right to a legal defence, guaranteeing public and effective assistance during both declaratory and enforcement proceedings.<sup>21</sup>

### **3.2 Internal complaints (in accordance with minimum standards regarding “whistleblowers”)**

According to EU Commissioner Jourová, Directive 2019/1937 of October 23 on the protection of persons who report breaches of Union law, (the transposition of which was due before December 2021) establishes a change “in the rules of the game” on this issue, extending its effects beyond the sphere of the European Union. In Spain, the Preliminary Draft of the Spanish Criminal Procedural Law of November 2020<sup>22</sup> has been influenced by this new European requirement, providing in Art. 528.6 thereof that, in the event that, in either the public or private sphere, an internal complaint is made, the “person responsible for the complaint channel” may make the communication without having to reveal the identity of the “whistleblower”. It is desirable that these new guarantees are finally consolidated in our legal system.

### **3.3 The presumption of innocence and protection of the right to remain silent**

Even though it is true that both Spanish legislation and case law enshrine high standards of protection for these two guarantees, the requirements set forth in the Directive may require, in the writer’s opinion, some adjustments in the Spanish regulation, especially as regards the presumption of innocence as a standard of treatment.<sup>23</sup> In the writer’s view, the Spanish legislator should pay attention specifically to the following issues:<sup>24</sup>

#### **3.3.1 References to guilt by public authorities**

The implementation of the rules set by the Directive on this issue has shown itself to be one of the more problematic issues in relation to the presumption of innocence

---

<sup>21</sup>For more information, see Jiménez Martín [12], pp. 126-142, Laro González [14], pp. 3-8 and Pillado González [17].

<sup>22</sup>Available at <https://www.mjusticia.gob.es/es/AreaTematica/ActividadLegislativa/Documents/210126%20ANTEPROYECTO%20LECRIM%202020%20INFORMACION%20PUBLICA%20%281%29.pdf>.

<sup>23</sup>More detail about the adjustment needs of the Member States is found in the Report from the Commission to the European Parliament and the Council of 31 March 2021, which evaluates the degree of application of Directive 2016/343 in the Member States).

<sup>24</sup>For more detail, see also Villamarín López [20], pp. 335-353, Guerrero Palomares [11], pp. 164-181, and González Monje [10], pp. 1-28.

as a standard of treatment within the Member States. Specifically, in Spain there is no express reference in procedural laws to the way public authorities may refer to a suspect or accused person and no effective mechanism has been provided to repair the possible damage that may occur if the public authority violates the limits required by the presumption of innocence.<sup>25</sup>

### 3.3.2 Information by the media about the course of the proceedings

Although the Directive is silent on this topic, it would be advisable to increase the level of protection (to the level of other European countries) not only to avoid leaks from police or from the courts to the press but also to regulate the way in which the media can report on criminal acts within the margins of respect for the presumption of innocence. For example, in France, images of suspects cannot be published and the broadcasting of perp walks is sanctioned; and in Germany the Press Code prohibits the publication of written information or photographs about crimes (see Art. 8 thereof). This issue may have been specially regulated bearing in mind recent reports from the UE Fundamental Right Agency about the application of the presumption of innocence in Europe. They show that public opinion generated by news regarding criminal investigations pressurises and influences the decision of judges in a case; by way of example, one of the judges interviewed by the UE Fundamental Right Agency expressed his difficulty in escaping from it with the following words: “If not (following the wing), public opinion will eat me up”.<sup>26</sup>

### 3.3.3 Presentation of suspects or accused (Art. 5 of the Directive)

Legally limiting the use of means of physical restraint on detained persons strictly to necessary cases is also to be recommended – thus putting an end to the current practice of our courts, which is usually the opposite; and even on the extra-legal level, it would be advisable to reform the design of the courts to avoid unnecessary exposure of detainees or suspects to public opinion.

### 3.3.4 The right not to incriminate oneself and to remain silent

Although it is true both that our Spanish Supreme and Constitutional Courts assume that the silence of the accused, in principle, should not be negatively evaluated and that they agree that such silence cannot serve as the sole basis for a criminal conviction, they have however taken the view that at times that it can be considered an additional element together with other incriminating evidence to override the presumption of innocence (Judgments of the Supreme Court of April 24 2008, of July 21 2006; in a similar sense, Judgments of the Constitutional Court 202/2000, of April 24 2000 and 61/2005, of March 14 2005). To quote verbatim the words of the Supreme Court, depending on the circumstances, “it may be justified that negative consequences are

---

<sup>25</sup>De Hoyos Sancho [5], p. 7.

<sup>26</sup>UE Fundamental Rights Agency, “Report on Presumption of innocence and the right to be present”, 2021, p. 32. Available on: <https://fra.europa.eu/en/publication/2021/presumption-of-innocence>.

drawn from the silence when, with objective incriminating evidence in this regard, an explanation can be expected from the accused”. Therefore, it would be especially advisable to clarify in Spanish legislation that no consequence can be drawn from the silence of the accused, in line with the requirement stated by Article 7 of the Directive.

### **3.4 The decision to entrust the pre-trial phase of the criminal procedure to the Public Prosecutor**

Although, in Spanish criminal procedure, the investigation stage is assigned to a judicial authority (called the “*juez de instrucción*”), there has been in-depth debate during recent decades around the possibility of incorporating the model of an investigating prosecutor in charge of that first phase of the proceedings. The implementation of the European Public Prosecutor’s Office – provided for by Regulation 2017/1939 of October 12 2017 (recently incorporated in Spain by Organic Law 9/2021, of July 2021) – may provide particular impulse. The aforementioned Preliminary Draft of the Spanish Criminal Procedural Law enshrines the new model of investigating prosecutor. Using the European rules as a reference, the legislator has argued in favour of this legislative option that this change of system represents a requirement derived from our “belonging to the area of freedom and justice of the European Union” and that it is necessary for the implementation of the European Public Prosecutor’s Office, given that it is the “model accepted by the countries in our neighbourhood (. . .) and that can already be considered part of the characteristic legal heritage of the European Union” (Recital III). We will see in the following months if this option is finally legally adopted.

## **4 Failures in the process to adapt our criminal procedure to European requirements**

Despite all of these breakthroughs, not everything has been successful in the Spanish process of adaptation to European requirements.

First, this is because Spain has been on occasion slow and sometimes irresponsible when it comes to fulfilling the task of incorporating European standards into its legal system. This was the case, in particular, with the adaptation of Spanish legislation to the 2016 Data Protection Directive, mentioned above. As the transposition deadline (which ended in May 2018) having been exceeded by far, Spain was condemned for breach of its obligations by the European Court of Justice in February 2020 in *European Commission v Kingdom of Spain*<sup>27</sup> where the Court imposed a lump sum fine on Spain of 15 million euros plus 89,500 euros for each day of delay (and note that it was not transposed until the following 26 May) as well as requiring the payment of Spain’s costs and those of the Commission. Of course this is the case which has had the most serious consequences for Spain but it is not the only one: Spain arrived two years late with the transposition of Directive 2010/64 on Translation and Interpretation and we have not yet done our homework in relation to Directive 2016/800

<sup>27</sup>Case C-658/19 ECLI:EU: C:20210:340.

on procedural safeguards for children (the deadline for which ended in June 2019) or Directive 343/2016 on the presumption of innocence (the transposition deadline for which ended in April 2018).

In any case, even though Spain has not adapted properly to the European time-frame, it should be remembered that, in application of the doctrine that arises from the *Adelener* case,<sup>28</sup> once the date for transposition of the Directives has expired, the courts of Member States have the obligation to interpret their domestic law in the light of the letter and spirit of the Directive to achieve its objectives (in the same sense, Judgment of the Spanish Constitutional Court of 30 January 2017, rec. 7301/2014). Consequently, Spanish judges must apply all of these European standards once the deadlines have passed.

Secondly, Spain has not been especially distinguished for reliably implementing other obligations arising from these Directives, such as the duty of informing the Commission on the application of these new laws in our country, data which allows the European Union to take the pulse and know the state of health of national systems of justice, although it seems that we are not the only ones: the Commission highlights in its Implementation Report on Directive 2016/343 in 2021 that only Austria had done its homework and provided timely information about the application of this Directive on the presumption of innocence.<sup>29</sup>

Secondly, I would highlight that, despite the legislative efforts that Spain has been making, on many occasions practice is quite different from the letter of the law. This, on the one hand, is due to perverse forensic practices, which deviate from legal requirements. Let us consider a couple of examples to illustrate this problem. First, when in a police station a detainee is informed with little clarity or with texts that are difficult for him or her to understand or when the written text is not given to them setting out their rights (sometimes with the excuse of preventing them from harming themselves with the sheet of paper they are given). On the other hand, some guarantees are not so effective due to the inadequate reading that the courts are giving to these new regulations. For example, as regards the interpretation of the requirement of translation of the “essential elements” of the procedure, which has been read, even by the Supreme Court, in a restrictive way, since the courts have demanded that the absence of compliance with this requirement has to cause material defencelessness to the individual, thus limiting the spirit of the Directive, which is that the mere lack of translation of these documents is sufficiently harmful to their right of defence (Judgment of the Spanish Supreme Court 18/2016, of 26 January 2016, cited by the most recent 471/2019, of 7 February 2019).

Thirdly, it also needs to be highlighted that many of these reforms require, in parallel, new tools to enforce the rights recognised on paper - but here, Spain has not made the necessary investment. Especially striking and sad is the Spanish text of transposition of the Directive 2010/64, on Translation and Interpretation, that openly proclaims that the changes introduced “may not lead to an increase in staff, salaries or other personnel costs.” Hard to believe but true. This has led, among other consequences, to rendering the provisions of Art. 123 of the Spanish Criminal Procedural Law on simultaneous translations practically illusory.

---

<sup>28</sup>Case C-212/04, ECLI:EU:C:2006:443.

<sup>29</sup><https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2021:144:FIN#footnoteref11>.

## 5 Final reflections

In view of all of this, the balance clearly leans towards the side of success:<sup>30</sup> Spain can congratulate itself with the high level of protection that has reached in terms of fundamental rights in their criminal procedure due to European influence. But, also looking at the failures, it is quite sad to see that Spain has not taken more seriously its obligations arising from Europe and that it has not always tried diligently and rigorously to fulfill its duties towards the European Union.

We in Spain must believe we are part of Europe and that all that comes from the European institutions is as much ours as our national law because, if we and other Member States fail to do this, we will lose a unique opportunity to live in a privileged environment regarding the protection of human rights, which serves as an obligatory reference in the international field. To illustrate my last reflection, I should like to conclude, if I may, by quoting Winston Churchill (words that cause me special sorrow after Brexit):

“If Europe were once united in the sharing of its common inheritance, there would be no limit to the happiness, to the prosperity and glory which its three or four hundred million people would enjoy. . . We must build a kind of United States of Europe” (University of Zurich, 1946).

**Funding Note** Open Access funding provided thanks to the CRUE-CSIC agreement with Springer Nature.

**Open Access** This article is licensed under a Creative Commons Attribution 4.0 International License, which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons licence, and indicate if changes were made. The images or other third party material in this article are included in the article's Creative Commons licence, unless indicated otherwise in a credit line to the material. If material is not included in the article's Creative Commons licence and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder. To view a copy of this licence, visit <http://creativecommons.org/licenses/by/4.0/>.

## References

1. Aguilera Morales, M.: Justicia penal y Unión Europea: un breve balance en clave de derechos. *Diario La Ley* **8883**, 1–20 (2016)
2. Arangüena Fanego, C.: Las Directivas europeas de armonización de garantías procesales de investigados y acusados. Su implementación en el Derecho español. *Rev. Estud. Eur.* **1**, 5–40 (2019)
3. Campaner Muñoz, J.: Problemas derivados de la transposición de la Directiva 2010/64/UE sobre traducción e interpretación. In: Arangüena Fanego, C., De Hoyos Sancho, M. (eds.) *Garantías procesales de investigados y acusados*, pp. 87–105. Tirant lo Blanch, Madrid (2018)
4. De Hoyos Sancho, M.: Garantías procesales de las personas jurídicas investigadas y acusadas: armonización en el ámbito de la Unión Europea y situación actual en España. In: Arangüena Fanego, C., De Hoyos Sancho, M. (eds.) *Garantías procesales de investigados y acusados*, pp. 53–87. Tirant lo Blanch, Madrid (2018)
5. De Hoyos Sancho, M.: Tomarse en serio la presunción de inocencia. Reflexiones al hilo de las manifestaciones inculpatorias realizadas por una autoridad pública. *Diario La Ley* **9850**, 1–8 (2021)

<sup>30</sup>Aguilera Morales is of the same opinion (Aguilera Morales [1], p. 8).

6. Fernández Carron, C.: El derecho a la interpretación y a traducción en los procesos penales. Tirant, Valencia (2017)
7. Fernández López, M.: La mediación en los procesos por violencia de género. Aranzadi, Madrid (2015)
8. Gascón Inchausti, F., Villamarín López, M.L.: Spain. In: Vogler, R., Huber, B. (eds.) *Criminal Procedure in Europe*. Duncker & Humblot, Berlín (2008)
9. Gavara de Cara, J.C.: La asistencia letrada al detenido y la problemática constitucional de la trasposición de la Directiva 2013/48/UE. In: Freixes, T. (ed.) *Garantías del proceso debido y Unión Europea*. BOE, Madrid (2020)
10. González Monje, A.: La presunción de inocencia en la Unión Europea: Directiva 2016/343 del Parlamento Europeo y del Consejo. *Rev. Gen. Derecho Europeo* **39**, 1–28 (2016)
11. Guerrero Palomares, S.: ¿Es necesaria la transposición de la Directiva 343/2016, de 9 de marzo, en materia de presunción de inocencia? *Rev. Estud. Eur.* **1**, 164–183 (2019)
12. Jiménez Martín, J.: El derecho a la asistencia letrada del menor de edad sospechoso o acusado: cuestiones derivadas de las Directivas europeas. *Rev. Estud. Eur.* **1**, 118–143 (2019)
13. Jimeno Bulnes, M.: Towards common standarts on rights of suspected and accused persons in criminal proceedings in the EU? pp. 1–20. CEPS (2010)
14. Laro González, M.E.: Derechos y garantías del menor en el proceso penal. Armonización legislativa y necesidades procesales. *La Ley Unión Eur.* **73**, 1–12 (2019)
15. Manzanares Samaniego, J.L.: Mediación, reparación y conciliación en el Derecho Penal. Comares, Granada (2007)
16. Ortega-Herráez, J.M., Hernández Cebrián, N.: Instrumentos y medidas para transponer al ordenamiento jurídico interno el mandato de calidad de la traducción e interpretación de la Directiva 2010/64/UE: el caso de España a través de un análisis comparativo transnacional. *Rev. Estud. Eur.* **1**, 97–117 (2019)
17. Pillado González, E.: Implicaciones de la Directiva (UE) 2016/800, relativa a las garantías procesales de los menores sospechosos o acusados en los procesos penales, en la Ley de responsabilidad del menor. *Revista General de Derecho Europeo* **48** (2019)
18. Valbuena González, F.: Harmonization of procedural safeguards of suspected and accused persons. *Eucrim* **1**, 50–54 (2020)
19. Vidal Fernández, B.: Interpretación y aplicación del Derecho a la traducción de documentos esenciales por los tribunales penales en España. *Rev. Estud. Eur.* **1**, 79–96 (2019)
20. Villamarín López, M.L.: The presumption of innocence in Directive 2016/343/EU, of 9 March 2016. *ERA Forum* **19**, 335–353 (2017)

**Publisher's Note** Springer Nature remains neutral with regard to jurisdictional claims in published maps and institutional affiliations.