

## **Materiales docentes en Inglés**

### **THE SPANISH CRIMINAL PROCESS**

#### **UNIT 1 THE CRIMINAL PROCESS**

##### **I. THE CRIMINAL PROCESS.**

Civil law, as the law that governs private relationships between individuals, is applied in order to give legal significance to acts of life, in general. For instance, legal agreements are signed when a property is bought, a marriage is created, or dissolved through divorce, etc. Civil procedure is, then, of private nature, and therefore its rules are based on the autonomy and willingness of the parties, so that a judicial activity is performed when conflicts arise and, particularly, when explicit requests –claims- from parties have been submitted before the Judge. The civil process is governed, therefore, by the parties' willingness. So, one of its characteristics is to give freedom to them in order to operate the process, i.e. to institute it or to stop it if they wish.

The autonomy of the parties in the civil process has its rationale in section 33 of Spanish Constitution, which recognises the citizen's right to private property. That means that citizens are entitled, as the owners of the right, to protect it if they wish, therefore, in this way, if a citizen believes that his right has been violated by the intrusion of a third party, he/she can, therefore, enforce it by filing a complaint before the court or, conversely, remain passive.

On the other hand, a criminal act is a public phenomenon and therefore the will and autonomy of the parties plays no role at all. However there is an exception for private crimes such as libel and slander where forgiveness of the victim is allowed, and only subject to prosecution by the victim. And somehow, also semipublic crimes where a prior request by issuing a *denuncia* (formal complaint presented by the victim before the police, Public Prosecutor or Judge) is a condition for the Public Prosecutor in order to proceed with it.

In short, the public nature of criminal acts determines the structure and content of the criminal process, so that the principles that govern it are to be considered within a framework of public justice and, therefore, not private. The consequences are redirected to the following aspects:

### **Legitimacy.**

Legitimacy is an aspect to bear in mind in order to request a punishment for the criminal act that has been committed. That legitimacy belongs only to the State and not to aggrieved parties. The criminal prosecution is based on the right to prosecute and charge with criminal counts against the accused person, and this kind of right belongs to the State through its criminal justice agencies, i.e., police, public prosecution service and the judiciary. Individuals are not entitled either to agreeing in a private document the imposition of criminal penalties, or agreeing the non-imposition of the punishment, or even deciding when a crime has or has not been committed.

#### **a) The criminal action**

By criminal action we mean the declaration of will to launch a prosecution against the defendant, requesting the judge or criminal court to convict the defendant through a sentence, or to impose a security measure on the grounds of the commission of a criminal offence. In other words, the procedure by which a party charged with a public offence is accused and brought to trial and punishment.

The criminal action is brought by the State through the Public Prosecutor, with the exception of semipublic crimes (assault, sexual harassment, abuse, discovery and disclosure of secrets, breach of duty for providing food, damage caused by gross negligence on an upper level of 80,000 Euros, etc.), and private crimes (only libel and slander) in which the claim is brought by the victim. But also, the victim or any other person or legal entity is entitled to launch a prosecution through the exercise of what is called a prosecution brought in the name of the people namely *acción popular*.

The criminal process is governed by the principle of legality, which means that the existence of an alleged criminal offence always leads to the initiation of a judicial

process (section 300 CPC). In Spain there is no discretion to prosecute at the Public Prosecution Office, as in England or the United States. In Spain the principle of legality obliges the Public Prosecutor to launch a prosecution any time a crime has been committed and reported to the Judge, police or Public Prosecutor.

**In summary**, when a private crime has been committed, the victim is the only individual entitled to initiate a criminal proceeding and to decide on its continuation until its final stage, or semipublic crimes, it is also necessary a prior complaint by the victim, but the victim cannot simply forgive the offender (as in the private crimes) because the public prosecutor is a constituted party and to whom the decision whether or not to continue the prosecution is concerned.

On the other hand, in public crimes the process can be initiated by any individual or *ex officio* by the public prosecutor or by the judge, as they are bounded by the law to do so when they know of the commission of a crime, such as murder (for instance no one gave notice of the crime but the body has been found).

#### **b) Discretion to prosecute.**

As crimes are of public nature, no appeal to alternative ways of private dispute resolution such as arbitration, or abnormal termination of the criminal procedure, such as waiver, acquiescence or abandonment of the criminal action is allowed. The dispositive principle does not apply in the criminal process

However there are some formulas based on the principle of opportunity such as conformity (*conformidad* in Spanish it is a term similar to guilty plea in English). Through this, the defendant and the counsel accept to be charged for the most serious penalty assuming responsibility for those charges, and it has the effect of immediately issuing a judgment without trial (sort of guilty plea).

## **B. The judicial monopoly**

Only Judges can pass sentence, and only in the context of a criminal procedure may the judge impose a sentence or a security measure against the defendant (Section 3 CPC)

## **C. State interest in criminal investigations.**

As the crime is of public nature, it is the State's duty to investigate and prosecute the crimes and the perpetrators, so the State must set the necessary means, both human and material as well as legal rules.

When it comes to investigation, we refer to a neutral and disinterested investigation. Criminal investigation should be done both for and against the accused so that the discovery of the truth is the main focus. Thus, the investigation stage will lead not only to prepare the indictment, but also is directed at preparing the defence. During the investigation facts could be discovered that can be used not only to support the charge but also to justify the exclusion of criminal liability of the accused person. The trial should be held when there is sufficient evidence to determine the commission of a criminal offence and that the accused person is the perpetrator.

The judicial police are the body in charge of carrying out the criminal investigation tasks under the direction of the investigative judge. The police investigation will be conducted in a preliminary stage, aimed at providing relevant evidence and sufficient information to enable the Public Prosecutor to launch a prosecution.

### **In short: the investigation stage has to justify the following:**

1. The subsequent trial preparation requires prior investigation and records of the commission of the offence and the circumstances including its perpetrator.

2. Prosecution should only be suffered by the accused when there is sufficient evidence to do so, and it should be determined before the opening of the next phase, if there is sufficient evidence to proceed.

#### **D. The material equality.**

We insist on the idea of the existence of a public inquiry, and an effective and impartial investigation to defend and protect the law without regards to other interests, especially political ones.

The State is obliged to strengthen their judicial police, to provide them with means and expertise skills as they can meet powerful people who have significant resources and influences, sometimes exorbitant. The independence of the police is essential in order to maintain an effective justice system and to avoid the risk of partial investigations.

#### **E. The accused's defence**

The fundamental right to defence is integrated with a catalogue of fundamental and instrumental rights:

- The right not to make a statement;
- The right not to give evidence against oneself;
- The right to be presumed innocent;
- The right to respect one's physical and moral integrity;
- The right to respect one's dignity;
- The right to not be discriminated against, on grounds of age, sex, religion, opinion, nationality or any other personal circumstance;
- The right to be assisted by a defence lawyer of one choice or by a legal-aid lawyer;
- The right to remain silent;
- The right to have an interpreter if the defendant does not understand the language;

- The right to be heard;
- The right to challenge the evidence against the defendant.

The right to defence is thus a fundamental right and, as such, must be protected not only passively by the State but also actively, by protecting it effectively.

The first right that must be recognised to the suspect in a criminal investigation is to gain access to the process, so that he/she can be heard by an independent tribunal. Secondly, they must have knowledge of the existence of a criminal process against them, for which they must personally be informed of the facts and evidence against them. Such information on the probable cause against them must be clear and precise as affects the right to defence and that right could be infringed if generic or vague information is transmitted.

The accused's access to criminal proceedings must begin with the information of the contents of the criminal investigation. In this sense, this right is exceptionally limited when the judge agrees to the secrecy of the investigation under section. 302.II CPC . The defendant's right to defence could be limited when the judge decides the secrecy of the investigation. Thereof, the defendant is not allowed either to gain access to any piece of evidence that is being gathered by the police, or what investigative step is being carried out by the police (for instance, a telephone tapping). However, in order not to violate the right to defence, the defendant should know exactly all the facts under investigation since, otherwise, we cannot take that right seriously.

The right to be informed of the cause and the possible charges (section 14.3.d International Covenant on Civil and Political Rights - and section 6.3 ECHR) involves not only the obligation to transfer the information of the charges with adequate time for the defendant to effectively give a plausible answer, but also the obligation to inform the accused of their rights, of the charges prior to the interrogation, and the obligation to provide an interpreter amongst others.

The technical defence (to be assisted by a lawyer) is mandatory, so it is an obligation to the State to appoint a counsel (when the defendant has not appointed one of his confidence), even against the will of the defendant. There is, however, an exception in cases of petty offences (*faltas*) and private offences, where the technical advice by a lawyer is not compulsory. The right to defence extends technical assistance and legal

advice throughout the whole criminal process, i.e., until a decision that will put an end to the case is obtained (order of dismissal or file), or until the final judgment. Thus, the defence shall continue serving in the procedural stage for which the counsel has been designated; being this is in the first instance, in the appeal, etc.

The accused must be treated as a subject of process and held as such should be interpreted in terms of exercising the right to defence. Thus, when it comes to making any statements they will be taken only as manifestations of acquittal, unless voluntarily plead guilty, or when formulas of opportunity as *conformidad* applies. That is, when the defendant is subjected to any statement, it must be understood that is an opportunity for him/her to defend him/herself and not for the purpose of obtaining a confession. However, if all warranties and rights available to the defendant have been respected, any voluntary statement of guilt could be presented in court as evidence against him/her.

In summary, the modern criminal process is not intended to be a tool of coercion for sentencing defendants, but the right to defence must be taken into consideration, and being a central issue for the process the right of the defendant to be presumed innocent.

### **Performance of the State:**

The prohibition of self-governance in criminal matters is formulated with radical character. Consequently, the essential function of the criminal process is none other than the performance of the right to punish of the State, by applying substantive law to cases of criminal nature that are to be prosecuted.

### **Other Functions**

If the State is responsible for declaring the defendant's guilt in the criminal process, of course, the instrument of discovery of the truth will only be effective if it declares the guilt of the real guilty person. Therefore, the process must fulfill the following functions:

## **1. State restraint**

The process itself is a formula of self-limitation of the State power in the investigation and punishment of offenders. The State cannot fulfill that function outside a process or ignoring established legal forms. If so, it will result in the invalidation of all investigation tasks done outside the process.

## **2. Protecting the accused person**

If the accused is the subject of the process and not a mere object, there is no doubt that the criminal process should also fulfill the function of protecting all kinds of abuses that- although it may limit the accused's inherent rights-, could therefore lead to unfair situations and do not ensure the discovery of truth.

Thus it is said that the criminal process verifies this feature because it prevents the violation of rights, except for the legally established channels that allows limiting those fundamental rights. Otherwise it will lead to an incompatible aim of criminal justice which could be summed up as the need to find the real guilty person of a criminal act and not to prosecute the innocent.

## **3. Protecting the victim**

The victim has the right to be compensated for damages suffered by the commission of the crime.

Therefore, in the criminal process both criminal and civil claims resulting from the crime could be accumulating. In this sense, the criminal process complies with the compensation function of the victim and compensation of the rights affected by the commission of the offence, and the satisfaction of the interests that the State cannot leave unprotected.



## **Overview of the criminal proceeding**

The criminal investigation is an investigation into the facts of an event which might constitute a crime, under the control of the Judge in charge of the preliminary investigation, and the inspection of the public prosecutor.

At the end of the investigation there are two possible outcomes:

1. No crime has been committed. The investigation is closed and so are the proceedings. The proceedings end without holding a trial;
2. Evidence points to the existence of a criminal offence. Criminal investigations continue until opening the trial.

### **Trial**

The evidence gathered against the defendant is sent to the Public Prosecutor's Office in order to file a bill of indictment and to the counsel for preparing the defence. Afterwards, the judge sets a date for trial.

When the trial has come to an end, the judge delivers a judgment, which may be:

- A judgment against the accused (conviction).
- A judgment in favor the accused (acquittal).

An appeal may be filed with a higher court against the judgment. This is the end of the procedure most of the time, but in other cases the convicted person can appeal this second sentence before the TS (Spanish Supreme Court), and when appropriate before the TC (Spanish Constitutional Court).

## **UNIT 2. JURISDICTIONAL COMPETENCE (JURISDICTION)**

### **I. Features of jurisdictional competence in criminal procedure law.**

#### **1. No dispositive forum.**

According to section 8 of the Criminal Procedure Code, parties are not allowed to pick and choose the jurisdictional forum in any of its three branches: objective, functional or territorial (venue). Therefore it is not possible for the parties to reach any agreement on this matter; parties shall submit their pleas to the legally established judge or tribunal. In addition, and because of the mandatory nature of the rules, judges and tribunals will check their own jurisdiction and competence.

#### **2. Duality of judicial function: division between investigation and decision. Accusatorial principle.**

A special feature of the criminal process is that in all proceedings except for the petty offences (*faltas*), there is a division of the judicial function (accusatorial principle applies): the pre-trial stage –investigation phase- (called *Sumario*) and the trial (judgment).

The Constitutional Court, in its judgment 145/1988 of 12<sup>th</sup> July, held that the judge that is in charge of the investigative activity during the criminal process cannot be the trial judge, in so far the investigative judge activity is in direct contact with the facts and data, and that information will be used in the trial to determine if the defendant is guilty or not. Should the investigative judge be the trial judge, it would cause prejudices against the accused resulting in the lack of impartial and objective judgment.

#### **3. Plurality of Courts of First Instance.**

Unlike the civil process where identifying the jurisdiction of the courts is rather simple, in criminal proceedings determining the competence of the court is more complex. The law contains a plurality of courts responsible for either investigation or judgment of

criminal cases in first or only instance, which dramatically complicates determining competent court.

For instance, in order to know which court is objectively competent, we must combine basically three criteria: the severity of the punishment (i.e., years' imprisonment related to the type of crime committed), the special characteristic of the offence (having in mind that the perpetrator is a minor, or the crime committed is gender related, etc.), and the individual status of the accused.

## **II. Objective Criterion.**

The objective criterion refers to the courts that have jurisdiction to hear a case in first or only instance. This jurisdictional competence is given by combining three types of criteria:

1. The gravity of the offence.
2. The special characteristic of the offence.
3. The personal status of the person who will be prosecuted.

- **The gravity of the offence**

This criterion is based on the distinction between serious and less serious crimes. In this way, the law establishes that criminal courts (*Juzgados*) have jurisdiction to hear misdemeanors (punishment not exceeding five years' imprisonment); whereas provincial courts (*Audiencias Provinciales*) have jurisdiction to hear serious offences (punishment of more than five years' imprisonment).

Regarding the investigation of the crime, it corresponds to the investigative judge: *Juzgados de instrucción* –examining courts- (investigation of crime regardless the seriousness of the offence).

*Juzgados centrales de instrucción*: investigation of crimes related to especial issues that only *Juzgados centrales de lo penal* and *Audiencia Nacional* are competent to judge.

See Manual and complete the chart.

- **Special criminal matters.**

The Spanish legislator decided to allocate the judgment of some cases to specific courts on the grounds of its special features, i.e. when the defendant is a minor the trial takes place before the *Juzgados de Menores* –Spanish Juvenile Courts- (Criminal cases committed by those who are over 14 years old and under 18 years old are the responsibility of juvenile courts and are ruled under the Organic Law 1/2000 “of Criminal Responsibilities of Minors”); when the crime is committed by any fact of gender based (violence against women), *Juzgados de violencia de género*, and for some kind of crimes (only those expressed by the Law of the Trial by Jury), the trial by Jury (*Tribunal del jurado*).

- **Personal status of the person who will be prosecuted**

The attribution of jurisdiction to a particular court is determined by the personal condition or status of the alleged perpetrator. That is, when the defendant plays a relevant public service or function within the political structure of the State or the Judiciary. For instance, senators and Spanish MPs (*diputados*) should be prosecuted by the 2nd Chamber of the Spanish Supreme Court (TS); regional MPs (*diputados autonómicos*) by the Criminal Chamber of the High Court of the Autonomous Community they belong to, etc.

## II. Functional criterion:

The stages of a criminal process may change from inception to completion. It is normal for a different judge be in charge of each stage: the criminal process is divided into the investigation phase, the trial, the appeal and the execution of the judgment.

The functional criterion gives us the clue in order to know which judge or court has jurisdiction to deal with the case (section 19 CPC):

- the investigation of the crime,
- the trial thereof
- the appeal against judgments in first instance.
- the execution of the judgment.

Both functional and objective jurisdiction must be checked *ex officio* by the judge or court before which the prosecution has submitted criminal charges. Specifically, the following courts should check its competence: *Juzgados de Instrucción*: investigation of crime, *Audiencias Provinciales*: appeals against judgments of the Criminal Court in first instance (*Juzgados de lo Penal*); also the *Audiencia Nacional* or *TS* should check their own jurisdictional competence.

But apart from the objective and functional competence, and since the courts are scattered throughout the national territory, the legislator included the criterion of territorial competence (venue), based on locus delicti criterion in order to individualising the court that should judge a particular criminal case.

## III. TERRITORIAL COMPETENCE (JURISDICTIONAL VENUE)

In criminal cases the preferred jurisdiction is the place where the said crimes have been committed. But it is not always possible to know the exact place where the crime has

been committed. For example, if a body is found buried in a field, the body may have been moved there by the perpetrator, and the place where the crime has been committed is hundreds of km. away, in another province or autonomous region. In these cases, and only for the purposes of determining territorial jurisdiction, the place where the body was found is taken provisionally, so a different court could be legally competent to either investigate or hear the case.

When a criminal offence has been committed in different places (i.e., defamation through the publication of a magazine that is sold all over the country, or crimes of fraud, or cybercrime) we need to know the place where the criminal acts took place, so in order to have a clue, procedural theorist and jurisprudence have formulated three theories: the activity theory, the outcome theory and the ubiquity theory. (You must seek and explain each of these theories)

### **Forum delicti commissi (lex loci delicti commissi)**

Unlike the civil process, in the criminal process there is a single criterion in order to determine the venue: the competent court is allocated in the place where the crime occurred. That is called, according to section 14 of the CPC, “the legal territorial forum”. In some cases, however, the exception to the general principle, just mentioned, comes when the defendant is vested with a special status (*aforado*) so, independently of the locus delicti criterion; he/she will be tried by *TS*. The same idea applies when the procedural law establishes a special rule of jurisdiction; for example, in the case of crimes that must be judged by the Spanish National High Court (*Audiencia Nacional*), because that court has exclusive jurisdiction over the entire national territory.

Therefore, regarding criminal investigation, the jurisdictional competence lies with the court which is allocated where the offence has been committed, and the competence to hear this case, -depending on the gravity of the offence-, will lie with *Juzgados de lo Penal* (up to 5 years’ imprisonment) allocated in that territorial place (for instance, Benidorm), or *Audiencia Provincial* (from 5 years’ imprisonment onwards) which is allocated in the capital of the province where the crime was committed. For example, if

a serious crime has been committed in Benidorm, the trial will be held in the *Audiencia Provincial of Alicante* (sections 14.3 and 14.4 CPC).

### **Subsidiary territorial competence rules:**

In some cases the place of the commission of the crime is unknown, and then section 15 of the CPC applies.

In any case, the criteria established in section 15 applies only when the location where the committed crime is unknown. If at any moment the place is uncovered, the judicial file (el Sumario) should be sent to the legal competent judge or court immediately, without concluding all investigative steps or measures needed. (Section 15 III)

The legally established subsidiary jurisdictions are:

1. The place where evidence of the crime has been found.
2. The place in which the accused has been arrested or detained.
3. The place of residence of the accused.
4. Any place in which the crime had been reported.

### ***LA CONEXION* (linked proceedings)**

Any criminal fact -from the criminal procedure point of view- attributed to an individual person, leads to the initiation of a criminal proceeding (by way of *denuncia*, *querrela*, or *ex officio* by the police, judge or Public Prosecutor). That means that for every criminal fact attributed to a single defendant, a criminal proceeding should be opened; that is, it should be investigated and eventually tried. In other words, as expressed by the CPC, "every crime that the Judicial Authority is informed it shall be subject to a criminal proceeding". However, taking this sentence in its literal interpretation it could lead, in some cases, to the opening of two different proceedings against the same defendant, i.e.,

manslaughter and robbery committed by the same person (two different crimes, so two different criminal proceedings). In those circumstances the *conexion* or linked proceedings' rule allows the judge to join the two related crimes in order to be tried in a single proceeding against their perpetrator. The rationale here is that there is no greater legal aberration than a person being tried in two different criminal proceedings, with the eventual result of being sentenced in one judgment and acquitted in another for the same criminal charges (conflicting judgments).

The exception to the above mentioned rule is established in section 300 CPC, referred to related or linked crimes, which, on the grounds of procedural economy, ease of proving it, and even avoidance of conflicting judgments, two or more criminal charges against a single defendant should be adjudicated in a single process.

1. The general rule, that should prevail regarding the decisional power of the judge -bounded by the pleas of the parties-, is that, with regard to the nature and entity of the criminal fact that is being tried, -named "the object of the process", or matter at issue-, it should be tried on its own and separately from other criminal facts. This is a rather complex matter that we will study later along the course. But now just keep in mind that the general rule above mentioned, is that for every object of the process a criminal proceeding should be opened and the decisional power of the trial judge is bounded for that object which has been delimited by the parties' pleas.

2. This rule, however, could be exempted in those cases in which procedural law provides a case for linked proceedings.

3. Linked proceedings are given preferable, so the judge cannot proceed in order to make a judgment separately, because the fundamental right to defence of the accused could be infringed. For example, if a single criminal fact has been committed by two or more people, and all of them have been accused of that crime, but are tried separately, in one trial one of them will hold the status of "accused" and in another trial will be considered as "witness".

4. However, the law may establish specific exceptions to the rule of linked proceedings, and being this the case, the analysis of the possibility to prosecute in different proceedings should be taken into account only when the right of defence could



be preserved. For example, in the so called *procedimiento abreviado*, section 762. 6 CPC provides a separate prosecution of related crimes when there is only one accused person but several criminal accounts (objective connectedness). On the contrary, it will never be a case for a separate trial when a single criminal account is charged to more than one accused person (subjective connectedness).

5. Section 5 of the Jury Act should be interpreted in the same way, trying to avoid the judgment of a criminal case in different proceedings (because the matter at issue that has to be decided is a mixed criminal act that compromises two different courts. In other words, the crime committed is a single act that, technically, could be tried by two different courts: one crime is competent of the Jury court –for example, manslaughter- and the other crime is competent of the criminal court-for example rape-, when doing so could lead to breaking the contingency of the cause.

6. Trial may be held in relation to the present accused person, but it could be suspended for absent defendants, in the cases and in the manner provided in sections 786.1 and 842 CPC.

### **Linked Proceedings Criteria (section 17).**

Section 17 CPC establishes five criteria in order to qualify linked proceedings. Such criteria can be grouped into three categories:

#### 1. Subjective Link (crime committed by two or more defendants)

a) Crimes committed simultaneously by two or more people brought together. That is, different kind of crimes committed by more than one person, but in a single criminal act, could be tried in a single proceeding. The criterion used by the legislator is the existence of a prior agreement between several people in order to commit the crime. The principle of linked proceeding in that case will apply not only if all defendants are liable to be tried by different criminal courts (for instance, one of them is *aforado*, but also if they are not). It should be noted that according to the Spanish Criminal Law

Code, if considered that different people committed the crime together, such participation must be considered in order to proceed with linked proceedings, as established in section 17.1 CPC. It is what we call *codelincuencia*, and, therefore, everyone is responsible for the crime. Each individual criminal act tends to achieve a common criminal result. For example, a bank robbery, one of the defendants took the money; the other defendant pointed a gun at the bank customers.

b) Crimes committed by two or more people in different places or times. The crime was committed by different people, with previous agreement and in different places. For example drug sales: several people sold drugs in a coordinated action. Another clearer example: the crimes committed by organised gangs: mafia.

## 2. Objective Link (several crimes committed by a single defendant)

a) Crimes committed as a means to perpetrate others or to facilitate its commission. For example, a person is arrested carrying cocaine. It is discovered that he/she had been coerced under threat of killing his friend if he/she refuses to commit the crime. The friend had been taken to Colombia where he/she was kidnapped and tortured (threats / kidnapping/drug trafficking); another example: the theft of a car to escape after committing bank robbery.

b) The crimes committed to ensure the impunity of others. Example: falsification of public documents to commit fraud.

## 3. Mixed or causal connection (a single defendant facing several criminal charges)

This category of linked proceeding relates to the case where several criminal charges could be attributed to a single defendant, but the double condition to proceed is that all the criminal charges should have analogy to each other, and have not been sentenced before. This criteria is, however, overly broad and based solely on considerations of judicial economy, so it could have been removed from the CPC (as it does not exist in

the Jury Act). Example: several graffiti made in various parts of the territory that have not been sentenced and keeping obvious similarity to each other.

In order to appreciate this kind of connectedness between crimes it is necessary to combine several criteria:

- The criminal plurality of acts should be attributable to a single defendant. If there were several people we must look at numbers 1 and 2 of section 17.
- The different crimes must be of analogous nature or interrelated to each other, such as the unity of the legally protected right (*bien jurídico protegido*), the unity of criminal law rule violated, or same modus operandi of time and place. For example: theft, attack on the police agent that was trying to arrest him/her, and subsequent criminal acts of fraud and concealment of assets to evade liability etc.
- None of the criminal acts should have been sentenced before, including in this meaning also the absence of a judgment on the merits (*sentencia de fondo*) in a previous criminal proceeding.

### **Changing the rules of jurisdictional competence (section 18 CPC)**

1. When *aforados* and *no aforados* are accused in a criminal proceeding for having committed related crimes together, the jurisdictional competence for the trial is attributed to the court with jurisdiction to try *aforados*, that is, 2nd Chamber of *TS* (section 272. III CPC)

2. When on the grounds of the special criminal matter the jurisdictional competence is attributed to *Audiencia Nacional*, or to Central Court, its jurisdiction extends to the related crimes committed, for example, crimes committed by a mafia linked to other kind of ordinary crimes (section 65 III CPC )

3. In the case of mixed related crimes (misdemeanors, serious offences and petty offences) committed in different territorial jurisdictions, the court or judge is competent

to which the judicial decision on the highest punishment will correspond: i.e. *AP* or Criminal Court (only when the crimes have been committed in different provinces along the national territory). *Locus delicti* applies, so the jurisdictional competent court should be the competent court to hear the case with highest punishment when all the crimes have been committed in the same territorial province (section 18.1).

4. According to section 14 *LOTJ* (Spanish Organic Law on the Jury Court) the Jury extends its jurisdiction to linked proceedings, but it excludes the case of corruption (*prevaricación*) or linked crimes that can be prosecuted separately without breaking the contingency of the cause.

**In summary**, section 18 CPC establishes three rules of jurisdictional competence in cases where linked proceedings apply:

1. If different crimes have been committed in different places but within the same territorial jurisdiction (same province or Autonomous Community), jurisdictional competence is given to the court with jurisdiction to try crimes with highest punishment.
2. Given the same criminal punishment, jurisdiction belongs to the court that first began to proceed.
3. If several courts have started the criminal proceeding at the same time, the decision on which court has jurisdiction to proceed comes from the *Audiencia Nacional* or *TS*.

### **UNIT 3. THE PARTIES OF THE CRIMINAL PROCESS.**

#### **I. The Parties.**

##### **Concept of criminal procedural party.**

In civil proceedings, a procedural party is a person or entity which must be included in a law suit so that the court can make a final judgment or order to conclude the conflict. In that case, the procedural law confers legitimacy to proceed with the claim to the one who may be the holder of a right or interest. Those who act in a lawsuit will be considered as parties, although the final judgment declares that his/her claim was not sustainable and that no interest or right existed. In short, the concept of compensation is based solely on the assertion by the plaintiff of a right of ownership, or possession of an interest.

##### **In the criminal process:**

a) No one could act in the process exercising their own rights, because the right to punish only belongs to the State. However, what the prosecutor holds is a legitimate interest that the Spanish Constitution recognizes not only in section 125 -that enshrines the so called “popular action”-, but also in section 24.1 which attributes to anyone the right to obtain an effective judicial protection.

b) Therefore, as the rights exercised in the criminal process do not belong to anyone but to the State, the existence of punitive rights has been denied, precisely because a request of punishment requires the ownership of that right.

c) In criminal proceedings, the Public Prosecutor -by virtue of its impartiality principle or fairness- may exercise a similar interest to that of the accused, when requesting to the Court the acquittal of the defendant (for instance when not enough evidence against the defendant arises during the trial. In that case we can say that there would be no conflict of interest between different parties).

**In short**, any attempt to analyse the concept of “prosecutorial party” as the party who owns the right that is being enforced in the criminal process, will deny the existence of the prosecutor in the criminal process. The given solution is not to build one similar concept to that in the civil process, but considering that the prosecutor is the party who requests, before the criminal court, the imposition of a criminal sanction or security measure against the defendant, regardless of whether the request is based on something that is possesses as the owner.

The procedural party, from the point of view of criminal proceedings, is everyone who requests the imposition of a criminal sanction or safety measure or also who it has been taken against, regardless of ownership of the right to punish, which never belongs to someone, or the existence of any particular interests which, in case of the Public Prosecutor, may not exist because of the impartiality required to State agencies responsible for investigating crimes.

## **II. Classification of the parties in criminal process.**

The parties of the criminal process can be classified into two groups: prosecutors and defendants/accused people.

### **Prosecutors.**

During the investigation stage prosecutors are in charge of requesting the practice of the necessary investigative tasks in order to prepare the trial, the necessary measures for this purpose, and deciding the charges and criminal counts against the defendant. There can be no conviction without previous charge.

But, beyond the identification of suspects and the probable charges against them, that is, apart from pointing to the person who is considered responsible for the crime and to decide the probable charges against him/her -section 650 CPC-, when the victim does not waive or exercise his/her civil claim for compensation of damages, it is understood that this kind of claim will be claimed within the criminal proceeding, either by the Public Prosecutor (except in case of crimes prosecuted *ex parte*) or by the offended party becoming as such for the sole purpose of trying the civil effect derived from criminal acts .

### 1. **Public Prosecution Service:**

The Public Prosecution Office is the State agency generally in charge of upholding the law. In the criminal process the public prosecutor is in charge of filing criminal charges against the accused person and requesting his/her conviction to the court in public or semi-public offences.

2. **Particular Prosecutor** (*acusador particular*): however, the meaning of “prosecutor”, in this field includes two different forms:

a) Particular prosecutor: the victim offended by the crime in cases of public and semi-public offences.

b) Particular prosecutor: the individual not directly offended by the crime in public offences.

### 3. **Private Prosecutor** (*acusador privado*):

The victim of a private crime is treated by as a private prosecutor when he/she declares his/her will to prosecute the crime (only for private crimes such as libel and slander (*injurias y calumnias*))

### 4. **Civil Actor** :

The one who has been harmed by a crime of any nature, and in such condition exercises a civil claim resulting from the crime (for instance: the owner of premises that after a car crashed into their property suffered severe damage)

### **Accused people.**

1. **The accused person/defendant:** is primarily the suspect and presumably the perpetrator of a criminal offence of any kind. He is the holder of the right of defence (section 24 SC). The State has an obligation to preserve this right validity and promotion.
2. **The civil responsible:** he/she could be the perpetrator of the crime, or someone else, who has civil liability either directly or subsidiary from the crime committed (parents when the crime has been committed by a minor, or the insurance agencies, in other cases -car crash-). They are liable of compensating the economic loss or damages due to the commission of a criminal act.



### **III. The Public prosecutor.**

#### **1. Introduction: The public prosecutor and the prosecution of crime**

The general rule in Spain is that the investigation stage (investigative function) is addressed to a judge. This, as such, assumes the duty to investigate and issue orders regarding all the necessary measures against the defendant or his/her assets in this pre-trial phase. The investigative judge is then in charge of both investigate and decide any question or request put on him/her by the prosecutor: he/she decides if the defendant remains in custody or if to grant him/her bail (*decide sobre la petición de prisión preventiva o libertad provisional*).

This statement is as derived from the provisions of section 303 CPC for ordinary proceedings (serious crimes); section 773 CPC (abbreviate proceedings); 797 CPC (speedy trials), and section 24 of the Jury Act (in regard of its own procedure).

However in Spain a judge is in charge of the investigation stage, some advances have occurred in this area since the legislator has assumed the need to reach deeper into the Public Prosecutor's functions, culminating in the Draft of a New Criminal Procedure Code (by influence of European procedural codes) where the trend is to address the direction of the criminal investigation phase to the Public Prosecutor.

Thus, and although no investigative powers have been given to the Public Prosecutor when the investigation is for serious offences (investigation of felonies and that of the ordinary procedure for serious crimes), the law allows him/her to decide on specific and pre-trial investigations tasks in the so called *diligencias previas*, that is, the investigation stage for "abbreviate proceedings. In this way, section 773.2 CPC allows a

sort of preliminary investigation controlled by the public prosecutor, when he/she receives a criminal complaint by the public, or a police report (however it is a possibility of impossible accomplishment in light of the provisions established in section 772 CPC), when it is necessary to practice any steps in order to verify the commission of the criminal facts adduced, and the criminal responsibility of its perpetrators, ordering the judicial police to conduct investigative steps as deemed necessary. This preliminary investigation shall be end, either when the Public Prosecutor decides to drop the criminal charges due to lack of evidence, or when he/she sends the file to the Judge in order to start the judicial investigation.

The prosecutor, then, may decide to take over the prosecution only if the alleged committed facts are not of criminal nature; i.e. he/she cannot drop the prosecution only because the suspect does not appear as the perpetrator -no evidence against him/her- , but only because there is no crime at all. On the other hand, and precisely because the criminal proceeding has been initiated –a criminal fact actually occurred-, the Prosecutor must immediately cease its own investigative function by sending the case to the investigative judge, and then that judge officially starts the proper judicial pre-trial proceeding (*diligencias previas*) .

The investigative tasks that may be ordered or practiced by the prosecutor are all those not legally reserved to the investigative Judge (sections 17.2 SC ; 773 bis.2 CPC , and 5 EOMF), either because they deal with fundamental rights decisions (remand in custody, search and seizure, tape recordings, or another constitutional issues such as suspension and dissolution of partnerships -sections. 18.3, 20.5 and 22.4 SC), or in relation to the practice of what is called *prueba anticipada* during the criminal investigation phase.

In juvenile criminal proceedings, the investigation is addressed to the Public Prosecutor, but he/she cannot decide on any measure regarding the limitation of any fundamental right.

On the other hand, the Public Prosecutor is in charge of examining judicial files *sumarios*, henceforth the judicial investigation steps cannot be declared secret to him/her (section 302.II CPC). The investigative judge is also obliged to inform the

public prosecutor of the investigative step or task which the prosecutor is interested in, should send to him/her all the appealable decisions, and any decision concerning the call of expert witness, or any other relevant decisions for him/her in order to exercise their rights as prosecutor .

Moreover, the prosecutor may seek judicial activity on any necessary investigative task in order to achieve the right approach to obtain an efficient criminal investigation, filing the appropriate *querella* (i.e. a formal way to initiate a criminal proceeding), if he/she considers that a suspect is the perpetrator. On the other hand, and like other prosecuting parties, he/she is entitled to appeal judicial decisions if it is believed that they are contrary to that requested or suggested by him/her.

In the intermediate phase, the prosecutor may request the conclusion of the *Sumario* without delay, and send the judicial file to the competent court, when considering that the file has met sufficient evidence, by way of indictment, which should contain all the criminal charges and relevant counts against the defendant (section 622.II CPC). He/she may also request to the judge either to carry on with the investigation, even when the investigative judge had decided its completion (*revocación del auto de terminación del sumario*), or its confirmation, and in this last case, he/she would either apply to withdrawal of proceedings (*sobreseimiento*) if it is understood that there is any legally established condition to do so, or apply for the opening of the trial in any other case, as the duty of the prosecutor is to seek justice, not merely to convict.

In the abbreviated proceeding (*procedimiento abreviado*), the Public Prosecutor will provide for the decision on sufficiency of evidence in order to provide a realistic prospect of conviction against each defendant and each criminal counts against them, providing an immediate indictment, requesting the opening of the trial, or the withdrawal of the proceeding, or, exceptionally, the practice of complementary investigative tasks (section 780 CPC).

When an application to open the trial has been done, and the court has authorised that, the evidence given, the prosecutor will submit the indictment containing the counts and charges against the defendant. However, at this point, he/she also has to have in mind whether to consider the withdrawal of the charges that another prosecutor (private prosecutor) had formulated. During the trial, and up to the moment of the judgment, the performance of the Public Prosecutor is perfectly comparable to that established for the other prosecutorial parties in the proceeding. Also, the Public Prosecutor must exercise control over the eventual execution of the judgment (sections 3.9 and 4.2 EOMF).

Finally, the prosecutor must file a civil action jointly with the indictment regardless of the existence of the popular accuser, if any, unless the victim expressly waived his/her right to compensation, or would have decided to exercise the right to compensation in a civil proceeding.

## **SPECIFIC DUTIES OF THE PUBLIC PROSECUTOR:**

### **1. To launch a prosecution (*ejercitar la acción penal*)**

The most important function of the Public Prosecutor -as stated in sections 3 of the Organic Law 50/1981 (Organic Statute of the Public Prosecutor); 105 and 773 of the CPC-, among others, is to launch a criminal prosecution, which means both to initiate a criminal proceedings against any person suspected of having committed an offence, and to formally accuse by way of indictment, if he/she decides to present charges against the defendant (sections 650 and 780 and 800 CPC).

With this aim, the indictment (section 271CPC ) shall be filed in cases of public offences regardless of it he has been encouraged by the victim to do so, and in the so called semipublic crimes previous report or complaint (*denuncia o querrela*) by the victim of the crime ( section 105 CPC ).

On the contrary, if there is a previous police report it is not necessary for the Public Prosecutor to file any formal complaint (*querrela*). In such cases it is well established

that he/she will have the status of prosecutor, and in this sense, will hold the status of party in the proceeding, in the terms expressed in section 306 CPC.

## **2. To request the practice of investigative task.**

Besides the advice that the public prosecutor could give to police investigators, and those that he/she can perform by him/her (section 773 bis CPC), the duty as Public Prosecutor requires to urge the investigative judge everything in ordering whatever he/she deems necessary in order to efficiently prepare the indictment and the trial (section 773 CPC in the case of *diligencias previas*, section 299 CPC in the case of *sumario*).

Take a look at section 3.5 of Public Prosecutor Organic Statute, section 311 CPC for ordinary proceedings -serious offences- , section 773 CPC for abbreviate proceedings, and section 27 of the Jury Act.

## **3. The Indictment**

When prosecuting public and semi-public offences, and unless a dismissal is requested, the duty of the Public Prosecutor is to draft the indictment containing the appropriate charges against the defendant. It will be provisionally made - in the ordinary proceeding- (*calificación provisional*), becoming a definitive bill of indictment after the practice of evidence in the trial (sections 650 and 732, 781 and 788.3 CPC). The same rule applies for abbreviate proceedings, section 299 CPC, and section 48 of the Jury Act.

#### **4. Power of detention.**

The Public Prosecutor may also, in order to ensure the presence of the accused in the proceeding, order the suspects' detention as stated in section 5 of the Organic Statute. That kind of power is bounded, in any case, by the rules that apply to this cautionary measure, both in terms of deprivation of freedom and conditions.

#### **5. Application for remand in custody (*prisión provisional*)**

The Jury Act amended certain provisions of the CPC, and specifically those related to remand in custody. Since then, and in clear contradiction with the rules that should guide a system of judicial investigation, remanding in custody can only be granted by the Judge if previously requested by any prosecutorial party, although it is normal that applications to be remanding in custody are made by the Public Prosecutor. Should the public prosecutor not request that, the judge is obliged to order the immediate freedom of the detainee (sections 504 bis, and 504. 2 CPC).

### **IV. PARTICULAR PROSECUTIONS: VICTIMS OF PUBLIC OFFENCES.**

As stated in section 270 CPC, all Spanish citizens, offended or not by a public crime, and also foreigners -but only if they were victims of the crime in person, property or persons or property of those who they represent-, are entitled to act as prosecutors when the relevant *querella* is submitted.

From this general rule, any person offended or not by a public crime may become a party in the criminal proceedings as private prosecutor. In order to be qualified as such, it is a condition to apply -in time and in the manner that the law requests-, either a formal complaint -*querella*-, or by expressing the will to become a private prosecutor in

the so called offering private prosecutorial function, namely *ofrecimiento de acciones*, if no formal complaint has been filed, and the legal deadline to do so has expired (as stated in sections 109, 110, 761 and 797CPC, within the scope of *procedimiento abreviado*).

In the case of people who have been offended by the crime, their heirs or representatives, the submission before the court of the *querrela* -private criminal complaint- does not require any bond –*fianza*- (section 281 CPC). Foreigners shall not have to provide such economic grant, unless they are not exempted for that as it is evidenced from international treaties or by applying the principle of reciprocity (section 281, II CPC).

The offended by the crime, like other prosecutors –except the public one-, has the right to obtain legal aid (article 6 Law 1/1996, of January 10 Legal Aid Act).

When a public crime is committed, the private prosecutor could waive his criminal action or formally express his/her forgiveness, but neither of these acts will have effect on the criminal proceeding against the accused person; it continues if the public prosecutor maintains his/her accusation/criminal charges.

## **V. PARTICULAR PROSECUTOR: VICTIM OF SEMIPUBLIC CRIMES.**

The general rules about how to become a particular prosecutor, in relation to any economic grants and the right to legal aid remain unchanged with respect to the earlier chapter.

The differences between both ways to become a particular prosecutor lies in the importance that the law gives to the will of the victim of this type of crimes, both in relation to the initiation of the proceeding, and in relation to the application to withdraw the prosecution when forgiveness to the defendant is given in order to extinguish his/her criminal liability.

In the cases of semipublic crimes, the complaint (*denuncia*) of the victim submitted before the Public Prosecution Office, requesting a criminal prosecution, is a sufficient

condition for the public prosecutor to launch a prosecution (section. 86 CC ). Unless the procedure provided in section 776 CPC has been followed; this kind of complaint (*denuncia*) does not confer the status of procedural party, but only is a procedural condition in order for the public prosecutor to proceed.

On the other hand, and only in the specific cases authorized by the Criminal Code, the victim's will of forgiveness, when granted before the execution of the judgment has started, will have the effect of extinguish criminal liability (section 130.4 CC )

## **VI. PRIVATE PROSECUTION: VICTIM OF PRIVATE CRIMES.**

This is the case where the victim is of a crime that the law considers purely private and, therefore, only prosecutable ex parte only through *querella*, forgiveness in favor of the defendant always produces the extinction of his/her criminal liability. In no case will the public prosecutor proceed.

Following the enactment of the current Criminal Code, these crimes have been reduced to defamation made against individuals without distinguishing whether they were produced in writing and advertising (libel).

The performance of this type of role when submitting the claim is subject to the following two conditions:

1. A reconciliation between offender and victim was attempted prior the *querella* was submitted. The failure of this reconciliation must be evidenced by certification of this attempt in order to submit the complaint (sections 278 and 804 CPC)
2. If defamation or libel has occurred at trial a license issued by the court is required, (sections 215.2 CC and 805 CPC)



## **VII. PARTICULAR PROSECUTOR NOT OFFENDED BY PUBLIC CRIMES. *ACCION POPULAR.***

The exercise of *acción popular* is reserved exclusively to Spanish citizens (section 270 CPC), as a fundamental right enshrined in section 125 of the Spanish Constitution, and integrated in the right to obtain an effective judicial protection in the exercise of the legitimate interests. Therefore, this right extends not only to individuals but also legal entities (STC 11.VII.83 ).

In all cases a bond –economic grant- should be given by the private prosecutor (section 280 CPC) and the amount of money that the Judge should decide will be proportional to the means of the private prosecutor, so money cannot be an obstacle to the exercise of what constitutes a fundamental right (section 24.1 SC and STC 147/1985 of 29 October among others)

You must study the content of sections 102 and 103 CPC.

## **UNIT 4 (I) ACCUSED PARTIES.**

### **I. THE ACCUSED PERSON.**

The accusation is a formal criminal charge against the person that it is alleged to have committed an offence punishable by law, which is presented/submitted before a court or a magistrate having jurisdiction to inquire into the alleged crime. The term “accused person” is a status that grants the individual against who the accusation is addressed, a set of rights amongst which the presumption of innocence is paramount. This status is given to the individual once the investigation into the crime has begun, or along the pretrial stage. The defendant became then a procedural party, i.e., the party against

whom the accusation is addressed by charging him with the commission of a crime, and the prosecutors have requested the judge conviction, punishment, or security measure (remand in custody) against him. Since the defendant is a subject of the process (and not the object of it), he/she is entitled to be granted with certain fundamental rights such as the presumption of innocence and the right to defence during the proceedings. Sometimes the accused person is also responsible for personal injuries or damages on property caused by the crime, so a civil action will also be addressed against him for restitution of the stolen belongings, for repairing the damaged property, or compensation for damages resulting from the offence.

The accused person is a necessary party of the criminal process; therefore the criminal proceeding could not exist without him/her. For this reason the identification and determination of the person of the accused is an issue of vital importance.

As said before, the defendant is a subject of the process and not a mere object of it. This means that he cannot be considered as a source of proof, i.e., the defendant cannot be the source of the evidence gathered against him, nor the investigation can focus only on the evidence that the accused can provide.

The Spanish label *imputado* (similar to the English term “suspect”) is used to name the individual who is facing criminal charges. In this sense, the defendant is labeled with several names along the criminal process, for instance he is labeled as suspect, accused, defendant, or convicted, depending on the procedural stage he/she is facing.

### **1. *Imputado* (Suspect):**

The *imputado* or suspect is the person who prima facie is the probable perpetrator and then section 118 CPC operates. Therefore, we are in the first phase of the process, when the investigative process has just started and all relevant evidence has not been gathered yet.

## **2. *Procesado* (defendant)**

The defendant is the individual who has been formally charged or indicted in the ordinary procedure (section 384 CPC).

## **3. *Acusado* (Accused):**

Strictly speaking, we define *acusado* as the suspect that has been formally charged or indicted. In the *procedimiento ordinario*, when the indictment has been issued by the public prosecutor (section 650 CPC); in the “abbreviated proceeding” the Indictment is called *escrito de acusación* (writ of accusation or writ of charges, there is not a similar concept in English Law), and also in the so called *juicios rápidos* (speedy trials)

## **4. Convicted**

A convicted person is the defendant that has been convicted by a Judge at the end of the criminal proceeding by being found guilty and, therefore, sentenced.

# **II. RIGHT TO DEFENCE**

## **Introduction<sup>1</sup>:**

### **Conditions to access the Law:**

Access to justice is a fundamental right recognised by Section 24 of the Spanish Constitution, which states that:

1. Everyone has the right to effective legal protection in the exercise of rights and legitimate interests, and in no case shall anyone be deprived of the right to defence.
2. Everyone is also entitled to have a judge appointed by law, to be defended through the assistance of a lawyer, to be informed of the charges brought against him or her, to a public trial without delay and, with all necessary guarantees, to the use of all relevant means to prove their innocence, to refrain from self-incrimination, to refrain from pleading guilty and to the presumption of innocence.

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<sup>1</sup> By Professor Luis Ortega Álvarez / Mr Isaac Martín Delgado, Researcher, Faculty of Law, Universidad de Castilla-La Mancha, Toledo, Spain).

Section 24 of the Spanish Constitution therefore contains a main clause providing general safeguards, and access to the law, in addition to general conditions concerning access to the law and to a fair trial. Consequently the phrase ‘everyone has the right to effective protection must be interpreted that everyone (not only natural persons, but also corporations under private law and another entities with legal personality) has the right to defence in a public trial if he or she is fit to be party to the proceedings and meets all the other conditions established by law (Although a fundamental right recognised by the Constitution, the right to effective protection, needs to be developed by law, and the specific conditions to exercise it laid down (section 53 of the Spanish Constitution).

Moreover, section 10(2) of the Spanish Constitution provides that every provision concerning fundamental rights recognised by the Constitution is to be interpreted in accordance with the European Convention of Human Rights (ECHR). Section 6 of the ECHR therefore has a direct impact on the system of judicial protection.

The content of section 24 of the Spanish Constitution has been developed by Judiciary Act 6/1985 of 1 July 1985 (*Ley Orgánica del Poder Judicial*). Section 7(3) states that:

‘Judges and Courts shall protect individual and collective rights and legitimate interests, and in no case may defence be withheld. Corporations, associations and groups affected or lawfully authorized shall be recognised in matters concerning the defence of collective rights and interests’.

Generally speaking, in order to have access to the law (Act 1/2000 of 7 January on civil proceedings) it is necessary to demonstrate a legal standing, that is, entitlement to rights, and to have a legitimate case, either a subjective right or legitimate interest (section 19(1) of the Judiciary Act restricts this possibility to Spaniards) which includes collective rights. Furthermore, the assistance of a lawyer who will also represent the defendant is required, although there are certain exceptions.

There are some cases in which there are no requirements to have a legitimate interest because access to the law is open to all and no right or legitimate interest is required. This is known as a public action (*acción popular*). It is invoked in criminal proceedings in connection with charges of public crimes, and sometimes in the administrative field, but only rarely.

### **Implementation of the presumption of innocence**

Pursuant to Section 24 of the Spanish Constitution, presumption of innocence is guaranteed to all. This means, as is widely recognised, that no one may be considered guilty prior to a fair trial before a court of law. This principle has been interpreted in its broadest sense within the Spanish system. Any action by a public body to the detriment of the interests of an individual must be proved beyond doubt. In other words, before a party can be convicted or punished, guilt must be established beyond reasonable doubt. The burden of proof rests with the plaintiff, never with the accused. Only a judge may rule on the evidence.

### **The right to defence**

General reference to the right to defence is made in section 24 of the Constitution. This section contains a number of provisions such as the right to a fair trial and the right to be heard. Each participant in a trial must be heard at every stage of the proceedings which could affect his or her rights or interests. There is also provision for the right to conduct one's own defence, or to be defended by a lawyer, and the right of access to court free of all charges if a party has limited financial resources. This is in accordance with section 119 of the Spanish Constitution. Lastly, there is provision for equal treatment throughout the proceedings (*igualdad de armas*) in consequence of which no means of defence giving an unfair advantage to one of the parties or detrimental to the defence shall be employed.

### **Information and assistance, in particular conditions of use of the mother tongue and translation of documents**

In every area of the legal system, civil, criminal, labour, administrative and military, a defendant must be informed of the grounds for the charges against him or her. In particular, section 520(2) of the Royal Decree of 14 September 1882 states that in the case of criminal proceedings an individual must be informed of their rights when they are arrested or when an order is issued. He or she must be informed of the right to remain silent and to refuse to answer questions, the right to refrain from self-incrimination, the right to choose and be assisted by a lawyer and the right to inform family members or others of his or her arrest. He or she also has the right to the services

of an interpreter free of charge if necessary, and the right to be examined by a forensic surgeon.

### **Protection of victims and witnesses, in particular protection of privacy**

There are two specific provisions regulating the protection of witnesses and legal experts in criminal proceedings and the protection of victims of violent crimes and sexual offences. Section 101 of the Royal Decree (*Real Decreto*) of 14 September 1882 (Criminal Proceedings Act). Act 5/1995 of 22 May on the Popular Jury (*Tribunal del Jurado*) allows citizens to participate in justice by being members of a jury. It applies mainly to criminal proceedings. This section is based on Act 1/1996 of 10 July on free legal assistance, to include corporations and foreigners. There is no special provision about the conditions of use of the mother tongue or translation of documents. The only provision concerns assistance of a translator or interpreter during the trial.

In principle, it is for the judge to determine the need for protection and to take the measures necessary for the protection of witnesses and legal experts. The most usual measures are withholding their personal details such as their name and address, covering their faces, and police protection. In addition, Spanish law provides a special system of state aid for victims of violent crimes and sexual offences. Should the victims be deceased, aid is also provided for their relatives.

### **Specific provisions for vulnerable social groups (women, children, immigrants, minorities, etc.)**

The provisions for vulnerable groups mostly concern legal aid and free access to the law. In particular there are:

- special provisions for foreigners. In Spain there is a special Act regulating the rights of foreigners, including the right to effective judicial protection, legal aid and the services of translators and interpreters.
- special provisions for minors. Two Acts regulate assistance for minors: one concerns criminal proceedings where the accused is a minor, and the other relates to civil proceedings and general protection of the rights of minors.

### **Implementation of court rulings**

The Spanish Constitutional Court has ruled that the right to effective legal protection includes the right to have rulings enforced. Otherwise, there can be no genuine legal protection. Consequently, sections 117 and 118 of the Spanish Constitution, and every specific Act regulating proceedings state that judicial power consists, not only in giving a ruling, but also in enforcing it. Compliance with all legal decisions and cooperation with the courts in order to enforce their rulings is a constitutional duty. This is a duty not only for individuals and corporations, but also for public authorities. All rulings must be enforced according to their terms. In some cases the enforcement may be not possible. If so, the concerned party is entitled to compensation.

Should a ruling not be complied with, the court may resort to a wide range of measures in order to enforce it. For example, it is possible to order the seizure of goods, the replacement of the responsible judge, or to impose a prison sentence. For rulings in criminal cases there is a special body, named *Juzgados de Vigilancia Penitenciaria*, - Prison Supervision Courts- which monitors the enforcement of judicial decisions in criminal procedures, especially prison sentences.

### **THE RIGHT TO DEFENCE. GENERAL MEANING**

The criminal process is the only tool through which criminal law can be enforced. In this sense neither the State nor the private citizen may impose a penalty without prior judicial due process. This means that although the accused person is guilty of the crime, the punishment cannot be imposed only after a judicial decision at the end of a criminal process with all procedural safeguards - principle of due process-.

The right to defence requires a basic assumption: the accused person must be heard, and the right to a fair trial in order to articulate his/her involvement in the judicial process.

The right of defence grants the accused person a number of more generic instrumental rights which are called "defences". They all have constitutional status and are specified as follows:

1. The right to the assistance of counsel.
2. The right to be informed of relevant evidence gathered against oneself.

3. The right not to plead guilty and not to incriminate oneself.
4. The right to remain silent.

**The general right to defence is twofold: formal defence and what we generally call self-defence.**

A. Formal defence: the formal defence is neither more nor less than the constitutionally recognised right to be assisted by counsel. This right, indeed vital, is the right to be assisted by a lawyer appointed by the defendant, or by the State; so, therefore, it is mandatory for public authorities - police, prosecutor or judge- to call the duty lawyer if the defendant has not been appointed one of his/her trust. The exception, and therefore, the limitation on the exercise of the right to retain counsel of trust is established in section 527 CPC that provides the possibility of the detainees to be held incommunicado, in which case the appointment of duty lawyer shall be made ex officio.

**B. Self-defence: all rights of the accused and what might be generically called self-defence.**

When we talk about the defendant's self-defence rights we are referring to the direct and personal involvement of the accused in the criminal process, in order to preserve his/her freedom, preventing eventual conviction or trying to obtain the minimum possible sanction. For example, amongst the acts that are considered within the right of self-defence we could find the personal attendance during an investigation task, applications to seek judicial attendance, application in order to request a hearing before the judge as many times as considered appropriate etc.



## **Specific rights of the accused (520 CPC)**

**1. The right to be informed of the charges.** the information that must be received by the defendant shall contain the following requirements:

a) Be clear, precise and in a language that can be understood by the accused, without legal jargon incomprehensible to him/her. This implies that, in the case of foreigners, the State must provide an interpreter.

b) The information given must be complete. And therefore, not limited only to certain facts, with additional explanations of the reasons why he/she is considered a suspect, and the evidence that has been gathered against him/her so far.

c) The information must be given before any statement made by the accused, never after this or contemporary with.

d) It should be cautioned before any interview as a suspect by the police. This means the police have to give information about his/her fundamental rights before any interview.

**2. The right to remain silent:** as established in section 520.2 a) CPC in relation to section 24.2 of the Spanish Constitution, all defendants have the right to remain silent when a police interview is in progress or before the judge. Silence is not to be construed as self-incrimination and therefore a defendant cannot suffer a negative effect against oneself in the trial.

**3. The right not to confess his/her guilt (privilege against self-incrimination):** this right can be translated into a right to lie. Since both the SC and the CPC recognise the right to remain silent and not to incriminate oneself, it could not be understood as only the guilty person will take the option to remain silent. Moreover, section 387 Criminal Procedure Code imposes no duty to the defendant who swears or promises to tell the truth, so the truth is more a moral condition than a legal one. The consequence of this is that if the police discover that the alibi presented by the defendant is false, they cannot infer from that the guilt of the defendant, even as evidence against him/her for two

logical reasons: on the one hand, the rule of law protects the possibility of the defendant for lying; on the another hand, because discovering the falsity of the defendant's version does not imply that the opposite is true. For example, if the suspect/defendant declares that at the time of the events (at 10 p.m. on 20<sup>th</sup> March ) he/she was at the Pub “Juanito”, and it is discovered that he was not there, it only means he was not there , but it could not mean that he/she committed the murder. There should be find sufficient evidence or clues in order to prove that he was at the scene of the crime and that he committed the crime.

### **Requirements of the defendant’s confession:**

Any confession made by the defendant, as the perpetrator of the criminal facts, is crucial for the discovery of truth, and can be admitted as evidence, in so far he/she has made his/her confession under cautioning, that is, he/she has been informed of his/her fundamental rights and provided that his/her confession has been given voluntarily and with knowledge of its consequences. Although one of the fundamental rights of every citizen is to plead not guilty, and the defendant also holds the privilege against self-incrimination this does not mean that they are absolute rights.

In order to be heard by an independent judge, section 486 provides that the defendant should be summoned, and if he/she does not appear before the judge without any reasonable cause for his/her failure to appear, the summons will become a warrant of arrest. If the defendant is detained he/she could be interviewed and make any statement within 24 hours of his/her detention, which could be extended up to 48h or more in serious offences (section 386). The interview could be repeated as often as deemed necessary by the investigative judge, by the prosecutor, by the defendant if he/she wishes to renew his/her statement, or by other prosecutors (sections 385 and 400). If the judge takes notice of any contradictions between the statements given by the defendant, he/she could ask him/her about it.

The examination of the defendant by the investigative judge will be in oral form (the judge could ask any question to the defendant, he/she can remain silent), but depending on the circumstances of the suspect/defendant/accused person and the nature of the case the judge may authorise him/her to answer by written document or even by memoranda

(in presence of the judge, of course). The statement shall be done in the mother tongue language of the accused, so in any other case Spanish authorities should provide an interpreter.

### **Conditions to be provided in the oral examination/interview:**

From sections 389 and 393 CPC, it appears that the questions that prosecuting bodies ask the accused person should be in a direct way, without being, in any way, directed leading questions (those to deceive the defendant) or suggestive (the ones which suggest the answer). In short: no interviewer may try to obtain answers or elicit a statement by the use of oppression. The questioning of the defendant shall take place ensuring that the accused is physically and mentally fit to be questioned. So that, in cases of fatigue, physical or psychological distress (anxiety) questioning must be ceased until the cessation of the cause.

Although the defendant has made a confession, section 406 CPC instructs the judge to continue the investigation, practicing all investigative steps necessary in order to verify the veracity of the confession and the existence of the crime.

Prohibited methods of questioning: see manual.

## **THE PLAINTIFF (CIVIL ACTION IN CRIMINAL LITIGATION)**

### **1. Concept.**

The plaintiff is the offended person by the crime in his/her person, property or assets, but he/she may or may not coincide with the victim of the crime. For example, if the crime committed is manslaughter: the victim is the deceased; the civil action is brought by the heirs.

The legal basis to submit a civil action is found in section 100 CPC, which states that such legal possibility arises from the moment that the commission of the crime has happened. The aim is that the plaintiff could claim the restitution of the consequential loss and damage, and the amount of damages to which the claimant claims he/she is entitled within criminal proceedings.

The injured party may appear before the court assisted by counsel, in order to file both criminal and civil claims at the beginning of the process, that is, when the *querella* is filed, but also once the process has started by way of what we call *ofrecimiento de acciones* which takes place, as said before, once the criminal process has started. This possibility entails an express statement of will from the offended, and it is not necessary to have filed the formal complaint in a previous procedural time (established in sections 109, 110 and 783 CPC). We talk, therefore, about civil plaintiff, when the offended person of the crime only comes to the proceeding as a party, in order to claim for criminal damages without the need to exercise any further request regarding criminal punishment. He/she is, therefore, a party of the process whose only interest is to claim the restitution of the consequential loss and damage, and the amount for the damages. However, this status as civil party is lost from the moment he/she expressly waives his/her right to claim in the criminal process and decides to exercise it in a subsequent civil process.

#### **How to file a civil claim within the criminal proceeding.**

According to section 112 CPC, the civil action is considered as a part of the criminal action unless this right is expressly waived. This means the following:

- a) It must be exercised by the Public Prosecutor without need of request from the offended person (section 108 CPC).
- b) It is understood that the offended person has not waived his/her right to restitution, reparation or compensation even when he/she remains silent after the *ofrecimiento de acciones*.
- c) It is feasible that the offended person could bring a civil action outside the criminal process without need to file the formal *querella* ( section 110 CPC), and in that case, his/her claim is limited to requesting the material restitution, reparation or compensation for any damage.
- d) When the offended person has reserved his/her right to bring a civil action, the civil judgment will only take place when a judgment in the criminal process has been held (section 111 CPC). Being this the case, an acquittal in the criminal process will not

imply that the civil judgment will not be successful to the plaintiff's plead, unless the Judge in the criminal process held that the crime did not occur (section. 116 CPC). And this means that whilst an acquittal may well occur, the civil judge may hold that a compensation for damages proceed. And the reason of this is because of the different principles that apply to both proceedings, and the different configuration of mens rea as an essential element in criminal law, and civil liability in civil law. In the same way, the death of the perpetrator of the crime extinguishes the criminal responsibility, but not the civil liability for the damages that his/her criminal action caused in the victim's property (section 115 CPC).

## **THE ABSENCE OF THE ACCUSED**

### **1. Concept:**

The defendant shall be present at every stage of the trial, and it is convenient to be present at the investigation stage. His/her presence, both in the investigation stage and the trial serves a dual purpose: on the one hand it allows the defendant to have an active role in his/her case during the investigation, allowing him/her to use the most appropriate means of defence. On the other hand, to be present at the trial (otherwise trial cannot be held) allows them to get an acquittal or to get a more favourable conviction. From this point of view the appearance of the accused becomes a true procedural opportunity for him/her. However, on certain occasion, the accused fails to appear either because he/she has not been found, or he/she has not turned up intentionally without cause.

As said before, failing to appear after proper summon, may result in warrant of arrest, and if is not found, the judge may declare the defendant in default.

The consequences of the absent defendant, depending on the peculiarities of the proceeding as we will see below, is that the judge may decide on the continuance of the investigation (section 840CPC) , or if at trial, the judge may decide on the adjournment of the trial. Absence of the accused in the ordinary proceeding is as follows:

If the accused fails to appear at trial the judge will declare them in *rebeldía*. If the absence of the defendant happens during the investigation phase, it will continue until the end, and the investigative judge will decide the conclusion of this stage but conserving all the investigative acts practiced so far (840). The investigating judge shall issue an order of conclusion of the *sumario*, the judicial file will be sent to the *AP* and the proceeding will be concluded and kept in the state where it is. If the trial has been opened, the judge will proceed to the adjournment and the case will provisionally be concluded unless more than one defendant is being tried. In this case, the course for the absent defendant will be adjourned until they are found and the trial, for the other defendants, will continue.

In the trial by jury, Gimeno Sendra criticises the Law and states what he believes is a misunderstanding speed of the proceeding set up in the *LOTJ*, since the trial for some defendants and not others -absent defendants- requires forming a new jury when the absent defendant is found and tried. It may result in a verdict that could differ and be contradictory to the previous one. This criticism should also be applied to section 746.6 II CPC, and thus the trial should proceed without adjournment, only when the defendants were personally summoned and the court is considered, after hearing the parties, that sufficient evidence exists in order for the trial to proceed against the defendants independently, stating in the trial record the grounds of the decision to proceed for the presence defendant's.

#### **Absence of the accused in summary proceedings:**

Unlike the ordinary proceedings, in the summary proceeding it is possible for trial *in absentia* when certain conditions are met. This is possible due to the reformed rules introduced by *LO 7/1988* of 28 December.

The requirements for trial *in absentia* are the following:

1. The accused, in the first appearance before the court, was required to provide his/her real address or other persons address that could receive a summon on his/her behalf, provided that the defendant has been warned that the notice will be addressed to his/her home or that other person, and that this is enough in order to hold the trial *in absentia*.

2. Provided that the eventual punishment does not exceed two year's imprisonment or six if otherwise.
3. In any case the trial will be held *in absentia* if the defendant's attorney previously appointed either by the court or by the defendant is present.
4. In any case, the trial *in absentia* should have been applied for by the prosecution, after hearing the defence lawyer, who may oppose to that application, arguing that the previously mentioned requirements have not been verified, and not sufficient evidence has been shown to hold the trial *in absentia*.

## **THE CIVIL LIABILITY<sup>2</sup>.**

When civil damage has occurred due to a criminal offence (e.g. broken windows, or damage to property in general) civil liability appears to be assumed by those who have caused such damage. Consequently, there is only one civil liability which arises when damage on property has been caused by the commission of a criminal offence.

Who is the responsible person? In other words, who must pay the economic loss for damage on property?

1. **Direct responsibility:** civil liability affects all those criminally responsible for the offence (section 116 *CP*), who will be joint and severally responsible. The sum of the compensation will be distributed among them in shares established by the judge or tribunal according to their contribution to the offence. Although it seems logical to differentiate more their general practice than to attribute equal shares. If there are accomplices, their share will also be determined by the judge. The main offenders and accomplices are both jointly and severally liable for their shares within their perspective class of participation, and subsidiary liable for the shares of the other class of participants. The right to claim an indemnity or contribution is not affected. The acquittal of the accused person

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<sup>2</sup> BACMAIER WINTER, L. Criminal Law in Spain. Ed. Wolters Kluwer, The Netherlands, 2012, pp. 201 y ss.

does not mean there is not civil liability, so a civil action is available to the victim (118 Criminal Code).

2. **Vicarious liability:** According to section 120 Criminal Code, parents or guardians are responsible for damage and loss caused by felonies and misdemeanors of those under the age of 18, in their care and living with them, where there was negligence or a breach of a duty of care on their part. In the case of the owners of written, audio or visual media, for felonies or misdemeanors perpetrated through those media (section 120.2 Criminal Code), the owners will be jointly and severally liable with the offenders. Another example of vicarious liability is the case of the owners of vehicles that may create risk for the third parties.
3. **State Responsibility:** Section 121 Criminal Code establishes a State civil liability which is different but incompatible with double compensation cases: for felonies or misdemeanors committed by authorities, agents, public employees or civil servants when the criminal acts were committed holding office and public functions.

## **UNIT 5 THE JUDICIAL POLICE**

### **I. THE JUDICIAL POLICE IN SPAIN.**

The police are primarily responsible for the maintenance of public order, prevention and detection of crimes. They also protect the life, liberty and property of the people. The judicial police are a subsidiary body of the Administration of Justice because functionally they are under the direction and guidance of the investigative judges and the Public Prosecutor. Among its most essential functions is that relating to the investigation of crimes and the perpetrators, detecting and bringing offenders to justice and apprehending all persons whom the police officer is legally authorised to apprehend.

Therefore, the judicial police play a general auxiliary function with respect to Judges and Prosecutors, both in the investigation of crimes -discovery of the circumstances of the crime- and in identifying criminals (section 126 Spanish Constitution ). In this area



the police play a very important role, basically, because they have special skills in the investigation of crime that have neither judges nor prosecutors.

Bear in mind that judges and magistrates meet the jurisdictional function (to judge and enforce judgments). The prosecution, meanwhile, has the basic function of promoting justice, prosecutors decide whether a person should be charged with a criminal offence and, if so, what that offence should be.

The performance of the judicial police in criminal investigations entails, however, certain problems:

1 - There has been, in the past, a widespread distrust on the part of Spanish citizens regarding the performance of the judicial police during the investigation of crimes. For that reason, almost all police functions are regulated by law. In essence, crime investigation is the process by which the perpetrator of a crime, or intended crime, is identified through the gathering of facts (or evidence) – although it may also involve an assessment of whether a crime has been committed in the first place-. Investigation can be reactive, i.e. applied to crimes that have already taken place, or proactive, i.e. targeting a particular criminal or forestalling a criminal activity planned for the future.

When the police's performance during a criminal investigation is not according to the law, as for instance when they do not strictly follow the rules in relation to limitation of fundamental rights –e.g. search and seizure without a warrant-, the law provides some corrective measures such as for the judge not to admit the evidence gathered and, as a result of that, the police investigative acts will not have any incidence in the proceeding, resulting in an eventual acquittal for the defendant (section 11.1 *LOPJ*, unlawful obtained evidence). On the other hand, the critical point is with regards to the police independence. In other jurisdictions, such as in England, the police are an independent body from that of the judiciary and the Public Prosecutions Service, but it does not mean that police investigation are not regulated by law. In England, for example, the police powers are regulated both in the Law (Police and Criminal Law Evidence), and in what they call Codes of Practice, with the same result as Spanish law in relation to the infringement of their rules, that is, judges will not admit any evidence gathered by police in their investigation when it is proven that they have violated fundamental rights.

2 - Poor legal regulation of the Judicial Police. This regulation does not include some of the investigative functions that the police usually perform. In sum, there are some police powers that do not enjoy a full legal covering or at least in an adequate way. The Criminal Procedure Code, which is certainly outdated in this issue, does not state what is of probative value in relation to the investigative tasks performed by the judicial police during the course of an investigation. In this sense, the jurisprudence of the *TS* and *TC* has had to clarify this issue.

### **THE ROLE OF THE POLICE IN CRIMINAL INVESTIGATIONS.**

The judicial police play an important role in the investigation of a crime. They are given a broad spectrum of powers that have been legally established little by little. Crime is increasing day by day with the increase in the complexity of the civilization. Hence, the role of the police has become more important than before and their powers increase every time the law is reformed.

Prior to the Spanish Constitution, the Judicial Police in criminal investigation fulfills only preventive functions, later their powers increase for gathering evidence in criminal investigations.

In sum, the main police functions are:

- Protect of victims of crime: in this sense, amongst other duties, the police must protect the victim of the crime, for example, taking the injured to the hospital, picking up his/her belongings, etc.
- Gather and secure future evidence: by way of recording and securing any evidence that may disappear. Note that the loss of evidence can mean impunity of offenders.

#### **Power to arrest.**

As soon as a crime is reported, someone should review (or “screen”) the allegation together with any supporting facts, and allocate sufficient resources to deal with it. This

decision can be made more difficult where there are competing priorities and only limited resources to deal with them. The commission of a crime can be reported to the police in a number of different ways. Police may discover or witness an offence for themselves during the course of patrol or routine enquiries, or they may be alerted by the activation of an automatic system or alarm, but, usually, a member of the public (either the victim or another witness) will telephone or go to a police station to report it. The initial reporting of the crime and the action taken immediately thereafter are considered extremely important. Investigators often talk about the “golden hour” following an offence during which evidence is still fresh, forensic samples have not been contaminated, witnesses are still in the area and, often, so is the suspect.

There are two basic approaches in managing a crime investigation. In some, typified by jurisdictions with a civil law tradition, the responsibility for an investigation is given to a prosecutor or judicial officer, such as an investigating judge. Where this is the case, investigators work under the instruction and management of the prosecutor and/or investigating judge and, indeed, there may even be a special law enforcement agency designated as “judicial police”. In the second approach, often found in jurisdictions with a common law tradition, investigations are conducted by the police more or less independently to prosecutors until the case, and the charged suspect is handed over for prosecution in the courts. There are, however many variations within both basic systems. For example, in many common law jurisdictions, prosecutors work closely with police investigators for at least some types of crimes. No matter what the system, basic tenets remain the same: identifying who committed the criminal act and gathering sufficient evidence to ensure a conviction.

In Spain there are two phases described in the investigative process: the preliminary investigation or intelligence phase and the investigation itself. Usually the police will be wholly responsible for the pre-investigation (which seeks to identify whether an offence has actually been committed and to gather basic information) after which a prosecutor or investigation judge will assume control. Indeed, section 282 CPC provides that the pre-investigation phase corresponds to the Judicial Police, but as soon as urgent and preliminary investigative steps have been carried out, police should notify the

investigating judge; so any independent police powers and the investigative task will end as soon as the judge takes control (section 286 CPP).

In relation to police arrest powers and deadlines for suspect detention at the police station, there is a legal framework of 24 hours, during which the suspect can be held arrested at the police station in order to be identified or interviewed if necessary. This period of time could be extended up to 72 hours maximum (sections 496 CPC and 17 SC). Preventive detention shall not exceed this maximum period of time, otherwise it could become an unlawful arrest. Once urgent and necessary investigative steps have been done (i.e. suspect identification, interview, etc.), the detainee must be available to the Judge.

- The fact that the Judicial Police today have investigative powers is supported by section 126 SC; section 11 of Law 2/1986, of the Security Forces of the State, sections 547 and 549 CPC and RD 769/1987, on the regulation of the Judicial Police.

The police forensic functions deserves special attention as they do important scientific work which will be presented as evidence against or in favour of the defendant, such as fingerprinting analysis, chemical analysis, ballistic and the like. Forensic reports have probative value as expert report opinion in the trial, but must be ratified in the trial as expert opinion evidence.

### **SPECIFIC DUTIES OF THE JUDICIAL POLICE IN CRIMINAL PROCEEDINGS. (source: Eurojustice)**

The police is divided in two national forces, the Spanish National Police (*policia nacional*) a civilian police force, which operates in cities and larger towns, and the Spanish Civil Guard (*guardia civil*), a police force under a military statute, which operates in smaller towns and rural areas. During the 1980s, other forces, that have competence in the Autonomous Communities and are under the control of the regional governments, were added. The Spanish National Police fall under the Ministry of Interior and the *guardia civil* under the Ministry of Interior of Spain and the Ministry of Defence of Spain.

All forces together form the national Spanish police system, the *fuerzas y cuerpos de seguridad* (State Security Forces). When using the word police, we refer to the various police forces: the national, the autonomous and municipal police.

Since criminal investigation in Spain may be conducted by an examining judge or by a public prosecutor, the police depend on both judges and prosecutors. Section 126 of the Spanish Constitution establishes the dependence of the police on judges and public prosecutors to investigate crimes and to trace and confine offenders on the terms stipulated by law. Sections 547 to 550 *LOPJ* –Organic Law 19/2003- ) regulated the police’s functional dependence on judges and the public prosecutors, who fall under the responsibility of the Ministry of the Interior (*Ley Orgánica de Fuerzas y Cuerpos de Seguridad del Estado*, OL 2/1986 hereinafter Police Act).

It is significant that in Spain there is still no such thing as a specific criminal investigation department force – although there is a political aspiration to create it in the future. Nevertheless, there are several police departments that act in aid of the judicial authorities and the prosecution service in carrying out whatever investigation is required to find offenders and investigate circumstances of criminal acts.

The diversity of criminal proceedings and their different regulations concerning criminal investigation have led to the establishment of different rules about who is responsible for investigating each case. In some cases the examining judge (*juez de instrucción*) is the only person responsible, although he may not carry out the investigation personally. In other cases, it is the sole responsibility of the public prosecutor. Most frequently, the examining magistrate and the public prosecutor share the responsibility for the investigative proceedings.

Another matter is who is to carry out the criminal investigation in practice. Normally, it is the criminal investigation department, which either acts of its own accord upon discovering the existence of facts that may constitute a crime (Sects. 282 and 284 CPC) or on the instructions of the prosecution office (Sects. 287, 288 and 783 CPC), in which case it depends on the latter, and is obliged to follow the instructions received. Hence the ultimate responsibility lies with the prosecution office. Thus, by virtue of the provisions of Sect. 548 *LOPJ*, the criminal investigation department depends on the judiciary and the prosecution service for all the actions that are requested to perform and in the same sense. Sect. 550.1 *LOPJ* establishes that in carrying out criminal

investigation the criminal investigation department shall act upon the instructions of the judges, the courts and the public prosecutor's office.

However, from an internal police point of view, the hierarchical police chief is directly in charge of the investigation and consequently guarantees that the police comply with all the regulations and legal procedures in the course of the investigation. When a judge or public prosecutor, depending on which prosecution office is to direct the investigation, is in charge, they must guarantee that the police comply with the legal obligations of the investigation (Sect. 35c Police Act).

Furthermore, when the investigation has been initiated by the criminal investigation department, there is no need to consult the prosecution office regarding the investigation, but it is necessary to notify the judiciary or the prosecution office of the results obtained in the investigation within 24 hours (Sects. 282 ff. CPC). Nevertheless, when the investigation has been carried out at the request of the prosecution office or, where applicable, the judge, it is the prosecution office or the judge that must give instructions. For example, in abbreviated proceedings, the prosecution office, by virtue of Sect. 773 CPC, must take special charge of handling the proceedings by issuing instructions so that the criminal investigation department may perform their functions more effectively.

In this sense, in any particular investigation, the prosecution office may issue orders and directions to the police force which the technical instructions issued by the police authorities may not contradict (Sect. 11 Royal Decree (*Real Decreto*) 769/1987 about regulation of the criminal investigation department). In this same sense, Sect. 35 Police Act stipulates that judges, criminal courts and the prosecution office shall have the following powers over the members of the criminal investigation department:

- They shall issue the necessary orders and instructions in the execution of the provisions of the CPC and the Prosecution Office Act (for example, with regards to the delivering of detained persons after a certain period of time in order to carry out the prosecution);
- They shall determine, in orders or instructions, the content and circumstances of the procedures to be carried out by the members of the prosecution service;
- They shall monitor the execution of procedures with regards to form and results;

- They may urge the exercise of disciplinary power over the members of the criminal investigation department when instructions are not fulfilled, in which case they shall issue reports that may require the processing of the relevant administrative procedure and any others if they see fit. In such cases, they shall receive testimonies of the decisions made.

In the same sense, sect. 4.4 of the Prosecution Office Statute establishes that the public prosecutor shall issue the orders and instructions relevant in each case to the members of the criminal investigation department.

Despite the clear division of work in the investigation between the police (which carries out the material investigation) and the public prosecutor or the judge, as the case may have, depending on who is directing and supervising it, certain special hypothetical cases that require a tailor-made solution. This is the case, for example, when the investigation has to do with acts pertaining to organised crime or in cases where coercion methods must be used to carry out the investigation. In such cases, there is no doubt about the need for the decision of the person in charge. In this way: there are possible cases where the investigation may concern activities of organised crime – understood to be crime committed through the association of three or more people, in a permanent or repeated manner. In that case the examining magistrate or the public prosecutor in charge of supervising the investigation may authorise members of the criminal investigation department to act under a false identity and to acquire and transport criminal objects, effects and instruments and delay the confiscation thereof (sect. 282b CPC). Thus the figure of ‘undercover agent’ (*agente encubierto*) appears.

The Law establishes two conditions:

1. Reasonable grounds;
2. That it is necessary to carry out the investigation (proportionality principle).

Section 549.1 judicial organisation act (*LOPJ*) stipulates that it is up to members of the criminal investigation department to perform actions requiring coercion that have been ordered by the judiciary or the prosecution service. However, in cases where a

fundamental right may be involved, it is necessary to request the relevant warrant from the appropriate judge. For example, when it is necessary to enter and search a closed place, to interfere with communications, to take intimate samples for blood tests or DNA tests (*intervención corporal*) and so forth.

In short, the role of the criminal investigation department in conducting a criminal investigation is very important. Its organisation depends on the formation of the police in general, although its functioning depends on the specific police force in charge of the criminal investigation. Historically, the role played by the examining magistrate has been very important. Even today, the examining magistrate is still in charge of the investigation of some criminal cases. However, most recent reforms relating to criminal procedure have attempted to increase the powers of intervention of the prosecution office, although, with some exceptions, it is not ultimately responsible for criminal investigation. This means that the prosecution office is obliged to investigate any evidence of a crime, as it does not have the autonomy to determine whether an investigation should be initiated or not.

The exception to this assertion may be found in procedures concerning juveniles, where the public prosecutor actually heads the investigation, directs it fully, and even decides when to initiate, continue and terminate it.

Another special situation arises from the investigation of criminal acts that the criminal system considers to be private (today only libel and slander against private people without publicity and a series of misdemeanors are considered as such). In that case, there must be a private claim for the investigation to be initiated and the prosecution service has no right to initiate, or even decide whether or not to continue the investigation.

#### **A) POLICE PREVENTION PROCEEDINGS.**

One of the police functions is to grant security to victims of crimes (to give protection to the victim, their families etc.) and secure sources of evidence, as evidentiary sources may be destroyed or tainted by the perpetrators. These preventive tasks are common to all types of procedures. The police are also required to practice investigative tasks as soon as they are notified of the commission of the offence, without need of a warrant or any order from the prosecuting authority, but only during the preliminary stage of the



criminal proceeding, that is, prior the initiation of the proceeding by the investigative judge. That is the reason why we call this stage “pre-procedural stage”.

The rationale behind the police empowerment in this initial phase of the investigation of crime is the urgency to carry out certain investigative tasks as waiting for judicial intervention could lead to the loss of the accused person, as he/she could go away and hide somewhere unknown for the investigators, or evidential samples could be tainted or destroyed by criminals.

**The specific tasks in that way are, amongst others, the following:**

1. Visual inspection and collection of effects and instruments of crime (weapon with which the crime was committed, evidence from the victim's clothing such as blood stains, hair or other evidential sources that could be found at the crime scene, etc.).

- Gathering information about the place where criminal facts occurred, reporting and writing down all the circumstances that are deemed useful for the judicial process: relationship between the criminal facts and the physical environment, taking statements from people who were at the scene and identify them (personal data are taken and also their home address), etc. In addition, the police agent will usually express in his/her report their professional point of views regarding the form of commission of the offence (*atestado*).

- If necessary, they will take photographs, recordings, etc.

2. Removal of dead bodies from the public path. The removal of the bodies is a function of the Judicial Authority, although this function is delegated to the police (section 778.6 CPC). The police should then remove the body to another place (usually to the forensic place) if the death occurred in public places, or pathways, taking the necessary decisions and measures to do so. They will mark the site where the body was found in order to let the Judge know the exact position and circumstances in which the body initially was (taking photographs, marking site with chalk, etc. (section 770.4<sup>a</sup>).

3. Search and seizure in cases of *flagrante delicto* or by consent of the owner.

Generally speaking, entering any citizen's premises or home, search and seizure requires court approval (by way of judicial warrant), as these acts affect section 8 ECHR, that provides a right to respect one's "private and family life, home and

correspondence", subject to certain restrictions that are "in accordance with law". Entry, search and seizure are two closely linked investigative proceedings, as it is pointless to authorise the entry into a home without any other purpose. As such, entry is done in order to practice the arrest of the accused, to collect sources of evidence, etc. In cases of *in flagrante delicto*<sup>3</sup>, or with the consent of the owner the police can proceed without judicial authorisation.

4. Detention/ arrest of suspects in the cases provided by section 492 CPC.

In speedy trials the Police fulfills the functions set out in section 796 CPP. Therefore, the police can request from medical staff that had attended the victim, a copy of the medical report that has been issued; also referring to the Institute of Toxicology, chemical substances found at the crime scene; or requesting to the Legal Medicine Institute for blood test analysis, etc.

## **B) INVESTIGATIVE PROCEEDINGS.**

Aim: to determine the offence and identify the alleged perpetrator.

### **a) Proceedings conducted by order of the public prosecutor or investigating judge.**

The Police's duty is to carry out all investigative steps as instructed by the prosecutor or the investigating judge in the context of criminal investigations and during the preliminary stage of the criminal proceeding.

The CPC does not list all possible investigative steps that can be assigned by prosecuting bodies to the police, so that it is understood that they are empowered to practice all what they reasonably believe should be done, except those in which a fundamental right is involved.

### **b) Autonomous investigative powers.**

By autonomous investigative powers it is meant all investigative steps that the police is empowered to do, without request from prosecuting authorities within the lapse of time between the moment that a criminal notice reached police's knowledge, and the initiation by the investigating judge of the proceeding. Once the judge has formally

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<sup>3</sup> While committing the offence; red-handed.

initiated the proceeding the police must cease in this autonomous function (sections 286 CPP, and 5 RD 769/1.987).

In short, the police are empowered to the following:

- Interrogate detainees after arrest (section 520 CPP).
- Question witnesses at the scene or immediately after in the Police Station.
- Identify the accused person through the parade or any other method useful for this purpose.
- Complete technical reports.
- Provide forensic reports, such as those concerning fingerprints, identification, ballistics, blood-alcohol levels, DNA analysis, etc.

### **THE POLICE REPORT (*Atestado*)**

The actions and investigative steps taken by the police and above mentioned as preventive or investigative functions, once completed, should be reflected in a written document. So we can define the police report as an official document consisting in all the investigative steps conducted by the police regarding an alleged criminal activity.

Police report will reflect and contain the following aspects:

- 1 – All steps taken by the police, including technical and forensic opinions issued by the Police Forensic Science Unit (ballistic, fingerprint identification, etc.). This part of the police report is called the “OBJECTIVE HALF OF THE REPORT”.
- 2 – Statements and opinions about the criminal facts and those regarding the suspect person (i.e. information of what and how the police believe the events have occurred – “SUBJECTIVE HALF OF THE REPORT”.
3. A report of previous arrests and the existence of prior order of arrest.

The police report should always be referred to the Judge (section 772.1 CPC) .

### **Police Report’s assessment as a source of evidence**

The police report has the value of criminal complaint (section 297 CPC) and, therefore, it is appreciated as a formal way to initiate a criminal proceeding.

However, things are not as simple as that. In relation to the content of the statements (subjective content) it could lead to some evidentiary consequences at trial, but in order to reach that consideration, the police agent who wrote the report must testify as a witness in the trial about the content of his/her previous written statements. So the police agent is a witness in criminal proceedings and his/her testimony will be considered by the trial judge as any other witness testimony.

Finally, forensic reports from police scientific units (expert opinion evidence) are of probative value in the trial as any other expert witness opinion. It is necessary for the expert who wrote the report to give his/her opinion at trial, and while doing so, they can be cross examined by other parties, therefore, the defendant is able to address his/her comments, objections, or request any clarifications.

## **UNIT 7. THE CRIMINAL INVESTIGATION STAGE. GENERAL PRINCIPLES**

### **I) CONCEPT**

The criminal process has a different structure from other judicial processes (labour, civil or administrative process). In those judicial processes, the claim (*demanda*) is the key that triggers the proceeding, parties should carry out pleading acts and the plaintiff and the defendant must gather and present all elements of evidence that shall be considered by the judge, if previously admitted, and after trial the judge holds a judgment.

The criminal process, by contrary, is structured in a different way. It consists of three stages or phases: an investigation phase, an intermediate phase and a trial. Currently, it has been said (by Gomez Colomer) that the trial is initiated after a criminal account is charged against a certain person, who is accused of having committed a specific criminal offense. But to get to this point requires a previous and necessary stage in which several investigative steps are carried out in order to investigate the crime with all its circumstances and perpetrators. Investigation can be defined as “the process of

collecting and analyzing evidence in an attempt to determine facts. A criminal investigation focuses upon a crime that has been committed” (W. Forbes). In the absence of a crime, an investigation might be classified as a civil offence, but if a crime has been committed the preliminary stage of the criminal proceeding usually begins the police investigation. Once sufficient evidence against the suspect has been gathered, will the prosecutor make a formal accusation –indictment- which will be grounded on the evidence found.

The investigation judge is in charge of investigating the crime, its circumstances, perpetrators and any other matters relating to the offence. He/she is assisted in this task by the judicial police (members of the national police forces assigned to his/her office). The Public Prosecutor, defence lawyer (and, if appointed, private prosecuting counsel) may request the judge to follow specific leads in the investigation. The Prosecutor is, at the same time, charged with the legal duty of ensuring that the defendant's fundamental and procedural rights are respected, and so the victim's rights are protected. When the investigation is due, if there is a *prima facie* case, the Public Prosecutor (*Fiscal*) will make the formal accusation, based on the evidence found, and, eventually, he will present the case against the accused person to the court. During the investigation stage all evidence obtained, including police documents and witness' statements are reserved. Documents and copies will not normally be released to interested parties or their representatives although, of course, defence lawyers and, if appointed, private prosecuting lawyers do have the right to access and examine. The investigative judge may, nevertheless, severely restrict the access to investigation papers, stating that the investigation shall be declared secret (*Secreto de Sumario*) in exceptional cases, e.g. those involving state security.

After the investigation phase then the intermediate phase comes and later the trial.

Why should the criminal process have a different structure from other judicial processes?

1. Firstly, because crimes are usually committed secretly, the perpetrator tries to prevent the discovery of the crime and the identity of the one who committed it. For example, a person is killed and the corpse is hidden somewhere, the perpetrator will try to leave no

trace that allows the police or anyone else to identify him/her as the perpetrator. For this reason we need a criminal process stage, addressed both to investigate the crime, with all the circumstances and also to find the identity of the offender.

2. No questions of private law arise in criminal proceedings as the public interest in Justice in this field is involved. The prosecution of crimes is a right unavailable to the individual as a private right, so it is the State who is the interested one in prosecuting the crime. Recall what was said about the State's right to punishment (except for the so called private offences).

3. The trial should be held only when there are real chances of successful prosecution. The civil process is initiated when a complaint by the plaintiff is issued before the court, and there is no control about the chances of success by the judge. The trial is opened only because the plaintiff has pleaded that his/her right has been infringed. On the contrary, in the criminal process there is judicial review of the evidence gathered against the accused person, so the trial starts only if there are real chances of success, that is, that there is enough evidence on the commission of the crime, the culprits have been identified and the evidence gathered against them points to their involvement in it. The accused does not have to suffer the judgment only because the Public prosecutor has drafted the indictment, although it is an essential step in order to open the trial.

The trial should only start when, as a result of the investigation phase, the existence of enough evidential elements can be shown *prima facie* that a trial should be held. In other words, what has been called "bench punishment," that is, to press charges against a person and force him/her to undergo a trial -with the disadvantages that this entails-, is only justified if there is enough evidence against him/her.

The Law cannot leave the investigation of crimes in private hands for various reasons:

- The difficulty of the investigative tasks, as the offender seeks impunity and usually tries to wash away the evidence of the crime.
- The risk of private prosecutors that entails contacting with people whose way of life is the criminal activity.

- Keeping “social order” is a public interest concern. In ensuring the maintenance of that social order, the State must provide sufficient material and human resources in order to achieve an efficient investigation, which requires special skills and expertise.

The success of the criminal Justice depends on an efficient development of this investigation phase, since inappropriate development could lead to the loss of irreplaceable items of evidence and the failure of the criminal justice system.

The investigation stage has been labelled with different names:

- The term *instrucción* is used more when referring to the investigation of serious offences (*sumario*). This is the label used by the CPC in Chapter IV of Book II, and also the term that has been used by procedural literature and jurisprudence.
- You can also identify this stage as the “investigation phase”, precisely because this phase basically involve an investigation, although this term would not make any reference to other measures that are taken in that stage such as remand in custody (measure ordered by the judge in order to ensure both the effective presence of the accused person in trial and the enforcement of the judgment).
- Certain authors (especially ORTELLS) identify this stage with the so called “preliminary procedure”, a term which has the advantage of highlighting the diversity of the acts performed -not only investigative- , and the agencies involved, not only the investigation judge, but also the judicial police and the Public Prosecutor.

## **II. JUDICIAL POLICE AND THE INVESTIGATION STAGE. ABBREVIATE PROCEEDINGS AND SPEEDY TRIALS.**

In this section we will analyse the police powers and tasks that are usually carried out by them during a limited lapse of time, which begins immediately after the *notitia criminis* and concludes when the police report the commission of the crime to the judge. However the police will usually carry out all investigative tasks either under the direction of the judge or the Public prosecutor after the opening of the pre-trial proceedings phase (in the abbreviated proceedings). If the crime committed falls within the legal framework of the so called speedy trials, the police will be in charge of the

investigation, without request from the prosecution authorities. This stage of the proceeding is called urgent investigative proceeding.

A) Abbreviated Proceedings (sections 770 and 771 CCP). The powers, duties and functions listed below do not preclude the enforcement of the rules that generally regulate the performance of the police in criminal proceedings.

1. Securing evidence: police should keep a record of any investigative task carried out by them by any technical means (visual examination and their opinions in written documents), collection of instruments or elements used for committing the crime or in relation to it -evidentiary items of crime- (victim's clothing, fingerprints, hair, etc.), removal of bodies in the street, retention of driving license when permitted by law, identification of witness who were at the scene of the crime in order to allow the court to summon them.

2. Victim assistance: police could request medical staff to assist the victim (the refusal to do so could lead to the imposition of a fine); release enough information to the offended and the victim (informing them of their right to be party of the criminal proceeding, the right to obtain legal aid, etc.).

3. Investigative Functions.

B) Speedy trials (section 796 CCP).

1. The duties and powers referred to in sections 770 and 771 CCP that are not explicitly provided in section 796 of the Criminal Procedure Code.
2. Forensic reports. The Police's duty is to send seized substances whose analysis is relevant to the Institute of Toxicology or Institute of Legal Medicine, at the relevant laboratory. If the referral -to the above mentioned agencies- of seized substances was not possible in order to get the forensic report on time, and the analysis is not complex, the police can decide on the following: when alcohol tests or blood tests are needed, they could request any medical staff to do the analysis and to send the results to the Court within the directed period.
3. Summons: the police meet summons functions (the accused has not been detained; witnesses, offended, victims, are all located).
4. Right to defence: the police must inform the accused -not detained- on the right to appear at the Court assisted by counsel. If the accused does not indicate



his/her willingness to appear before the Court assisted by a lawyer, the police will inform the Bar Association in order to seek the appointment of a legal aid lawyer.

### **III. CLASSES AND PURPOSE**

#### **A) CLASSES**

The investigation stage is named as follows:

- Ordinary proceedings (serious crimes): *sumario* (sections 299 et seq.)
- Abbreviated Proceedings: preliminary Investigation (sections 779 et seq.).
- Jury: *LOTJ* refers as to the instruction (24 *LOTJ* )
- Speedy trials: urgent proceedings before Police Court – *Juzgado de guardia*- (sections 797 et seq.).

#### **B) AIMS/GOALS.**

a) Ordinary proceeding. *Sumario*.

The essential goal of the *sumario* is to prepare the trial. In this stage is developing a research activity, securing evidentiary items, and identifying criminal suspects, so we could describe this stage as overly broad.

According to section 299 CPC, the *sumario* is the stage where the following tasks should be carried out:

1. All necessary steps in order to investigate the crime, the circumstances under which the crime has been committed and the identification of the perpetrator.
2. Measures for securing suspects (remand in custody) and economic responsibilities:
  - Reasons to believe the suspect could leave the court's jurisdiction to avoid the trial and possible punishment.
  - Reasons to believe the suspect may destroy evidence or interfere with witnesses.

- The suspect is likely to commit further offences before the trial.
- The suspect is believed to be in danger from accomplices, victims, or vigilantes.

### 3. Search and seizure: obtaining, securing and conservation of sources of evidence.

The court's decision on the defendant's guilt can only be based on the evidence presented at trial, under the principles of immediacy and orality, and the possibility of contradicting evidence by the opponent (cross-examination). As the aim of the *sumario* is to prepare the trial, the investigative acts are aimed at fact-finding and identifying the offender. This phase is also aimed at ensuring that no evidential data or evidentiary element is lost. Where the existence, condition, or value of some material object is in issue or relevant to an issue, it may be produced for a visual examination by the tribunal. The tribunal may inspect a knife alleged to have been used in the commission of a murder. The knife was found at the scene, seized by the police and used as evidence later in the trial. But it may happen that it is impossible to provide the exact evidential element at the trial in order to be inspected by the tribunal. For instance, a blood test could not be done before the tribunal, instead, what is provided as evidence is an expert opinion –the blood analysis was done in the lab, and the result written down in a document showing the test results-. As such an expert report showing the blood test, is not a material object, but the opinion given by an expert in the particular field of expertise (psychiatrist, chemist, scientist, etc.) is. In the context of the content of a tape-recording, what is provided as evidence in the trial is a transcript document of the taping (even when the original recordings are available for the judge). In these cases, the probative value is given to the actions taken during the investigation –the blood from the offender was taken when the car crash occurred; the tap-recording was done whilst the telephone conversation was in progress-, provided that all legal conditions to give that value have been met (we will see that in later lessons).

4. If the activity at this stage has resulted in the conclusion that alleged facts were not of criminal nature, or the suspect/defendant person is not the perpetrator, no trial will be held. So, the *sumario* has the function to screen any inadequate or insufficient charges against the accused person.

The trial should only be held when, as result of the investigative phase, the presence of evidence against the defendant is enough to provisionally conclude that a trial should proceed.

b) Preliminary investigation .

After the reform introduced by Law 38/2002, preliminary investigations are assimilated to the *sumario*. Section 777 of the Criminal Procedure Code states that the investigation is aimed at conducting the necessary steps in order to determine the criminal nature and circumstances of the criminal facts, and the people who have participated in it .

c) Investigation proceedings (jury proceeding)

Section 27.1 Jury Act limits the investigative phase to investigative steps requested by the parties and that are essential in order to decide whether or not the trial should be held.

The investigation judge may order the police to carry out all necessary investigation tasks, in addition to those requested by the parties (section 27.3 LJ).

d) Urgent investigations.

This kind of investigative procedure is controlled by the police. Usually the police will decide which leads of investigation shall be carried out, provided that the investigation of the crime committed is rather simple more than complex. The police's report should contain all evidentiary elements found, the identification of the perpetrator, names and addresses of witnesses, etc. Two circumstances may, however, occur:

- Investigative steps that have been practiced so far are sufficient to charge the defendant (no additional investigation activity is needed), and the defendant has been questioned.
- Investigative steps practiced are not sufficient to charge the defendant: the investigative judge may decide that the additional investigation should be carried out (investigative steps as established in section 797), insofar they could be done during the judge's guard duty or at least within the following 72 hours.

The urgent investigation should be carried out during a limited time (i.e., within the Judge's guard duty). If after that deadline the judge considers that insufficient data and evidence have been gathered, the speedy proceeding will be transformed into abbreviated proceedings.

### **III) GENERAL RULES**

#### **A) PREVALENCE OF WRITING**

The investigation stage develops an activity that must be translated into writing documents. This phase is governed by the principle of writing.

--- the investigation phase --- written

----the trial----- orality principle

Section 120 of the Spanish Constitution provides that the proceedings shall be predominantly oral, especially in criminal cases.

Why is the investigation predominantly written? The investigation stage is not considered as a procedural phase where the judge issues a decision on the guilt or innocence of the defendant, but it is only aimed at preparing the trial. Investigative authorities must keep records of each investigative step taken, because this is the only way to prove the time, place and content of what was investigated and found. Investigations are long time away from trial, and on the basis written documents, the prosecutor would decide either to charge the defendant or not. In other words, the decision on whether to open the trial or withdraw the prosecution depends on the evidence gathered and recorded.

Furthermore, although as a general rule the evidence should be practiced at trial (and then we should technically talk about the practice of proof), it may be impossible because a witness is seriously ill and could be dead before the trial is held. In this case, the witness' testimony could be anticipated. However, the practice of proof before the investigative judge given by the witness should proceed only if certain safeguards are provided or granted (we will see them later). This procedure (called anticipation of proof –there is not a similar procedure in English law- *prueba anticipada*) is recorded and introduced later at trial by the trial judge reading it (reading procedure documents section 730).

The Jury Act has attempted to introduce certain oral procedures within the investigation stage through the establishment of “appearances ” or "hearings" (sections 24 and 31).

## **B) SECRECY OF THE INVESTIGATION STAGE.**

### **a) General .**

Section 301.1 establishes that investigative proceedings are kept as a secret from society but not for the parties who, therefore, are able to take knowledge of all the judicial decisions on all investigative tasks that should be carried out, and to intervene if they wish so ( section 302, I) . For this reason, no one can provide information on the events and content of the investigation stage to third parties (*terceros del proceso*), i.e. to leak information to society.

The infringement of this prohibition leads to different kinds of penalties (the ones established in section 301) to lawyers, private prosecutors and officials (judges, Public Prosecutors, judicial police clerk, or judicial staff). In short, penalties can be imposed to anyone who is involved in this investigative stage.

What about the media? Today it is not uncommon to find information about criminal investigation released by newspapers and the media. We usually learn about truthful statements given by witnesses and victims even before the judge has been informed about them, or information is released on the investigative tasks and its results even before procedural parties themselves. This current phenomenon is called "trial by media", which describes the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt or innocence before the verdict or judgment by a court of law. Usually trials by media mislead general public by putting into question the impartiality of the investigation judge, the Public Prosecutor and the judicial police. And usually all this happens when the secrecy of the investigation has been decided by the judge. Although it is said that a confrontation of fundamental rights exists, namely freedom of information and the right to honor, privacy and presumption of innocence of the defendant, and logically the latest should prevail over the former, unfortunately -in fact- it is the other way around.

As Professor GIMENO SENDRA states, in a democratic society no one "can kill the messenger." The media (press) has a duty to report on what is happening in court (STC.

13/1985), provided that their news are based on reliable sources of information (SSTC. 190 and 41/1996 ) and not on mere rumors, snares, or the curiosity of others. If these limits are not infringed, the TC authorise as legal, the release of neutral judicial news by the media (SSTC. 41/1994 and 52/1996. However, one thing is to release information about what is going on during the trial stage (the trial is public), and it is completely different to release information about what is going on during the investigation stage, which secrecy has been ordered by the judge.

#### **b) The secrecy of the investigation to the parties.**

Although section 302.2 of the Criminal Procedure Code provides as a general rule the publicity of the investigation (parties should have knowledge of what is going on at this stage) this publicity can be exempted when certain conditions apply:

1. Exceptional nature. The secrecy of the investigation is exceptional, as it affects the right to defend the defendant in the criminal process. It affects the defence to the extent that, as a result of the judicial decision to keep the investigation secret, the defendant is prevented from becoming aware of the investigation procedures and the possibility to intervene in them.

2. Exceptional circumstances. When should the judge decide on the secrecy?: When disclosure of information might jeopardise the investigation. This could happen for instance, when there is a risk of hiding sources of evidence, if there is a risk of frustrating investigation (it is clear that when adopting a wiretap, the defendant cannot be prevented, because in this case he/she will not use the phone or, if used, will take extreme caution). The secrecy of the investigation cannot be ordered for reasons other than the avoidance of frustration of the investigation.

3. Since secrecy limits the right to defence, the court should take appropriate safeguards measures in order to ensure the immediate hearing of the defendant. The judge cannot fail in conducting or requesting any investigative act which has an unrepeatability nature (as for instance, a blood or drugs test) and it could be useful for defence. The judicial decisions of secrecy oblige to the Public Prosecutor and the investigating judge to extreme their commitment in favour of the defendant's fundamental rights (section 2CPC).

4. Secrecy deadlines: the judicial order for secrecy cannot exceed one month. However, the Constitutional Court (S. 176/88 amongst others) held that it is possible for the judge to extend this period if deemed necessary in order to ascertain criminal facts under investigation (justification of the extension), whenever there is no other proportionate and more reasonable alternative measure. This assumption avoids understanding that an extension of legal deadlines could violate fundamental rights.

5. The secrecy rule does not affect to the public prosecutor, and the reason for that exclusion lies in their duty to perform their prosecutorial function with fairness (no subjective interest in the matter at issue, the only interest that should be defended is the public interest in justice, that is, the enforcement of the law) and its public status, and, as such, acting under the principle of legality.

### **C) TIME FOR INVESTIGATING.**

As established in section 184.1 *LOPJ*, when a criminal fact is under investigation it any time of the day and every day of the year would be available without special authorisation.

Due to logical reasons arising from urgency in the investigation (i.e. the investigative task must be performed at a specific time of the day because it cannot wait for next business day -imagine it is Sunday, bank holiday, or any day of August and the investigative task is not practicable for this reason-) and the nature of the criminal investigative task (acts which if not practiced at a particular time could become in unrepeatable) underlying the need for this broad standard of time.

## **IV) SUBJECTS INVOLVED IN THE INVESTIGATION STAGE.**

### **A) THE INVESTIGATION JUDGE.**

#### **Direction of the investigation stage.**

- The judge is in charge of completing the investigation judicial report (section 306). He/she enshrines the principle of official investigation as all decisions on the criminal investigation tasks that should be carried out are of his/her responsibility, regardless whether the decision has been or not sought by the parties. Therefore, he/she can

practice (or order the police to practice) any necessary investigative task in order to complete the investigation file –*sumario*- (sections 311 and 777).

Amongst his/her investigative powers, they are empowered to take statements from witnesses, request the preparation of the defendant 's criminal history (section 377), to adopt any precautionary measures and, prior request from prosecutors, to order security measures involving limitation of fundamental rights –such as the interception of communications or search and seizure, etc-. The investigation judge is also responsible for the decision to put an end to the investigation file.

### **Investigative steps that can be ordered or practiced:**

*Ex officio* - The judge is not bounded by the investigative steps proposed by parties, so he is empowered to decide the practice of any investigative task he/she deems necessary for the investigation of the criminal facts.

*Ex parte* – The examining judge should order the practice of any investigative step requested by parties when he/she understands that they are not useless or harmful for the investigation.

Useless: any investigative task which has nothing to do with the crime under investigation.

Harmful: these kinds of investigative actions detrimental to the aims of the investigation, i.e. actions that try to hinder the success of the instruction.

In the Jury trial the investigation judge will only accept those investigative procedures that are essentially understood in order to decide on the opening of the trial (section 27 LJ).

### **B) THE PROSECUTOR.**

In addition to the previously studied prosecutorial functions within the pre-trial investigation stage, and established in section 773, the performance of the public prosecutor is limited to the following aspects:



1. To order the police the practice of an investigative task, in the terms and in the manner provided in section 311 CPP.

2. To be informed about the practice of any investigative activity carried out by the police.

3 To examine the judicial investigation file (section 306 CPC) conducted by the investigation judge in order to avoid any delays for its full completion and in order to improve the efficiency of the criminal justice investigation, and watch over the fundamental rights and procedural guarantees that all defendants in the process are entitled to ( section 773).

4. During the course of the investigation the public prosecutor is empowered to order investigative tasks to the judicial police (section 287).

### **C) THE INTERVENTION OF THE ACCUSED. THE EXERCISE OF THE RIGHT TO DEFENCE DURING THIS STAGE.**

The Law 53/1978 of 4<sup>th</sup> December substantially modified the principles governing the accused's intervention along the investigation stage, and that was due to the reinforcement of the right to defence introduced by the mentioned law.

In this sense, section 118 CPC passed the moment in which the right to defence should be granted at the very moment the suspicion against a person arises, and section 302 grant the accused person the right to personally intervene in any procedural stage, for which purpose, the defence lawyer has to be summoned and informed of the practice of any investigative step.

Based on the above mentioned, we can say that the investigation stage has become adversarial and, as such, has balanced the position of the parties thereof. Not only the defendant is involved in the active part of the criminal process, but also in the passive part of it, so he/she must be informed of the actions taken and will be able to apply for the practice of any investigative task that tends to exculpate him/her.

MORENO CATENA, states that following the intervention of the defence lawyer along the investigation stage, his/her performance can be redirected to the fulfillment of the following:

1. To be informed of the proceedings, unless secrecy is ordered by the judge. The parties are entitled to be informed on the existence, status and development of the investigation at all times, unless the secrecy of the investigation has been ordered.
2. To propose and apply for any judicial measures and to get their practice in accordance with the provisions of ss. 311 and 396 CPC.
- 3 . To participate in any investigative steps (section 302).
4. To attend detainees as stated in section 520 CPC, as any detained person has the right to choose a lawyer of trust to assist him/her.
- 5 . To appeal judicial decisions in the terms expressed in sections 216 et seq. and 787 CPC.

## **UNIT 8. FUNDAMENTAL RIGHTS IN CRIMINAL PROCEEDINGS**

### **I. THE LIMITS OF THE CRIMINAL INVESTIGATION**

The criminal process is clearly an adversarial proceeding, in the sense that there is a conflict of interests between parties. On the one hand, society is represented in the public interest that defends the public prosecutor and, on the other hand, the accused's interest to defend themselves from the criminal charges against them by the public prosecutor.

Indeed, the criminal investigation is the stage of the criminal process where both parties will use all available means in order to prove the parties' pleas in relation to the allegedly committed crime – although the innocence should not be proved by the accused, the accusation should always be proved beyond reasonable doubt- The use of means of evidence, however, may not in any case be unlimited because, if so, it could

become a relentless struggle, aggressive and unfair, so the law establishes that that use must be done within certain limitations.

Having in mind the way the investigation phase is designed, the State has been granted an overriding interest both in the investigation of the crime and in the prosecution of the perpetrators, so in order to restrict such overriding interest, the law grants a set of rights to the accused person that prevent the risk of carrying out an aggressive investigation resulting in the violation of fundamental rights. The aim of the criminal investigation is to discover the truth but without violating fundamental rights, so the goal of the criminal justice is to find a balance between the States' duty to protect fundamental rights and the State prosecutorial interest.

The State cannot be granted a range of unlimited powers when investigating the crime, but the accused person could not be granted absolute rights either, otherwise the discovery of the truth will become an impossible goal. How is this conflict resolved? By way of limiting the scope of fundamental rights of the accused, but only under certain circumstances must that be established by law. For this reason, and in general, the limitation of fundamental rights can only be conducted as follows:

1. The limitation of a fundamental right must be provided in a LO (organic law) or recognised by the Spanish Constitution (principle of legality)
2. The limitation must be legitimate, that is, carried out by following the legally established procedure.
3. The restrictive measure must pursue a relevant goal.

#### **REQUIREMENTS:**

1. Judicial warrant. This means that any time a fundamental right must be restricted a warrant by the judge should be issued. Exceptions to this rule are:

a) As regards to limitation of the fundamental right to freedom: the police are empowered to arrest and detain any person without previous judicial warrant when section 490 CPC applies (*flagrante delicto*, etc.) or by the application of section 492 (reasonable suspicion to believe that the arrested person has committed a crime).

b) As regards to the right to inviolability of one's home: a warrant shall not be required in cases of *flagrante delicto* or consent by the owner.

c) As regards to the right to a maximum detention period of 72 hours, inviolability of one's home, and the right to one's privacy of communication, the police may also carry out investigative steps involving these fundamental rights without a warrant when the accused person is part of an organised gang or terrorist organisation (section 520). However, any decision involving restriction of defendant's rights by the police must be reported (and justified) to the judge as soon as possible. See also section 21 LO PSG (Public Safety Protection Act)

2. Proportionality principle. The limited extent of interference on fundamental rights must be proportionate in four ways:

a) There is a specific accusation (*imputación*) against an identified defendant: i.e., that is not practiced indiscriminately. The exception is when circumstances of what is called abstract danger arise. For example, section 19.2 of Public Safety Protection Act allows the police to carry out controls in public places –traffic and road controls- and public premises when a crime that causes great alarm is committed, for instance a terrorist attack (there is a criminal fact, but there is not an identified defendant).

b) The decision on the most suitable restrictive investigative measure to be taken in relation to the criminal fact committed. For example, to determine whether a suspect belongs to a criminal gang, interference on communications (tap recording) is justified, but no different restrictive measure such as taking a DNA sample from the suspect, logically the latter would be the most appropriate.

c) The restrictive measure should be necessary in order to achieve the aim, which means that there must be no other less burdensome measure available. For example, in order to ensure the presence of the accused at trial a summon is the most suitable one, unless a risk for the defendant to escape from justice exists, then remanding in custody will be the most suitable measure.

d) Proportionality from a means to an end: that is, there should be a proportionated ratio between the intrusion on the right, the seriousness of the investigated crime, and the possible penalty to be imposed. Therefore, in the case of petty offenses a limitation of a fundamental right could never be legitimate.

4. To state the grounds that justifies the warrant. The judicial decision when issuing a warrant restricting fundamental rights must be justified on legal and factual grounds, explaining the reasons why the warrant should be produced. This requirement stems from the principle of proportionality and it sets up as a guarantee of that principle, as the judicial decision only can be reviewed and appealed by examining the legal and factual conditions adduced by the judge.

5. Guarantees in the execution of the restrictive measure. The limitation of the fundamental right in question should be granted by applying the legally established procedure, and adopted with respect to minimum guarantees. In particular, to ensure the reliability of the restrictive measure while ensuring the minimum impact on the right affected. For example:

-Body intervention must be performed by medical staff.

-Telephone tapping manage by specialists.

-Searching and seizing computers and electronic devices (data recovery), made by computer experts.

## **II. UNLAWFUL OBTAINED EVIDENCE**

The fundamental rights of the accused person may be limited under certain circumstances, namely those addressed to avoid a null investigation. Thus, in order to effectively protect fundamental rights within the criminal investigation stage, the law establishes a kind of penalty to the State when the investigative bodies in charge of that procedural stage do not strictly follow the legal rules. The sanction that is imposed by the law is simply to ban the use of any obtained evidence against the accused person

when it has been obtained unlawfully, that is, without regards to the legal requirements mentioned above. And this is because the public interest in obtaining evidence necessarily must be done without harming the presumption of innocence of the accused, and a judgment of guilt grounded on evidence obtained violating fundamental rights and which also violates the presumption of innocence. Thus, the Spanish Constitution establishes certain limitations on the State's obligation in obtaining the truth within the criminal process.

Currently no one would approve torture as legitimate tool for obtaining the accused's confession on his/her involvement in the crime. If we decide that this statement is correct, we should also state that, for the same reason, no other similar methods should be legitimated, as some methods for obtaining evidence found its basis in the same reasons as torture: obtaining evidence of accused's guilt violating their fundamental rights and freedoms.

What does unlawful obtained evidence mean? Unlawful obtained evidence is anything that has been obtained with the intention of establishing a defendant's guilt by violating their fundamental rights or freedoms. For example, if a search and seizure is conducted by the police without a warrant and as a result of the search psychotropic substances are found in the defendant's home, they will be a case of unlawfully obtained evidence and, therefore could not be presented as evidence against the accused person in the trial. What has been violated is the fundamental right to the inviolability of one's home since it was made arbitrarily –without legal backing)

The unlawful obtained evidence has its origin in the American doctrine of fruit of the poisonous tree, and that means that everything that comes from an illegal situation (poisoned tree) is prohibited (the fruit that is intended to use as proof of guilt). The doctrine that evidence discovered due to information found through illegal search or other unconstitutional means (such as a forced confession) may not be introduced by a prosecutor. The theory is that the tree (original illegal evidence) is poisoned and thus taints what grows from it. For example, as part of a coerced admission made without giving a suspect the defense warnings (statement of rights, including the right to remain silent and what he/she says will be used against them), the suspect tells the police the location of stolen property. As the admission cannot be introduced as evidence in trial, neither can the stolen property be admitted.

This theory is enshrined in section 11 LOPJ which expressly states that ‘the evidence obtained directly or indirectly violating fundamental rights or freedoms will have no effect’.

As for what ‘obtained evidence’ means, the TC (STC 64/86 of 21 May) held that is referred to the evidence obtained in violation of any fundamental right. By ‘obtaining’, the following should be understood:

- a) The activity of search and investigation of the evidential source (interception of communications, search and seizure, etc.).
- b) The task of obtaining results from a source of inadmissible evidence in our system as it violates a fundamental right (i.e. the defendant’s confession under hypnosis, torture or similar).

When the violation occurs, the evidential result may be attacked by declaring it null as it has been obtained by violating a fundamental right, so it is understood that when the evidential source is presented at trial infringing the right to presumption of innocence (section 24.2 SC). It could be attacked also by application of section 238 LOPJ that establishes the invalidity of procedural measures when violating essential rules of procedure.

Section 11 LOPJ states that unlawful evidence could be obtained either directly or indirectly. By ‘obtained directly’, means the evidence obtained directly violating a fundamental right, for example, when the drug has been seized during a search without judicial warrant, and no other legal exception to this requirement applied. By ‘obtained indirectly’, means that the evidence was obtained using a legal way to obtain it, but to go there the police used information obtained in an illegal way (derivative evidence).

For example: a defendant is questioned under duress or threats (illicit) and confesses where the money from a robbery bank is hidden. The evidence presented in trial is not the confession (unlawful) but the stolen items that the police found at his/her home with judicial warrant (legally). As the police only knew about the place where the stolen items were hidden after threatening the defendant, the evidence found in the defendant’s

home is an example of unlawful evidence indirectly obtained, and, as such, also banned for being assessed by the decisional judge.

The TC held that, in general, any evidence obtained by violating a fundamental right is null. But this general rule could be attenuated in some cases with the so-called derivative evidence obtained from unlawful evidence. Derivative evidence has the same meaning as unlawful evidence obtained indirectly, but, in that case, as said before, the illegality that comes from derivative evidence could be attenuated by the doctrine so-called theory of the connection of illegality. This doctrine tries to restrict the meaning of the fruit of the poisonous tree.

Example: interception of communications without judicial warrant. Thanks to the information thus received the police are aware of who committed the crime. Afterwards he/she is questioned under caution as accused, and his/her statement is taken legally. This is done in a legal manner and under all guarantees.

The TC held in STC 81/98 of 2 April, that information obtained even through a police interview with all the guarantees should be rejected by the court and therefore should have not any effect on the judgment when the evidential facts obtained by the confession are connected with the evidence obtained in violation of fundamental rights.

From that judgment, the TC applies the theory so called unlawfully connected evidence, which establishes the possibility for the court to admit the derivative evidence, as incriminating evidence, when this derivative evidence is not connected directly with the evidence obtained violating fundamental rights.

When the court cannot be able to assess this type of evidence?

The test that the court should apply is the following:

1. A causal relationship between direct and indirect (derivative) unlawful evidence should exist. If not, the court could assess the evidence.
2. Unlawful connectedness: i.e., that the illegality (violation of the fundamental right) is transmitted directly to the derivative obtained evidence. When is illegality transmitted? Two conditions should be met:



a) Internal Requirement: it refers to the way used in order to obtain such derivative evidence. The condition that applies in order to reject the derivative evidence is that the information should have been obtained only through the information gathered by direct unlawful evidence. Consequently, this obliges the court to examine each judicial case separately, because while some courts will accept the evidence gathered in this way, others will reject it. For example, Andrés Ibáñez, a TS Judge, the confession given by a defendant even under caution, but given by the accused person solely after being informed by the police about the incriminating evidence obtained against him/her, when the accused did not know that that evidence was illegally obtained, would lead to a confession under coercion -forbidden in our criminal justice system-. The accused person has been coerced, because the confession has been obtained after putting on him/her devastatingly incriminating evidence but obtained illegally. Probably if he/she would have known that such incriminating evidence was illegally obtained and, consequently, with no legal effect, no confession would have been obtained from him/her. In other cases, for example, the court has held that information obtained was neutral, and then, the derivative evidence is disconnected from illegality. For example, an interception of communication is illegally made. From that interception the police are aware that two people will meet at the accused's home, and then the police apply for a warrant and detain the accused when receiving the drug from the other person in his/her home. The court held that the information about when two people will meet is neutral, no additional information about drug trafficking was released. As the accused was under surveillance, the same detention will result later, so the derivative evidence obtained by the unlawful interception of communication was not the only source of information in discovering drug trafficking.

b) External requirement: the need to protect the fundamental right requires the court's assessment of the scope and grade of its infringement. When the infringement of the fundamental right is serious, the court understands that there is a case for unlawful obtained evidence, but in other cases it could be the opposite. For example, an interception of communications without judicial authorisation is a serious violation, because the laws are very clear on requiring a judicial warrant. However, the illegality could be attenuated when the judge issued a warrant, but forgot to renew it by way of extending the deadline limits for interception of communications, -as the legal time limits could be extended by renewing the warrant-. In that case, the TC and TS

understand that the violation has not been particularly severe and the court may come to appreciate the evidence obtained.

In short, what the TC held is that what courts should review when an application for rejecting unlawful evidence is presented, are the reasons for the connection or disconnection of illegality, which leads to an extremely casuistic outcome.