Lesson 21 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 send 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).
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 12th 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.
1. **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.

2. **Functional criterion:**

The stages of a criminal process may change from inception to completion. It is normal for a different judge to 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.
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*, *querella*, 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 exists 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*. 
LESSON 23. 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 remands 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 271 CPC) shall be filed in cases of public offences regardless of if he has been encouraged by the victim to do so, and in the so-called semipublic crimes previous report or complaint (denuncia o querella) 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 (querella). 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.


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 querella -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 reconcilement between offender and victim was attempted prior the *querella* was submitted. The failure of this reconcilement 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. PRIVATE 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.
LESSON 24 (I) ACCUSED PARTIES.

1. 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.

**RIGHT TO DEFENCE**

Introduction: (By Professor Luis Ortega Álvarez / Mr Isaac Martín Delgado, Researcher, Faculty of Law, Universidad de Castilla-La Mancha, Toledo, Spain).

**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.
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, - Prision Supervision Courts- which monitors the enforcement of judicial decisions in criminal procedures, especially prison sentences.

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 20th 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 waive 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 silence 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).