

**THE CHARTER OF FUNDAMENTAL  
RIGHTS OF THE EUROPEAN UNION  
AND THE RIGHT TO DEFEND  
ONESELF**

FERNANDO L. IBÁÑEZ LÓPEZ-POZAS

## SUMMARY

I. INTRODUCTION. II. APPLICATION OF THE RIGHTS CONTAINED IN THE CHARTER. 1. The first steps. 2. Application of the Charter, an undisputed fact. III. THE RIGHT TO DEFEND ONESELF. 1. Concept and basis. 2. The Right to defend oneself or the Right to be represented by Counsel? 3. Manifestations of the right to defend oneself. 4. The right not to incriminate oneself and the duty to co-operate with the authorities. a) The position of the ECHR. b) The position of the ECJ. c) Conclusion.

Fecha recepción: 20.04.2013  
Fecha aceptación: 22.05.2013

# THE CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION AND THE RIGHT TO DEFEND ONESELF

FERNANDO L. IBÁÑEZ LÓPEZ-POZAS

Doctor Contracted Professor. Department of Procedural Law at the National  
Distance Education University

## I. INTRODUCTION

The European Court of Human Rights reminds us that the aim of the Convention is not to guarantee theoretical or illusory rights, but rather practical and effective rights; this may be applied in particular to the rights of defence, bearing in mind the special importance that the right to a fair trial has in a democratic society, from which the said rights flow<sup>1</sup>.

The right of defence<sup>2</sup>, according to Gimeno Sendra, «is the fundamental right of every suspect to access the criminal justice system, as soon as he is suspected of having committed a criminal offence, and to designate a Lawyer at the choice of the accused or appointed by the Court as part of the said proceed-

---

<sup>1</sup> Case of Artico v. Italy, 13 May 1980, series A, No. 37, sections 32 and 33.

<sup>2</sup> In general terms, and without being exhaustive, the following may be consulted on the right to a defence: GIMENO SENDRA, V., «Constitución y Proceso», Ed. Tecnos, Madrid, 1988; MORENO CATENA, V., «La defensa en el proceso penal», Civitas, Madrid, 1982; FAIREN GUILLÉN, V., «El encausado en el proceso penal», in *Temas del Ordenamiento Procesal*, Tomo II, Tecnos, Madrid, 1969; PRIETO CASTRO Y FERRÁNDIZ, L., «La Defensa», in «Temas del Derecho actual y su práctica», Universidad de Salamanca, 1979; GUTIERREA-ALVIZ Y CONRADI, F., «El Derecho a la defensa y a la asistencia de Letrado en Derechos Procesales Fundamentales», *Manuales de Formación continuada*, vol. 22/2004, Madrid 2005.

ings, in order that both counsel for the defence and the suspect may carry out the tasks of making allegations, adducing evidence, and challenging evidence as they consider necessary, so as to effectively exercise the fundamental right to freedom which all citizens are entitled to, given that as they have not been convicted, they are presumed innocent»<sup>3</sup>.

The International Treaties ratified by Spain enshrine this Right, although they do so in a disparate way, and the formula they use can be more or less detailed. Thus the Universal Declaration of Human Rights, at article 11.1, provides 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 has had all the guarantees necessary for his defence».

Likewise the International Covenant on Civil and Political Rights provides as follows at article 14. 3 d): «to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right, and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it».

Lastly the European Convention on Human Rights provides as follows at article 6.3:

3. Everyone charged with a criminal offence has the following minimum rights:
  - a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.
  - b) To have adequate time and facilities for the preparation of his defence.
  - c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
  - d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.
  - e) To have the free assistance of an interpreter if he cannot understand or speak the language used in court.

It is important to emphasize that what the Charter does is to set out the fundamental rights, already enshrined in the national constitutions and in the inter-

---

<sup>3</sup> GIMENO SENDRA, V., «Manual de Derecho Procesal Penal», Madrid, Ed. Colex, 2010, p. 129.

national treaties<sup>4</sup>, for the citizens of the European Union, and this «visibility» is one of its greatest achievements, given that as Spiros Simitis said, «fundamental rights can only accomplish their mission if the citizens recognize their existence and are aware of the possibility of enforcing them (...) such that all individuals may be aware of them and have access to them; (...). Clearly-identifiable fundamental rights encourage a favourable disposition towards accepting the European Union. The means ought to be found to provide the rights with maximum visibility, which requires them to be expressly set out, at the risk of repetition, instead of a mere general reference to their existence in other documents»<sup>5</sup>.

We may say that this commendable statement has been realized only in part, if we take the right of defence as an example, given that the text went from setting out an extensive list of the rights of defence, as in article 6.3 of the Convention, to a concise statement in article 48.2 of the Charter, worded as follows «respect for the rights of the defence of anyone who has been charged shall be guaranteed».

But the fact is that in order to know what the content of those *rights* is we have to look to the «Explanations relating to the Charter of Fundamental Rights»<sup>6</sup>, a document drawn up under the responsibility of the Presidium of the Convention, which drafted the Charter of Fundamental Rights of the European Union and which establishes that «article 48 coincides with sections 2 and 3 of article 6 of the ECHR», in addition to referring to another article of the Charter, section 3 of article 52, in which it is stated that its meaning and scope shall be the same as those conferred by the said Convention. As such the said visibility is configured through the use of other international texts which will show us the facts about the right of defence.

The next step is to refer to the interpretation of the Convention through the caselaw of the European Court of Human Rights, which, *inter alia*, in its

---

<sup>4</sup> CALDERÓN CUADRADO, P., «Los derechos de la defensa. Una visión crítica de su reconocimiento en el ámbito de la Unión Europea», in «La Justicia y la Carta de Derechos Fundamentales de la Unión Europea», Ed. Colex, Madrid 2008, emphasizes the idea that «the Charter is above all an exercise in codifying the pre-existing rules», p. 108. SAIZ ARNAIZ, A. «De primacía, supremacía y derechos fundamentales de la Europa integrada: La Declaración del Tribunal Constitucional de 13 de diciembre de 2004 y el Tratado por el que se establece una Constitución» en AA. VV. Constitución Española y Constitución Europea: análisis de la Declaración del Tribunal Constitucional (DCT 1/2004, de 13 de diciembre), Madrid, Centro de Estudios Políticos y Constitucionales, pp. 51 a 75.

<sup>5</sup> Group of Experts of Fundamental Rights chaired by Spiros Simitis. Report «Affirming fundamental rights in the European Union: Time to act», Brussels, February 1999, pp. 11 and 12.

<sup>6</sup> Official Journal of the European Union C 303/29 14.12.2007.

judgment in the case of *Pakelli v. Germany*, judgment of 25 April 1983, section 31, held that section 3 of article 6 ECHR guarantees the accused three rights which may be formulated distinctly: firstly the right to defend oneself, secondly the right to defend oneself through legal assistance of one's own choosing, and finally and on certain conditions, the right to legal assistance free of charge.

To end it is worth mentioning that article 24.2 of our own Constitution provides the following rights, *inter alia*: a right of defence and to legal assistance; to be informed of the accusation made against one; not to incriminate oneself, and not to confess one's guilt.

These first few lines make it clear that the established relationship between the rights acknowledged in the European Charter of Fundamental Rights, in the European Convention on Human Rights, and in the national Constitutions, will compel the different Courts, with increasing frequency, to undertake an integrating overview of the right of defence and to develop its content.

## II. APPLICATION OF THE RIGHTS CONTAINED IN THE CHARTER

### 1. *The first steps*

For many years, the protection of human rights and fundamental freedoms within the European Union was a matter that was left to the jurisdiction of the Member States, and the Treaties did not envisage any overall European jurisdiction. This led to the European Court of Justice having to decide on fundamental rights whenever there was a clash between European Law and human rights, making certain statements<sup>7</sup> which we may classify as being the first steps or the foundations of fundamental rights in general, although these were not exactly for the protection of individuals<sup>8</sup>.

---

<sup>7</sup> Case 29/69, *Stauder v. City of Ulm*, Rep. 1969, p. 419, in which the ECJ accepted that European Law should not override human rights protected at a national level, and the Case of *Nold v. Commission*, Rep. 1974, p. 491, in which the ECJ held that fundamental rights form an integral part of the general principles of law, the observance of which it ensures» (section 13). RUBIO LLORENTE, F., *Una Carta de dudosa utilidad» en AA.VV. (Dir. Francisco Javier Matia Portilla) La protección de los Derechos Fundamentales en la Unión Europea*, Madrid, Civitas 2002, pp. 171 y ss.

<sup>8</sup> As an example of this situation of defencelessness, the judgment of the Court of 1 April 1965, case 40/64, *Marcello Sgarlata et al. v. Commission of the European Communities*.

In 1969 there was an important shift in the decisions of the Court of Justice, in that although according to the said Court Mr. Stauder's fundamental rights had not been infringed, it was held, firstly, that the provisions of European Law should be interpreted in the light of fundamental rights, that these are included within the general principles of European Law, and that furthermore those fundamental rights are guaranteed by the Court in its decisions<sup>9</sup>.

Continuing with this theme, the next decision we wish to refer to is the Nold<sup>10</sup> case, where the Court of Justice held that «international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community Law».

The last step, or the first instances of recognition and use of fundamental rights, is in the Rutili<sup>11</sup> judgment, where for the first time the Court of Justice refers to the Convention as an instrument of International Law for the protection of human rights, which it relies on as grounds for the decision taken<sup>12</sup>.

This path<sup>13</sup> followed by the Court of Justice with regard to fundamental rights is, as Pi Llorens says, the evolution that arises when the attitude towards fundamental rights shifts from one of inhibition to one of protectionism<sup>14</sup>.

In December 2000, an act of undisputed importance took place: the proclamation of the Charter of Fundamental Rights of the European Union, which document at the time was not binding given that it lacked an effective pronouncement taking into account its content.

And the same thing that happened with regard to fundamental rights in general, also applies to the application of the Charter, given that it is through

---

<sup>9</sup> Judgment of the Court of Justice of 12 November 1969, case 29/69, Erich Stauder v. City of Ulm-Solzalamt. We may consider that the next milestone was the judgment of 17 December 1970 in case 11/70, Internationale Handelsgesellschaft Mbh v. Einfuhr – Und Vorratsstelle Fuer Getreide Und Futtermittel.

<sup>10</sup> Case 4/73, Nold v. Commission of the European Communities, judgment of the Court of Justice of 14 May 1974.

<sup>11</sup> Case 36/75, Roland Rutili v. Ministry for the Interior, judgment of the Court of Justice of 28 October 1975.

<sup>12</sup> RAINIER ARNOLD. «Los Derechos Fundamentales Comunitarios y los Derechos Fundamentales en las constituciones nacionales» en AA. VV. (Dir. Francisco Javier Matia Portillo), *La Protección de los Derechos Fundamentales en la Unión Europea*, op. cit. pp. 50 y ss.

<sup>13</sup> With regard to this evolution, see SICILIA OÑA, B., «Derechos fundamentales y Constitución Europea», *Vitoria-Gasteiz Colección Derechos Humanos*. P. Francisco de Vitoria», Ararteko, 2006.

<sup>14</sup> PI LLORENS, M., «Los derechos fundamentales en el ordenamiento comunitario», *Barcelona, Ariel Derecho* 1999, p. 26.

the Conclusions presented by the advocate generals<sup>15</sup> in various cases that the Charter is brought to life and judgments start to be made in which the said Charter is mentioned.

The Court of First Instance also starts to apply the Charter in some of its decisions, and this is exemplified by the judgment of 30 January 2002, *Max. mobil Telekommunikation Service v. Commission*, which applied article 47 of the Charter indirectly, explaining that judicial control of the activities of the Commission, and as such, the right to effective judicial protection, form part «of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States»<sup>16</sup>.

In this process we would like to highlight the Conclusions of Advocate General Ruiz-Jarabo Colomer presented on 12 September 2006, in the case *Advocaten voor de Wereld VZW v. Leden van de Ministerraad* (Framework Decision 2002/584/JAI on the European arrest warrant and the surrender procedures between Member States).

Ruiz Jarabo proclaims that the Charter is not ineffective: «Firstly, it does not arise out of nothing, with no connection to its surroundings; on the contrary, it forms a part of the evolutionary process which I have set out, codifying and reaffirming, as is stated in its preamble, certain rights which derive from the common heritage of the Member States, in the national and international spheres, and as such the Union must respect these and the Court of Justice must protect them, according to the provisions of articles 6 EU and 46 EU,

<sup>15</sup> The case of *Bectu* (c-173/99), judgment of 26 June 2001. Advocate General Tiziano, in his conclusions, stated as follows: «... is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the Commission after approval by the Heads of State and Government of the Member States, often on the basis of an express and specific mandate from the national parliaments (...) we cannot ignore its (he refers to the Charter) clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context»; of Advocate General Mischo of 22 February 2001, presented in cases *D* and *Sweden v. Council* (judgment of 31 May 2001, C-122/99 P and C-125/99 P, Rec. p. I-4319), point 97; of Advocate General Jacobs of 14 June 2001, presented in the case *Netherlands v. Parliament and Council* (judgment of 9 October 2001, C-377/98, Rec. p. I-7079), point 197; of Advocate General Geelhoed of 5 July 2001 presented in the case *Baumbast and R* (judgment of 17 September 2002, C-413/99, Rec. p. I-7091), points 59 and 110.

<sup>16</sup> This was also done, *inter alia*, in the judgments of 3 May 2002, *Jégo-Quére v. Commission* (T-177/01, Rec. p. II-2365) and 15 January 2003, *Philip Morris et al. v. Commission* (T-377/00, T-379/00, T-380/00, T-260/01, and T-272/01, Rec. p. II-1).



section d), irrespective of the legal nature and the capacity of the text approved in December 2000».

Focussing now on the rights of defence, we should refer to the conclusions of Advocate General Verica Trstenjak presented on 3 May 2007 in Case C-62/06, *Fazenda Pública – Director Geral das Alfândegas v. Z. F. Zefeser – Importação e Exportação de Produtos Alimentares, L.da*.

In this case, the position of both the Portuguese and Irish Governments and the Commission, amongst other pre-trial questions, was that pursuant to the provisions contained at article 2 of the Regulations and its application, only the national customs authorities have the power to classify conduct as «an act that could give rise to criminal court proceedings». This argument is confirmed, according to them, both by the systematic structure of the provisions and by the wording of article 3 of the Regulations, which does not require the conviction of the interested party, referring also to the *Meico-Fell*<sup>17</sup> judgment, where the Court of Justice held that the customs authorities had powers to collect import taxes *a posteriori*.

In contrast, *Z. F. Zefeser* alleges that an act can only be classified as a criminal offence where it has been held to be so in a peremptory judicial decision. Only then, in his opinion, can there be grounds for *a posteriori* enforcement of collection rights in alleged infringements of the criminal law. He states that the principles of legal certainty and the presumption of innocence debar the legal opinion of the customs authorities and of the Public Prosecutor's Office from being the basis of the collection *a posteriori*.

According to Verica Trstenjak, in the examination of the pre-trial question, it is necessary to refer to the provisions of article 6, section 1, of the ECHR, pursuant to which in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which principle is formulated in similar manner in article 47 of the Charter of Fundamental Rights of the European Union. Taking into account these formulations, the Court of Justice has expressly laid down a general principle of European Law according to which everyone is entitled to a fair hearing, which principle is also applied within the scope of the criminal law<sup>18</sup>.

---

<sup>17</sup> Judgment of the Court of Justice of 27 November 1991 (C-273/90, Rec. p. I-5569).

<sup>18</sup> As a curiosity in this process we may recall that the European Court of Human Rights, even before the Court of Justice used the Charter, mentioned it in the judgments of the cases *I. v. United Kingdom*, and *Goodwin v. United Kingdom* of 11 July 2002.

2. *Application of the Charter, an undisputed fact.*

As from the entry into force of the Lisbon Treaty and pursuant to article 6 TEU, section 1, the Charter has the same legal value as the Treaties, and as a result currently forms a part of the Primary Legislation of the Union. The provisions of the European Convention on Human Rights have also been enshrined in the Lisbon Treaty and article 6 TEU, section 3, provides that the fundamental rights guaranteed by the Convention and those that result from the constitutional traditions common to the Member States, constitute general principles of the Union's law. From this it may be deduced that not just the Union and its institutions, but also the Member States, when they interpret and apply Union Law, are bound by the Charter and the Convention.

In order to highlight this «marriage» between the Convention and the Charter and its direct application, we shall quote the Conclusions of Advocate General Eleanor Sharpston presented on 18 October 2012, in Case C-396/11, Ministerul Public – Parchetul de pe lângă Curtea de Apel Constanța v. Ciprian Vasile Radu, in a request for a pre-trial decision brought by the Curtea de Apel Constanța (Romania).

For the purposes of this article, the pre-trial question petitioned the Court of Justice to interpret Framework Decision 2002/584 in relation to the entry into force of the Lisbon Treaty, and in particular if the said interpretation ought to change as a result of the amendments to the Treaty on the European Union introduced by article 6 TEU. It also raised the question of the relationship between the rules of the European Convention on Human Rights and Fundamental Freedoms (specifically article 5), and the Charter of Fundamental Rights of the European Union (article 6 in this case).

Mr. Radu alleged that the entry into force of the Lisbon Treaty gave rise to a substantial change to the way in which fundamental rights were applied in the Union. The answer from the Advocate General was in the negative, arguing that although the Charter was merely solemnly proclaimed in Nice on 7 December 2000, the decision on the precise legal rank it was to be conferred was postponed. As a result, it was not incorporated into any of the Treaties and its provisions were not given binding force through any other mechanism. However, it was quickly considered to be an authoritative catalogue of fundamental rights, given that it confirmed the general principles inherent to the Rule of Law common to the constitutional traditions of the Member States.

The Charter acquired the status of «Law of reduced effect», i.e. although its provisions are not directly applicable as part of Union Law, they are nonethe-

less capable of giving rise to legal consequences within the Union, often with far-reaching effects.

And this situation persisted until it was incorporated into the Lisbon Treaty, where the provisions of the Charter, including articles 48 and 52, form part of the Primary Law of the Union and the fundamental rights guaranteed by the Convention constitute general principles of Union Law, and as such they are permanently applicable<sup>19</sup>, as is enshrined in the judgment of the Court of Justice of 22 November 2012 in case C-277/11, the purpose of which is the request for a pre-trial decision filed, pursuant to article 267 TFEU, by the High Court (Ireland), by way of a judgment dated 1 June 2011, received by the Court of Justice on 6 June 2011, in the proceedings between Mr. M. and the Minister for Justice, Equality and Law Reform, in which it was stated: «In that regard, it must be recalled that observance of the rights of the defence is a fundamental principle of EU law (see, in particular, the judgments of 28 March 2000, Krombach, C-7/98, and 18 December 2008, Sopropé, C-349/07). In the present case, with regard more particularly to the right to be heard in all proceedings, which is inherent in that fundamental principle (...) that right is now affirmed not only in Articles 47 and 48 of the Charter, which ensure respect of both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 thereof, which guarantees the right to good administration».

### III. THE RIGHT TO DEFEND ONESELF

#### 1. *Concept and basis.*

As Bentham said «... If there is any law that may be called natural law and which has in itself the evident character of convenience and justice, it would seem to be the right to defend oneself, or to call on a friend to help in one's cause. Why force me to have my fate rest with a lawyer, if there is none in whom I have as much confidence as myself?»<sup>20</sup>.

Fenech defined defending oneself as a generic defence whereby the party in question defends himself personally through acts comprising actions or omis-

---

<sup>19</sup> CARRILLO SALCEDO, J.A., *Notas sobre el significado político y jurídico de la Carta de Derechos Fundamentales de la Unión Europea* *Revista de Derecho Comunitario Europeo*, n.º 9, enero-junio 2001 pp. 14 y 15.

<sup>20</sup> BENTHAM, Jeremy, «Tratados sobre la organización judicial y la Codificación», Imprenta de la Sociedad Literaria y Tipográfica, Madrid, 1845, translated by B. Dumont Chapter XXI, p. 79.

sions aimed at ensuring or preventing the success of the actions being brought against one<sup>21</sup>.

The right to defend oneself requires the direct intervention of the accused in the various stages of the proceedings<sup>22</sup> in the exercise of the right of defence, the need to attend the various stages, the power to adopt various positions in the face of the questions posed by the other party, from remaining silent to adducing facts and law, and even direct participation in oral hearings, examination of witnesses, and the right to have the last word<sup>23</sup>.

We consider that the ultimate grounds for this are to be found in the words of López Yagües: «the right of the accused to exercise his defence through direct intervention in the proceedings is based on the necessary respect for human dignity and on the acknowledgement that any person whose rights are threatened is entitled to the possibility of articulating the fight to safeguard them»<sup>24</sup>

## 2. *The Right to defend oneself or the Right to be represented by Counsel?*

Article 24 of our Constitution refers to the fundamental right «of defence and to be represented by Counsel», the Charter provides at article 47 that «Everyone shall have the possibility of being advised, defended and repre-

---

<sup>21</sup> FENECH NAVARRO, M., «Derecho Procesal Penal», Ed. Labor, Barcelona, 1952, pp. 457-458.

<sup>22</sup> For MIRA ROS, C., those who demand that the accused be allowed to defend himself by way of contesting the accusation or through his valid waiver of the right to defence, through remaining silent or through stating his conformity with the action brought by the parties, are individualist liberal postulates; in «Régimen actual de la conformidad», Ed. Colex, Madrid, 1988, p. 144.

<sup>23</sup> For GIMENO SENDRA, defending oneself forms part of the full entitlement of the accused, who is free to exercise or not to exercise it in the proceedings, and also exercising his fundamental right to remain silent, «Manual...», op. cit. p. 134. For his part, CAROCCA PEREZ maintains that defending oneself ought to be a right that cannot be waived, meaning simply that the party cannot of his own volition decide that he should not be allowed the possibility of intervening personally in the various stages of proceedings at which matters concerning his interests are being discussed. In effect, all jurisdictional proceedings should establish the possibility that the interested parties may intervene. The grant of this opportunity, for which purpose proper notice is required, is therefore one that cannot be waived or refused by the interested party. It is another matter where the party should decide not to intervene after being offered the possibility to do so, but this would amount not to a waiver of his fundamental right of defence, in the form of defending oneself, but would rather constitute an exercise of this right; «Garantía constitucional de la defensa procesal», Ed. Bosch, Barcelona 1998, p. 450.

<sup>24</sup> LÓPEZ YAGÜES, V., «El derecho a la asistencia y defensa letrada», Universidad de Alicante, 2002, p. 53.

sented», adding in the next paragraph that «Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice», and subsequently article 48.2 provides for «respect for the rights of the defence».

This formulation, as is also the case in our Constitution<sup>25</sup> could lead us to think that we find ourselves in the presence of two fundamental rights, one fundamental right to professional defence through the expression «advised, defended and represented», to which the possibility is subsequently added that this should be free of charge, and a second fundamental right, contained at article 48, which would be composed, together with other rights, of the possibility to defend oneself.

If we refer to article 6.3 of the European Convention on Human Rights in order to determine if we are in the presence of a fundamental right to professional assistance and a fundamental right to defend oneself, following the provisions contained in the Explanations of the Charter, and we refer to the wording of the precept, we find that there is a divergence between the official English and French versions with regard to the right to be assisted free of charge by a lawyer appointed by the court.

The English version reads as follows:

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

c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;

The rights are joined by the conjunction «or».

In contrast, the French version:

3. Tout accusé a droit notamment à :

c) se défendre lui-même ou avoir l'assistance d'un défenseur de son choix et, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat d'office, lorsque les intérêts de la justice l'exigent;

---

<sup>25</sup> DÍEZ PICAZO GIMÉNEZ, I., «Comentarios a la Constitución Española de 1978». Directed by ALZAGA VILLAAMIL, Tomo III, Artículo 24, Ed. Edersa, 1996, p. 74, it examines this question and asks whether article 24.2 proclaims a fundamental right to private defence or to defend oneself before the Courts.

The rights to defend oneself and to be assisted by legal assistance of one's own choosing are separated by «ou» (i.e. «or»), whilst the right to free legal assistance from a duty lawyer is joined by «et» (i.e. «and»)<sup>26</sup>.

If we refer to Spanish learned opinion in the examination of this question, it has been presented as a conflict between the two rights, in which the scope of each one within the field of the right of defence is strengthened or limited<sup>27</sup>.

The question of the right to defend oneself has also been tackled directly by our Constitutional Court in various judgments, mainly judgment 29/1995 which established the scope of this right. It held that the right of private defence or the right to defend oneself, even in the context of a legal culture such as our own, dominated by the practice of professional defence, does actually form a part of the more generic right, acknowledged at article 24.2 of the Spanish Constitution, «to a defence»<sup>28</sup>.

In accordance with this understanding or interpretation of article 24.2 of the Spanish Constitution in relation to article 6.3 c) ECHR, the right to defend oneself, even if including it in certain situations, does not merely consist of an alternative right to the right to be represented by counsel, but rather it always has its own specific content, relatively autonomous, in so far as it is an expression of the somewhat dual nature of criminal defence, which is normally composed of two procedural participants, the accused and his Defence Counsel, irrespective of their unequal importance.

The content of the right to defend oneself does not extend to the power to do away with the compulsory professional defence. The legal requirement for

<sup>26</sup> ESPARZA LEIBAR, I., and ETXEBERRIA GURIDI, J.F., state that the aim of the precept under examination is none other than to ensure effective protection of the right of defence, for which purpose the French version, which is the model chosen by the authors of the Spanish version, provides, in the opinion of the ECHR, greater certainty or coverage. «Comentario al artículo 6», p. 227, in *Convenio Europeo de Derechos Humanos. Comentario Sistemático*. Director Lasagabaster Herrarte, I., Ed. Civitas, 2004.

<sup>27</sup> LÓPEZ YAGÜES, V., «El derecho a la asistencia...», op. cit., examines the opinions of the various sectors of learned opinion. See also: ARANGÜENA FANEGO, C., Exigencias en relación con el derecho de defensa: el derecho a la autodefensa, a la defensa técnica y a la asistencia jurídica gratuita (art. 6.3.c) (CEDH)» en AA. VV. (Dir. Javier García Roca y Pablo Santolaya Machetti) «La Europa de los Derechos» Centro de Estudios Políticos y Constitucionales, 2009 pp. 389 a 406.

<sup>28</sup> See among other sentences: Tribunal Constitucional, Sala Primera, Sentencia 65/2007 de 27 Mar. 2007, rec. 2508/2004, Tribunal Constitucional, Pleno, Sentencia 258/2007 de 18 Dic. 2007, rec. 2670/2004, Tribunal Constitucional, Pleno, Sentencia 91/2000 de 30 Mar. 2000, rec. 3868/1998, Tribunal Constitucional, Sala Segunda, Sentencia 45/2011 de 11 Abr. 2011, rec. 823/2010, Tribunal Constitucional, Sala Primera, Sentencia 199/2009 de 28 Sep. 2009, rec. 4234/2007.

defence through Counsel has its own specific legitimacy, in particular for the benefit of the accused himself, but also as a guarantee of due process in criminal proceedings, in particular ensuring there is no coercion during police interviews, and in general terms a level playing field in oral trials, and avoiding the possibility of the accused being defenceless so that professional prosecution can be countered by professional defence.

Sometimes the right of the accused to be assisted by Counsel is a pure right; on other occasions, and in addition to representation by a Court Advocate, it is a procedural requirement which the judicial body must ensure is complied with where the accused fails to do so through the pertinent exercise of the said right, informing him of the right to do so or even, when his passive attitude continues despite it all, with the direct appointment of Counsel and Court Advocate.

In this regard, the European Commission of Human Rights has found that article 6.3 c) «does not guarantee the accused the right to decide for himself in which way he should be defended», and it is the pertinent authorities who are to decide if the accused is to defend himself or with the assistance of a lawyer chosen by the accused or by a lawyer appointed by the court (decision on the admissibility of the claim no. 5,923/72 against Norway, 3 May 1975).

Numerous decisions have held, with the same aim of referring to national Law in the regulation of this matter, that «the State has powers to regulate the appearance of Lawyers before the Courts and their duty to abide by certain ethical principles» (decision on the admissibility of claims nos. 7,577/76, 7,586/76, and 7,587/76, Ensslin, Baader, and Raspe v. the Federal Republic of Germany, 8 July 1978).

The Commission, in the Green Paper on «Procedural safeguards for suspects and defendants in criminal proceedings throughout the European Union<sup>29</sup>» concluded that although all rights comprising the notion of «right to a fair trial» were important, some rights were so fundamental that it was necessary to give them priority at this stage. The first of all these rights was the right to advice and to be assisted by a lawyer. Without a lawyer, a suspect is less likely to be aware of his rights, and as such, it is less likely they will be respected. The Commission considers this right to be the foundation for all the others.

In *Hoechst v. Commission*<sup>30</sup>, the European Court of Justice explicitly held that the right to be represented by counsel is one of the fundamental rights governing administrative proceedings, and any infringement of this right can

---

<sup>29</sup> Commission of the European Communities. Brussels 19.02.2003. COM 2003 75.

<sup>30</sup> Cases 46/87 and 227/88, *Hoechst AG v. Commission*, Rec. 1989, p. 2859, sections 15 and 16.

lead to a penalty, also holding that the possibility of the said right being irredeemably damaged in preliminary investigation proceedings must be avoided, especially in any verifications, which may play an essential part in securing evidence of the unlawful conduct of companies resulting in the liability of the said companies.

Thus, although some manifestations of the right of defence only affect adversarial proceedings following service of notice of the charges one is accused of, others, such as the right to legal advice and the right to the confidentiality of any correspondence between the Lawyer and the client (recognized by this Court in its judgment of 18 May 1982, AM & S, 155/79, Rec. 1982, p. 1575), must be respected as far back as the preliminary investigations.

Lastly the European Court of Human Rights, in the case of *Benham v. United Kingdom* (1996), held that «where the deprivation of liberty is at stake, in principle the interests of justice call for legal representation».

All of these manifestations make it clear that there is a double manifestation of the right of defence<sup>31</sup> which includes both the right to be advised by a lawyer, and the right to perform one's own defence personally and actively, and that this only limits or excludes professional assistance where the simplicity of the matter should allow this.

### 3. *Manifestations of the right to defend oneself*

The next step is, as Spiros Simitis said, to make this right to defend oneself «visible» in our Criminal Procedure Act and then seek to have it enshrined in proceedings before the European courts. The verification of expressions or manifestations of this personal or private defence, whether in ordinary or abridged criminal proceedings, and in particular in summary trials for minor offences, and at this time, and clearly, leads us to confirm and verify the scarce impact that this right has in our Procedural Law.

Following the Constitutional Court, we may cite, in the investigation stage, the verbal proposition of the challenge against the investigating judge by the defendant deprived of his liberty under the *incommunicado* régime (article 58 Criminal Procedure Act); personal attendance at the investigation proceedings (article 302 Criminal Procedure Act), and in particular, the possibility of making

---

<sup>31</sup> According to BASSIOUNI, M.C., choosing one does not constitute a waiver of the other or result in the exercise of the other being barred, in «Human Rights in the context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions», *Duke Journal of Comparative and International Law*, no. 3, 1993, p. 283.



observations in the visual inspection procedure (article 333 Criminal Procedure Act) and in the procedure concerning the «body of the offence» (article 336.2 Criminal Procedure Act) the possibility of appointing expert witnesses (articles 350.2, 356, and 471.2 Criminal Procedure Act); applications for the performance of an identification procedure (article 368 Criminal Procedure Act); the possibility of personally challenging the Ruling for converting arrest into remand in custody (article 501 Criminal Procedure Act), or finally, and as the most significant possibility, that of testifying as many times as one likes and whenever considered pertinent in one's defence throughout the trial (articles 396 and 400 Criminal Procedure Act). For its part, in the oral trial stage, it is worth pointing out how the accused may state his conformity with the sentence being sought by the prosecution (articles 655 and 793.3 Criminal Procedure Act) prior to the debates taking place, as well as exercising his «right to have the last word» (article 739 Criminal Procedure Act).

For this reason, despite the fact that it is acknowledged by our constitution, and as Moreno Catena says, «the Criminal Procedure Act does not allow the accused sufficient means in order to exercise his right to defend himself», going on to say that «the right to defend oneself (...) appears in Spanish law as something completely residual»<sup>32</sup>.

When we talk of those expressions of the right to defend oneself, we ought to consider whether they can be transferred to European Law, or furthermore, if the right of defence and/or the right to defend oneself have given rise to other manifestations thereof or to the transformation or expression in other forms in which the accused must defend himself or carry out some act before the authorities or the jurisdiction.

As we said at the beginning of this article, the rights of defence are set forth in sections a) to e) of article 6.3 ECHR, but we are not dealing with a closed list, on the contrary, the said article states that all accused have the following «minimum» rights. This interpretation has been upheld by the caselaw of the European Court of Human Rights, providing for «new» rights such as the right «not to incriminate oneself»<sup>33</sup> within the rights of defence. With regard to this right, expressly recognized by our Constitution, we consider it to be a manifestation of a broader right, the right to defend oneself, by considering the accused to be an active element within the proceedings who has the capacity to decide to remain silent, to co-operate, to testify, etc., and we also consider

---

<sup>32</sup> MORENO CATENA, Víctor, «La defensa en el proceso penal», Ed. Civitas, Madrid, 1982, p. 33.

<sup>33</sup> Case of Funke v. France, judgment of 25 February 1993.

that it is included within «the rights of defence» contained at article 48 of the Charter of Fundamental Rights.

4) *The right not to incriminate oneself and the duty to co-operate with the authorities*

This right has been recognized by the caselaw of both the European Court of Human Rights and the European Court of Justice, although not uniformly. We shall start by briefly setting out the approach of the two Courts.

a) The position of the ECHR

The European Court of Human Rights decided on this matter in the well-known *Funke* judgment which concerned a German citizen resident in France who alleged an infringement of article 6 of the Convention on the basis that he considered that his conviction for refusing to hand over certain documents required by the Customs service infringed his right not to incriminate himself. In the said judgment, the Court «notes that the customs secured Mr Funke's conviction in order to obtain certain documents which they believed must exist, although they were not certain of the fact. Being unable or unwilling to procure them by some other means, they attempted to compel the applicant himself to provide the evidence of offences he had allegedly committed to remain silent and not to contribute to incriminating himself».

This view is completed with the view stated in the judgment of the *Saunders* case<sup>34</sup> in which the claimant complains about the use of the statements made before the inspectors of the Ministry of Trade and Industry in the criminal proceedings against him. Although an administrative investigation may entail a «criminal charge», in accordance with the meaning that the caselaw of the Court gives to this independent concept, it has not been argued before this court that article 6.1 of the Convention was applicable to proceedings pursued by the inspectors or that those proceedings could entail a criminal charge within the meaning of the said precept (judgement of *Deweere v. Belgium* of 27 February 1980). In this regard, the Court reminds us of its judgment in the case of *Fayed v. United Kingdom*, in which it held that the inspectors acting in accordance with article 432.2 of the Companies Act 1985 had an investigative role and that their aim was to attain and secure facts that could later be used as

---

<sup>34</sup> Case of *Saunders v. United Kingdom*, judgment of the European Court of Human Rights of 17 December 1996.

the basis for action by other pertinent authorities – criminal, administrative, disciplinary, or even legislative<sup>35</sup>.

As was stated in this case, to require that in these cases a preliminary investigation should be subject to the safeguards of judicial proceedings within the meaning of article 6.1 would in practice result in an undue hindrance to effective administration of complex financial and commercial activities in the public interest, and as such the only control activity of the Court is to examine the use of the statements in criminal proceedings.

In this case the British Government did not deny in its allegations that the claimant had been subjected to legal pressure to testify. British legislation, specifically articles 434 and 436 of the Companies Act 1985, obliged the claimant to answer the questions given that a refusal by the claimant to answer would have entailed a conviction for disobedience and the imposition of a fine or custodial sentence of up to two years, and it is not a defence when posed with those questions to allege that they are of an incriminatory nature. The British Government emphasized the fact that none of the answers given by the claimant were self-incriminatory and that only such answers fall within the right not to incriminate oneself and given that the claimant only gave answers that exonerated him, no rights had been infringed even though the said answers had served as the basis for his conviction.

The European Court of Human Rights did not accept this argument from the Government, noting that some of the answers given by the claimant were, in reality, incriminating, in the sense that they entailed an admission of knowledge of information which incriminated him. In any event, bearing in mind the concept of a fair trial under article 6, the right not to incriminate oneself cannot reasonably be confined to manifestations of admissions of unlawful activities or to observations which are directly incriminating. Testimony obtained under compulsion which appears not to be incriminatory, such as exonerating allegations, or mere information on questions of fact, and which may be later used in criminal proceedings by the prosecution in support of its case, e.g. by contradicting or casting doubt on other statements by the accused or other evidence in which he intervenes or in order to undermine his credibility, can also infringe his right of defence. According to the Court the public interest cannot be invoked in order to justify the use of answers given compulsorily in a non-judicial investigation in order to incriminate the accused during the trial.

---

<sup>35</sup> Judgment of 21 September 1994.

With these judgments<sup>36</sup> we may see how the European Court of Human Rights has made it clear that despite requirements laid down in national legislation on certain cases, there is no procedure that allows a limitation of the rights of defence.

As is stated by Nieto and Blumenberg «at least in these cases, the rights of defence are configured as an absolute fundamental right, in the sense that they may not be limited by being weighed against the interest of the protection of the activity and efficacy of the inspection or the needs for evidence»<sup>37</sup>.

#### b) The position of the ECJ

The leading judgment of the European Court of Justice is that of the «Orkem v. Commission» case<sup>38</sup>, and the first thing we ought to say about it is that it should be viewed within the historical context in which the ECJ found itself with regard to fundamental rights and which we have developed in the main body of this article. As such, it should also be pointed out that the case-law it establishes has been upheld in numerous judgments<sup>39</sup> and in the conclusions of the advocate generals<sup>40</sup>.

In this case the Court of Justice had to assess the powers of the Commission with regard to inspection in view of the right of defence and the Court of Justice held that companies are under a duty to actively co-operate with the investigation measures. However, the duty to co-operate actively with the Com-

---

<sup>36</sup> Evidently there have been other judgments which have upheld these declarations such as the case of *J.B. v. Switzerland*, 3 May 2001, in which the Swiss Government alleged that the information required was only effective within administrative proceedings; the case of *Weh v. Austria*, 8 April 2006; the case of *Heaney and McGuinness v. Ireland*, 21 December 2000.

<sup>37</sup> NIETO MARTÍN, A., and BLUMENBERG, A., «Nemo tenetur se ipsum accusare en el Derecho Penal Económico Europeo», p. 405, in «Los Derechos fundamentales en el Derecho penal Europeo», Directores Díez-Picazo, L.M., and Nieto Martín, A., Madrid 2010, Ed. Civitas Thomson Reuters.

<sup>38</sup> Case of *Orkem v. Commission*, 374/87, judgment of 18 October 1989.

<sup>39</sup> Case of *Limburgse Vinyl Maatschappij et al. v. Commission*, judgment of 15 October 2002, case of *Aalborg Portland et al. v. Commission*, judgment of 7 January 2004, *ThyssenKrupp Stainless GmbH v. Commission*, judgment of 14 July 2005, Case of *Mr. M. and Minister for Justice, Equality and Law Reform, Ireland, Attorney General*, judgment of 22 November 2012.

<sup>40</sup> Amongst other Conclusions by the Advocate General Mr. L.A. Geelhoed presented on 19 January 2006, Case C-301/04 P, *Commission of the European Communities v. SGL Carbón*.

mission does not mean that the company has to incriminate itself admitting to infringements of the competition rules.

In this regard, the Court of Justice drew a distinction between answering questions on the one hand, and the submission of documents on the other. With regard to the former, the Court of Justice established another distinction. It held that the Commission has powers to compel a company to answer questions of a factual nature, but it does not have the power to compel a company to provide answers which could amount to an admission by the company of the existence of an infringement. When faced with the latter situation a company may exercise its right to remain silent as part of its right of defence. With regard to documents, the Court of Justice did not limit the powers of the Commission concerning inspections. The company in question must notify the documents that exist in relation to the subject matter of the investigation, even where the said documents may be used to prove the existence of an infringement, where it is asked to do so. In addition, in order to detect some of the more serious cases, the Commission established a policy of co-operation. This policy is set forth in the so-called Communication on co-operation. In exchange for co-operation (supplying relevant information and evidence), the fine may be reduced, in accordance with the degree of co-operation.

Lastly it should be pointed out that the policy of co-operation does not entail any obligation, on the contrary, it is based on voluntary co-operation. As such, a reduced fine in exchange for co-operation is compatible with the right of defence, and in particular, with the right not to incriminate oneself. Furthermore, the reduced fine will be granted for a contribution during the administrative proceedings only where the said contribution allowed the Commission to determine the existence of an infringement more easily, and where appropriate, put an end to this.

### c) Conclusion

It is evident that the ECJ, despite stating that it attaches great importance to the caselaw of the European Court of Human Rights, diverges from it completely in the judgments in the cases of *Funke* and *Saunders*. The justification for this interpretation has been provided in numerous judgments, focussing, first of all, on the fact that it is not possible to merely extrapolate the finding of the European Court of Human Rights to corporate bodies or companies. Competition Law refers to companies and the Commission only has powers to impose fines on companies and groups of companies where they breach articles 81

EC and 82 EC, and the right not to incriminate oneself is reserved exclusively for natural persons and may not be invoked by juristic persons. And secondly, whilst not considering the possibility that the ECHR may extend certain rights and freedoms to companies and other juristic persons, this Court also applies the level of protection conferred on natural persons and juristic persons differently<sup>41</sup>.

Even if the arguments set forth are true, the position of the ECJ in giving preference to Community administrative rules does not mean that the fact the right to defend oneself does not apply in administrative proceedings cannot lead to data collected without any form of controls being subsequently used in criminal proceedings, thereby breaching article 6 of the Convention and articles 47 and 48 of the Charter.

**Título:**

LA CARTA DE DERECHOS FUNDAMENTALES DE LA UNIÓN EUROPEA Y EL DERECHO A LA AUTODEFENSA

**Sumario:**

I. Introducción. II. La Aplicación de los derechos recogidos en la Carta. 1. Los primeros pasos. 2. La Aplicación de la Carta, una realidad incontestable. III. El Derecho a la Autodefensa. 1. Concepto y fundamento. 2. ¿Derecho a la autodefensa o derecho a la asistencia de Letrado? 3. Manifestaciones del derecho a la autodefensa. 4. El derecho a la no autoincriminación y la obligación de colaborar con la administración. a) La postura del TEDH. b) La postura del TJCE. c) Conclusión.

**Abstract:**

A study is presented into the right of defence in the Charter of Fundamental Rights of the European Union with regard to the European Convention and the Spanish Constitution, in order to establish, on

---

<sup>41</sup> As an example of this position, reference is made to the judgment in the case of Niemietz v. Germany of 16 December 1992 in which it is held that the protection of the offices of companies may be lower than that of private dwellings. The Court held that the concept of «home» may be extended to the office of a professional and that such an interpretation would not unduly hinder the Contracting States, given that they would maintain their right to intervene. In the case of Colas Est *et al.* v. France in the judgment of 16 April 2002, the ECHR also held that under certain circumstances the rights guaranteed by article 8 may be interpreted to mean that they include the right to respect the registered office, branch offices, and other offices of a company.

the basis of this premise, the existence of two fundamental rights, a fundamental right to receive professional defence, and a second fundamental right, which is composed, in association with other rights, of the possibility of defending oneself.

The enforcement of the Charter by the Court of Justice of the European Union and by the European Court of Human Rights is examined, at different times in its history, up until its integration into the Lisbon Treaty, through which the provisions of the Charter form part of the primary legislation of the Union. Lastly, the manifestations of the right to defend oneself are examined, and in particular the right not to incriminate oneself in the caselaw of the CJEU and the ECHR.

**Resumen:**

Se presenta un estudio sobre el derecho de defensa en la Carta de Derechos Fundamentales de la Unión Europea en relación con el Convenio Europeo y la Constitución Española para, a partir de esta premisa, establecer la existencia de dos derechos fundamentales, un derecho fundamental a la defensa técnica y un segundo derecho fundamental, que estaría conformado, junto con otros derechos, por la posibilidad de la autodefensa.

Se analiza la aplicación de la Carta, por el Tribunal de Justicia de la UE y por el Tribunal Europeo de Derechos Humanos, en distintos momentos históricos hasta su integración en el Tratado de Lisboa en el que las disposiciones de la Carta forman parte del Derecho primario de la Unión. Por último se estudian las manifestaciones del derecho a la autodefensa y en especial el derecho a la no autoincriminación en la jurisprudencia del TJUE y del TEDH.

**Key Words:**

Fair Trial, defending oneself, right not to plead guilty, right not to incriminate oneself

**Palabras Clave:**

Juicio Justo, autodefensa, derecho a no confesarse culpable, derecho a la no autoincriminación.

