



Spain

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The Authors



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Professor Bachmaier wrote Part II (Criminal Procedure). Dr del Moral wrote Part I (Substantive Criminal Law) and Part III (Execution and Extinction of Sanctions). The General Introduction was jointly written by the two authors.

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List of Abbreviations

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Art(s).	Article(s)
ATC	Decision of the Constitutional Court (<i>Auto del Tribunal Constitucional</i>)
CCP	Code of Criminal Procedure (<i>Ley de Enjuiciamiento Criminal</i>)
EAW	European Arrest Warrant
ECHR	European Convention on Human Rights
EOMF	Organic Law on the Public Prosecution (<i>Estatuto Orgánico del Ministerio Fiscal</i>)
LOFCSE	Police Act (<i>Ley Orgánica Fuerzas y Cuerpos Seguridad del Estado</i>)
LOGP	Penitentiary Law (<i>Ley Orgánica General Penitenciaria</i>)
LOPJ	Judiciary Act (<i>Ley Orgánica del Poder Judicial</i>)
LOTJ	Jury Act (<i>Ley Orgánica del Tribunal del Jurado</i>)
PC	Penal Code (<i>Código Penal</i>)
<i>Rev. Dcho. Proc.</i>	<i>Revista de Derecho Procesal</i>
RP	Prison Regulations (<i>Reglamento Penitenciario</i>)
SC	Spanish Constitution 1978
STC	Sentence of the Constitutional Court (<i>Sentencia del Tribunal Constitucional</i>)
STS	Sentence of the Supreme Court (<i>Sentencia del Tribunal Supremo</i>)
TC	Constitutional Court (<i>Tribunal Constitucional</i>)

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List of Abbreviations





General Introduction

§1. THE GENERAL BACKGROUND OF SPAIN

1

I. Geography and Climate

1. Spain is located in southwestern Europe and comprises approximately 80% of the Iberian Peninsula (the remaining 20% is occupied by Portugal). Its total area is some 504,750 km² (194,884 mi²) of which 5,240 km² is water. Of Spain's boundaries, 4,964 km (88%) is water. Spain is flanked to the north by the Cantabrian Sea, the Mediterranean Sea to the south and southeast, and the Atlantic Ocean to the west. In the northeast, Spain borders on France and Andorra, with the Pyrenees as a natural frontier, and in the west on Portugal. In the extreme south of Spain lie the Straits of Gibraltar, which separate Spain and the rest of Europe from Morocco in North Africa; at its narrowest extent, Spain and Morocco are separated by only approximately 12 km (8 mi). Additionally, off the Iberian Peninsula the Balearic Islands in the Mediterranean Sea, Canary Islands in Atlantic Ocean close to the Moroccan coast, and Ceuta and Melilla (and some little rock islands), located in northern Africa, are Spanish territory. Spain is the third country of Europe in extension and the fifth in population.

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2. There are five big mountain ranges crossing the country, and about 50% of them are located at an elevated plain. Landscapes are extremely varied, some almost desert-like, others green and fertile; of course, there are also the long coasts. Due to its geographical situation and its orographic conditions, the climate in Spain is extremely diverse. Peninsular Spain experiences three major climatic types: Continental, Oceanic, and Mediterranean. Draughts and wildfires are very frequent. The locally generated tempered continental climate covers the majority of peninsular Spain. Annual rainfall generally is 30 to 64 cm. An oceanic climate prevails in the northern part of the country, characterized by relatively mild winters, warm but not hot summers, and generally abundant rainfall spread out over the year. The Mediterranean climate region roughly extends from the Andalusian Plain along the southern and eastern coasts, with temperatures usually higher in both summer and winter. Besides these three major types, there is a semi-arid climate in the southeastern part of Spain; the highest section of the Pyrenees qualifies as an Alpine climate, and the Canary Islands are a true Subtropical climate in terms of temperature. The record of temperatures in Spain have been, -32°C in the Pyrenees for the coldest, and 47°C in Seville and Murcia for the hottest.



II. Population

3. In 2007 Spain officially reached 45 million inhabitants with an annual population growth of 15%. Spain's population density, at 87.8/km² (220/mi²), is lower than that of most western European countries, and its distribution along the country is very unequal. The most populous urban regions are Madrid, the capital of Spain (approximately 5.9 million inhabitants) and Barcelona (5.3 million inhabitants). People from other countries have chosen to move to Spain, foreigners who come mainly from Morocco, Latin America, and European Eastern countries. Based on 2004 figures, within the European Union (EU), Spain has the second highest immigration rate in percentage terms (approximately 11%).

The first official language is Spanish (or Castilian) with other three co-official languages. As to religion, about 80% of the population recognize themselves as Roman Catholic, but Spain has had no official religion since the Constitution of 1978.

III. Economy

4. According to the World Bank, Spain's economy is the ninth largest worldwide and the fifth largest in Europe. As of 2006, absolute gross domestic product (GDP) was estimated at \$1.184 trillion with an annual growth rate of 3.6% in 2006. This growth rate has been kept throughout 2007, but the signs of deceleration were already visible at the beginning of 2008 (with an estimated growth rate of 2.6%). By sectors, the GDP division is as follows: agriculture, 3.9%; industry, 29.7%; and services, 66.4%. More recently, the Spanish economy has benefited greatly from the global real estate boom, with construction representing 16% of GDP and 12% of employment. One of the problems of the Spanish economy by early 2007 is an inflation rate that is traditionally higher than the one of its European partners, and affected by house price increases of 150% from 1998 and a growing family indebtedness (115%), mostly based on this same real estate boom. Most business is run by small companies. Indeed in 2007, out of 1,412,041 registered enterprises, only 4,816 employed more than 250 employees, while approximately 1 million had fewer than six employees.

In 1999 Spain was among the leading group within the EU to adopt the Euro as their accounting money in preparation for its launch as a physical currency, which happened in 1 January 2002. This culminated in a fast process of economic modernization, even though the strength of the Euro since its adoption has raised recent concerns that Spanish exports outside the EU are being priced out of the range of foreign buyers. However, this has been offset by the facilitation of trade among the Euro nations.

The Spanish economy is credited for having avoided the virtual zero growth rate of some of its largest partners in the EU. The Spanish economy has thus been regarded lately as one of the most dynamic within the EU, attracting significant amounts of foreign investment. During the last four decades, the Spanish tourism industry has grown to become the second biggest in the world. Industrial production is mainly focused on textiles and apparels, food and beverages, chemicals, metals, automobiles, and shipbuilding.





General Introduction

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5. The Workers' Statute, adopted in March 1980, articulated trade union rights as guaranteed by the Constitution. The statute eliminated direct government intervention in labour relations. It also included provisions for minimum wage standards, for access to social security funds, and for a delineation of the contractual nature of wage accords. Democratically elected works councils (*comités de empresa*) were established as spokesmen for employees, and unions were given responsibility for arriving at industry-wide, and local, wage agreements. There are two large labour organizations and a consultative body (the Socio-Economical Council). The CEOE (*Confederación Española de Organizaciones Empresariales*) is the largest federation representing the employers' interests and negotiations with the labour unions. The unemployment rate stood at 7.6% in October 2006.

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IV. Political and Administrative Structure

6. Since the 1978 Constitution, Spain, officially called Kingdom of Spain, is a Parliamentary Monarchy with a hereditary constitutional monarch as head of state. Following the death of General Franco in 1975, the parliamentary democracy was restored. Spain is established as a social and democratic State, subject to the rule of law, which advocates freedom, justice, equality, and political pluralism as highest values of its legal system. The Constitutional Court monitors maintenance of these rights and the protection of the fundamental rights.

The 1978 Constitution sets out the principle of separation of powers. Legislative power is centred in *Las Cortes*, a bicameral legislature, comprising a lower house (*Congreso de los Diputados*) and an upper house (*Senado*). Both bodies are elected by universal suffrage every four years (unless parliament is dissolved earlier by the head of state). The 350-member Congress of Deputies uses a proportional representation system (d'Hondt system), whereas the Senate contains 208 members elected directly as well as 49 regional representatives.

7. Executive power in Spain lies with the Council of Ministers (*Consejo de Ministros*). It is headed by the president of the government, who is nominated by the King, confirmed by a vote of the lower house of parliament, and then appointed by the King. The Prime Minister designates the rest of the members of the Council, who are then appointed by the King. The Council is the highest national executive institution with both policy-making and administrative functions. The two Ministers most relevant to the criminal justice system are the Minister of Justice and the Minister of Home Affairs.

The judicial power is vested exclusively in Judges and Magistrates, which are impartial, independent, and subject only to the rule of law.

8. The King is the Head of State and Supreme Commander in Chief of the armed forces, the symbol of its unity and permanence. He arbitrates and moderates the regular working of the institutions, assumes the highest representation of the Spanish State in international relations (Article 56 SC). The person of the King is inviolable and shall not be held accountable.





9. There are fifty provinces in Spain, which are grouped into seventeen Autonomous Communities. There are two Spanish enclaves on the Mediterranean North-African Coast of Morocco (Ceuta and Melilla), which have a special administrative status as Autonomous Cities. In contrast with the model of centralized territorial organization, the Constitution of 1978 represents a clear break with tradition. Until 1978, under the Franco regime and following the previous territorial organization deeply inspired by the French model, Spain had a centralized administrative system: The administrative as well as the executive branches were centralized, and provincial and local governments had very limited powers. The 1978 Constitution introduced a decentralized structure in the territorial organization.

10. The Constitution recognizes the existence of *nationalities* and regions with right to self-government (Preliminary Title, Article 2 SC). Originally, the Constitution envisaged a largely unitary State, except for three self-governing Autonomous Communities for the three historically and culturally distinct nationalities of Catalonia, the Spanish Basque Country, and Galicia. However, other regions, in accordance with Article 143 SC, could also acquire the status of Autonomous Communities. As a result, Spain is now composed entirely of seventeen Autonomous Communities (and two enclaves) with varying degrees of autonomy, to the extent that even though the Constitution does not formally state that Spain is a federation, Spain can now be argued to have de facto a federal structure. In less than twenty years, there has been a continuous and extensive devolution of powers from the General State Administration to the Autonomous Communities. As a result Spain has become one of the most decentralized States in Europe. A great number of interpretation conflicts originate between the central and regional institutions about their respective competences, which are decided by the Constitutional Court. Currently, there is a stream towards a major devolution process to certain Autonomous Communities. This movement has led to the reform of the Autonomous Statutes (*Estatutos de Autonomía*) of several Communities (such as Catalonia), which have the aim of achieving a greater degree of sovereignty.

11. The main task of the General State Administration consists of applying the State Government's administrative policy. To accomplish this purpose, the General State Administration is organized into different Ministries with headquarters in Madrid and specific peripheral services throughout the national territory. Objectivity, impartiality, and efficiency of all public administrations are endorsed by the Spanish Constitution and put into practice through a unitary law on administrative procedure.

12. The various governmental functions are distributed between the State and the seventeen Autonomous Communities. These tasks are divided into three categories: (a) exclusive functions over matters in which either the State or the Autonomous Community have full legislative and executive power; (b) shared functions over matters in which the State and the Autonomous Community in question have joint legislative and executive powers; (c) concurrent functions over matters in which both the State and the Autonomous Communities may act. Although Spanish Constitution allows Autonomous Communities to have executive and legislative institutions, SC does



not allow them to have judicial institutions. Judicial power is unitary in Spain and Autonomous Communities Courts are Courts of the State. According to Article 149.1 SC, the State holds exclusive competence over matters like national defence, immigration, nationality, international relations, labour legislation, commercial and civil legislation, industrial property, customs, monetary system, general finances and State debt, basic legislation on environmental protection, etc. With regard to the criminal justice system, it is interesting to point out that the State holds exclusive competence over the administration of justice; criminal and penitentiary legislation, and procedural legislation; and public security, without prejudice of the creation of autonomous police forces. However, Parliament has the ability to transfer or delegate legislative power to all or one of the Autonomous Communities (Article 150 SC). Most of the Autonomous Communities have assumed competence over matters linked with the administration of justice, specifically with the personal and material resources for the functioning of the courts and the exercise of the judicial power.

In the communities with more than one province, the government is held by the Provincial Deputation (*diputación provincial*). With the creation of Autonomous Communities, deputations have lost much of their power except for those single-province communities, where deputations have been absorbed by the Autonomous power. Spanish municipal administration is highly homogeneous, most of the municipalities having the same powers (such as municipal police, urban planning and development, social services, and municipal taxes). In most Spanish municipalities, the citizens elect the municipal council that acts as a sort of legislative body that is responsible for electing the mayor who can appoint a board of governors.

13. Spain has a multi-party system following the constitutional principle of political pluralism stated in Article 6 of the Constitution. There are two strong parties (Socialist Party and Popular Party) and some other smaller parties, which may decide which of the major parties will govern, but have still never held government (at the national level).

To get an idea of the present-day political representation the results of the last general elections are presented here.

Summary of the 9 March 2008 Congress of Deputies Election Results

Party	Votes	%	Dif.	Seats	% Esc.	Dif.
Partido Socialista Obrero Español (PSOE)	11,282,210	43.84	+1.25	169	48.29	+5
Partido Popular (PP)	10,276,238	39.93	+2.22	154	43.71	+6
Convergència i Unió (CiU)	774,317	3.05	-0.18	10	3.14	-
Partido Nacionalista Vasco (EAJ/PNV)	303,246	1.20	-0.43	6	1.71	-1
Esquerra Republicana de Catalunya (ERC)	296,473	1.17	-1.35	3	0.86	-5
Izquierda Unida (IU)	963,040	3.80	-1.16	2	0.57	-3

Continued

Party	Votes	%	Dif.	Seats	% Esc.	Dif.
Bloque Nacionalista Galego (BNG)	209.042	0,82	+0,01	2	0,57	=
Coalición Canaria (CC)	164.255	0,65	-0,26	2	0,57	-1
Unión Progreso y Democracia (UPyD)	303.535	1,20	n/a	1	0,29	+1
Nafarroa Bai (Na-Bai)	62.073	0,24	=	1	0,29	=

V. The Judicial System

14. To ensure the full separation of powers and judicial independence, the Constitution establishes the General Council of the Judiciary (*Consejo General del Poder Judicial*, CGPJ), stated in Article 122.2 SC as the institution that will govern judicial power. Judges are independent and bound only to the rule of law. Spanish judges are mainly professional, selected on the basis of highly competitive examinations and are appointed for their lifetime. They may only be removed, suspended, transferred, or retired on the grounds and subject to the safeguards provided for by law (Article 117.2 SC and 379 LOPJ).

15. The principle of jurisdictional unity is the basis of the organization and operation of the courts (Article 117.5 SC), and the Constitution expressly forbids the existence of special jurisdictions, with the only limited exception of the military courts.

The administration of justice is divided into four branches: civil, criminal, labour, and administrative courts; within each jurisdiction they are organized hierarchically. The Supreme Court is the highest judicial body in all branches of justice, except the provisions concerning constitutional rights and guarantees (Article 123.1 SC). The Constitutional Court mainly decides (a) appeals alleging the unconstitutionality of a statute or regulation, (b) individual appeals for protection against violation of fundamental rights, and (c) conflicts of jurisdiction between State and Autonomous Communities.

Spanish territory is divided for judicial purposes in (Articles 30 et seq. LOPJ): (a) Municipalities (*municipios*), (b) Judicial Districts (*partidos judiciales*), (c) Provinces (*provincias*), and (d) Autonomous Communities (*Comunidades Autónomas*). This division is almost equivalent to the administrative division of the territory and corresponds to the administrative demarcations with the same name, except the judicial districts, which is a purely judicial territorial division (Article 32 LOPJ). The judges have jurisdiction only within the territorial boundaries of their district. In the first instance, courts in all four branches of the jurisdiction (*Juzgados de Primera Instancia e Instrucción*, *Juzgado de lo Social*, and *Juzgado de lo Contencioso-Administrativo*) one judge sits alone. The rest of the courts usually sit in chambers, with either three or five judges.



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16. Each Autonomous Community has a High Court of Justice, which is the top of the judicial organization of each region, without prejudice of the jurisdiction of the Supreme Court. Corresponding with the number of provinces, there are fifty Provincial Courts, divided into criminal and civil sections. The Provincial Courts are appeal courts, but they also act as trial courts in relation with serious offences. The Provincial Court sits in chambers – usually with three judges, but in certain cases, in a one-judge chamber.

Article 97 LOPJ provides that in each province and seated in the provincial capital there will be at least one Juvenile Court. The Juvenile Courts are responsible for deciding the offences committed by minors: older than 14 years and younger than 18 years. In the jurisdictional organization there is a specific judge, the ‘Judge for Penitentiary Issues’ (*Juez de Vigilancia Penitenciaria*), who supervises the execution of imprisonment penalties and security measures.

§2. CRIMINAL LAW, CRIMINAL JUSTICE, AND CRIMINAL SCIENCE

I. Definitions of Criminal Law

A. Criminal Justice System

17. Spanish legal science does not generally use a concept of criminal law encompassing both substantive and procedural law. On an academic and theoretic level, there exists a certain dissociation in both areas of the penal system, despite the strong link that exists on a practical level. Within the Spanish legal system, it is misleading to talk about criminal law as including both substantive and procedural criminal law. It is more precise to use the term ‘criminal justice system’ to describe the set of provisions regulating the punitive power of the state. This way, both kinds of provisions are included – those describing infringements and establishing sanctions and those containing rules on how the punitive power must be enforced (provisions regulating criminal proceedings).

B. Criminal Law

18. Substantive criminal law is a set of provisions describing forms of conduct that have an associated punishment or security measure due to their socially intolerable character. The main legal body of substantive criminal law is the Penal Code (PC) of 1995.

C. Criminal Procedure

19. Despite the separation of both areas on an academic level, it is unanimously accepted that there exists a close symbiotic or instrumental relationship between substantive criminal law and procedural criminal law. Criminal law can only be applied through procedural law in the form of a set of rules describing the





manners, procedures, and channels through which the commission of a criminal conduct must be proven in order for a penalty or security measure to be imposed. The Code of Criminal Procedure (CCP) of 1882 is the main but not the only statute on criminal proceedings.

In the academic world, the study of criminal procedure law is dealt with in the context of procedural law in general rather than together with criminal law. The expression 'adjective law' has fallen into disuse due to its suggestion of undervaluing procedural law in that it could encourage the idea of this area being of a secondary nature or of a purely formal character. The term ignores the fact that criminal proceedings are a fundamental element of the punitive reality, as significant and important as substantive criminal law itself.

D. Criminal Offences

20. The term 'offence' (*delito*) is the most used in Spanish law to refer to penal infringements. The word 'crime' (*crimen*) does not have a specific legal meaning. In contrast to other legal systems, it does not include any technical nuance differentiating it from the term 'offence' (*delito*) as used in criminal law. The use of expressions like 'crime' and 'criminal' is less technical than the terms 'offence' and 'offender'.

However, the Spanish term '*delito*' has two meanings – one generic and one more specific. It can mean offence in a generic sense, including in principle both felonies and minor criminal violations known strictly as 'misdemeanours' (*faltas*). Misdemeanours are those violations punishable with minor penalties.

On a more precise level, *delitos* means only felonies as opposed to misdemeanours. Felonies are defined in this context as violations punishable with severe or less severe penalties.

It is sometimes difficult to establish whether *delito* is used in its generic sense, that is, including felonies and misdemeanours, or whether it is used in a specific sense, excluding misdemeanours.¹

1. In this work, the Spanish term *delitos* has been translated as 'offences' when used in a generic sense, that is, including felonies and misdemeanours, and as 'felonies' when used in the strict sense, that is, excluding misdemeanours.

21. Felonies and misdemeanours are essentially different from administrative infringements. The jurisdictional character of the authority imposing the sanction is their main distinguishing feature. In the case of felonies and misdemeanours, the authority is jurisdictional; in the case of administrative infringements, it is non-jurisdictional. Penalties and security measures may only be imposed after the appropriate criminal proceedings by the responsible jurisdictional authority.

II. Characteristics of Criminal Law

22. Spanish criminal law is *public law*. This characterization is an unavoidable consequence of the state monopoly on the exercise of the *ius puniendi* in all its





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components: creation of criminal law, enforcement of criminal law, and execution of penalties.

It is also an *autonomous law* and not an *accessory* one; it has a *primary* rather than secondary nature as has been argued by some commentators. Criminal law is not limited to imposing sanctions for conduct prohibited by other areas of law. Criminal law makes its own judgments and creates rules and prohibitions. The principles of unity and rationality, and the systematic nature of the legal system are not obstacles to the autonomy of criminal law.

It is a *sanctioning law*, but it is not the only area of law that has this character. Contrary to the theories aimed at the unification of all sanctioning law, substantial differences persist in the Spanish legal system between sanctioning administrative law and criminal law. This separation has not prevented a degree of approximation between both with respect to guarantees.

The autonomy can go hand in hand with the *subsidiary character of criminal law* as this is, by nature, *ultima ratio* (i.e., a last resort). The sanctioning instruments administered by criminal law, which are the most severe in the entire legal system, must only be applied when less harmful means are deemed insufficient.

III. Overview of the Criminal Justice System

A. The Police

23. The organization of the police structure in Spain is rather complex with two national police forces and two further units at the regional and local level. At the state level there is the Civil Guard (*Guardia Civil*), a military force, and the National Police (*Policía Nacional*). The distribution of competences between Civil Guard and National Police depends largely on territorial criteria.

In general, the Civil Guard is responsible for the development of security functions and the prevention and repression of crimes in rural environments and within the territorial seas (Article 11 LOFCSE). There is, in addition, a distribution of responsibilities based upon the subject matter: The civil guard is responsible for functions related to armament and explosives, control of smuggling, surveillance of road traffic, border control, environmental preservation, and control of compliance with environmental law (Article 12 B LOFCSE). Within the administrative Spanish structure, the civil guard depends on two ministries: the Ministry of Interior and the Ministry of Defence. Civil Guard's peripheral organization is structured into (a) Zones (*Zonas*), (b) Commands (*Comandancias*), (c) Companies (*Compañías*), and (d) Posts (*Puestos*). Each Zone corresponds to the territory of an Autonomous Community. The command of each Zone is under direct control of the Vice-Director of Operations. In each one of the provinces, there will be at least one Command. The command and territorial distribution of Companies and Posts is decided by joint ministerial order from the Ministries of Interior and Defence.

24. The National Police Act in the capital cities of each province and in other cities that the government may determine (Article 11.2 LOFCSE). At the present, there are 58,270 national police agents; of those, 49,876 are operative.





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The administrative structure of the National Police Corps is composed of the following: (a) Superior Headquarters (*Jefaturas*), normally one, at least, in each Autonomous Community. There are currently twenty Superior *Jefaturas*. (b) Provincial Commissaries, which depend on the relevant Superior Headquarter. Each Provincial Commissary is directed by a Commissary in Chief (*Comisario Jefe*) and is divided into Brigades; Zonal, Local, and District Commissaries; and also 'Mixed Commissaries' and Commissaries of Border Posts.

25. Public security is an exclusive competence of the State, but Autonomous Communities can participate in its execution with their own respective police forces (Article 149.1.29 SC). The Autonomous Communities of Catalonia (*Mossos d'Esquadra*), País Vasco (*Ertzaintza*), and Navarra (*Policía Foral*) have created their own police forces, while other Communities – like Galicia, Valencia, or Madrid – have requested the ascription of some units of the National Police to exercise their functions of autonomous police. Those units of the National Police develop their functions under the command of the relevant Autonomous Community's authorities. If members of the State and autonomous police concur in the same action, the operational direction shall be in charge of the State forces. The agents of Autonomous Police can only act within the territorial boundaries of the relevant Autonomous Community, except in emergency situations if the State authorities request them to act outside their territory (Article 42 LOFCSE).

Municipalities can create their own local police forces (*Policía Local*), which can act exclusively within the territorial limits of the municipality. They have security functions, such as the protection of municipal authorities and local facilities, as well as the control of urban traffic, and their involvement in the criminal investigation is usually very reduced.

26. Police forces are given functions of surveillance, protection, and maintenance or restoration of public order to comply with the constitutional provisions aimed at the protection of the free exercise of rights and freedoms and at the guarantee of public security. Units of judicial police are in charge of the investigation of crimes. In a wide sense, all members of the Security and Police forces – regardless of whether they belong to the national police, civil guard, autonomous police, or local police – can act as judicial police of first phase: that means that all members of the police forces are responsible for taking the necessary measures when arriving at the crime scene in order to facilitate the crime investigation and identify the offenders. In this sense, it is said that all the police agents may act as judicial police, if needed. For example, in rural areas where there are no specialized judicial police units, local police or civil guard agents are usually the first to arrive at the crime scene and adopt the initial measures with regard to investigating the crime and gathering evidence.

27. In a strict sense, the Judicial Police are made up of specific units of the National Police or the Guardia Civil, specializing in the investigation and prosecution of crimes. These units have special professional training in crime investigation and perform their tasks exclusively in the field of criminal investigation; thus, their members do not perform any function in the field of public order. The units of judicial police can be established according to territorial criteria (Judicial Police for



a certain territory) or to material criteria (i.e., related to the specialization in certain crimes, Article 30 LOFCSE). At the central level, the Judicial Police are structured around a General Commissary of Judicial Police (*Comisaría General de Policía Judicial*) that comes from the General Director of Police. This General Commissary has the functions of investigation and prosecution of supra-territorial crimes, especially of drug-related crimes, as well as organized crime, economic or financial crimes, technological crimes, and gambling control. The General Commissary of Judicial Police is divided into five specialized units. In some Courts and some specialized public prosecution units, there is a judicial unit attached to it. This means, that those police agents will act only in the investigation of the crimes that fall within the competence of those courts or prosecution offices.

28. There is not a comprehensive regulation of all investigative measures that are to be adopted by the police, but rather a general rule of the powers of the judicial police within the criminal investigation. The lack of regulation of the powers of the judicial police is due to the underlying idea – within the structure of criminal proceedings in the CCP – that the Investigating Judge directs the criminal investigation and gives precise instructions to the police officers. Although this division of functions is no longer completely true in every case, the statutory rules still conform to that model. Generally, the police may carry out all necessary investigative acts to determine the circumstances of the offence and the author or persons involved in it, except those measures that need a previous judicial warrant (Article 549.1 a LOPJ and Article 282 CCP). Specifically, the Judicial Police Act states that, at the crime scene, the police shall observe the scene, try to reconstruct the facts, collect all elements that could be used as evidence or that could help identify the offenders. To find out the identity of the offenders, the police may perform DNA analysis, perform expert studies of voices, show photographs of possible suspects to the offended and the witnesses, and hold line-up identifications. They can make inquiries to find out where the suspects can be found and interrogate witnesses. The police are also empowered to administer alcoholic and drug tests to drivers, regardless of whether there has been an accident with possible criminal consequences or not. Furthermore, they must adopt those measures necessary to protect the offended and detain the suspect or suspects if possible.

They cannot adopt any measure that restricts fundamental rights, without a previous judicial warrant, except entering a domicile when the action is urgent (Article 553 CCP). A majority of investigative methods interfere with the fundamental rights of the person under investigation or even third persons, but in the CCP the exact measures subject to judicial authorization are search of dwellings, interception of communications (postal, telephone or others), body searches other than external, and undercover agents. The controlled delivery of drugs requires a judicial warrant, but this measure may also be adopted by the Chief of the Judicial Police Unit.¹ In the CCP, there are no provisions concerning other investigative measures carried out by the police, such as cross-checking data or other kinds of surveillance, and thus the requisites to adopt these measures, which undoubtedly can interfere with the fundamental rights of the citizens, are not clearly defined.

1. On the tasks and powers of the judicial police within the criminal investigation, see Queralt, J.J., *Introducción a la policía judicial* (Barcelona: Bosch, 1999), 129 et seq.

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Part I. Substantive Criminal Law

Chapter 1. General Principles

§1. THE PRINCIPLE OF LEGALITY

I. Statement and Content

80. The principle of legality in criminal law has been laid down both on the constitutional and statutory levels. According to the principle, the definitions of offences and the establishment of penalties can only be achieved by formal law. Regulation in this area is strictly reserved to statute. The Latin maxim *nullum crimen, nulla poena sine lege* is expressed in Article 25.1 SC: 'Nobody may be convicted or sanctioned for acts or omissions which at the time of their commission did not constitute a felony, misdemeanour or administrative violation according to the legislation in effect at that moment.' This declaration also reflects the obligations arising from international treaties to which Spain is a party.¹

The validity of the principle of legality is reiterated by the PC, which extends its effect to security measures: 'No act or omission which prior to its commission was not established by statute as being a felony or misdemeanour may be punished. Security measures may only be imposed if the requirements previously established by statute are fulfilled.' Apparently, in order to highlight the importance of this principle, Article 2.1 reiterates the idea, emphasizing the element contained in the Latin expression *nulla poena nisi praevia lege*: 'No felony or misdemeanour may be punished with a penalty not established by statute prior to its commission.'

If a court is aware of an act that it considers should be punished, it must abstain from dealing with it, but it may issue a request to the Government stating the reasons why it should be penalized (Article 4.2 PC).

1. Article 15 of the International Covenant on Civil and Political Rights and Art. 7 of the European Convention on Human Rights.

81. In addition to the criminal guarantees (legality of offences and dangerous conditions) and penal guarantees (legality of penalties and security measures), the following are derived from the principle of legality: jurisdictional guarantees (only judges and tribunals may convict of felonies or misdemeanours and impose penalties or security measures: Article 1 CCP), procedural guarantees (the procedures regulated by law must be followed in the punishment of offences: Article 1 CCP), and execution guarantees (the execution of penalties must comply with the laws and implementing regulations: Article 2 Organic General Prison Law).



82. Article 81 SC regulates a special type of statute called organic laws. They are different from ordinary statutes in that they require a higher quorum in Parliament for their validation. Their passage, amendment, or derogation requires an absolute majority of the Congress of Representatives in a final vote on the bill as a whole. The relationship between ordinary and organic laws is not hierarchical but related to areas of competence. Organic laws may, in principle, only regulate those areas reserved to them by the Constitution. One such area reserved to organic laws is that of fundamental rights and public liberties (Article 81.1 SC). The projection of this constitutional regime onto criminal law generated an intense debate about the proper nature of criminal statutes.

1

According to one section of commentators, felonies and misdemeanours may only be defined by organic law requiring a qualified majority. An ordinary statute lacks the capacity to create offences and assign penalties.

2

Other commentators argued that one must differentiate between legislation *developing* fundamental rights and public liberties and legislation *affecting* those rights and liberties. All criminal law affects rights having that status such as liberty or honour. But this does not mean that they develop them. According to this doctrine a non-organic statute would, in principle, suffice to define offences and assign penalties. At the other extreme, a considerable number of criminal law commentators argue that a non-organic criminal statute is not constitutionally legitimate. Every criminal statute has, by definition, an impact and ultimately an explicit or implicit developmental effect of those fundamental rights.

The TC¹ opted for an intermediate interpretation between the extremes. Only those criminal statutes that, due to the protected legal interest or the nature of the penalty (especially punishment restricting liberty) concerned, directly affect fundamental rights or public liberties recognized as such by the SC must be organic laws.

In parliamentary practice it has been established de facto that all criminal legislation is passed as organic laws. Hence, the PC of 1995 was passed by Organic Law 10/1995 of 23 November. This does not prevent certain precepts – which are, in essence, not criminal, despite being included in criminal laws due to their content or for reasons of convenience – from maintaining an ordinary law character, as declared expressly by that law.²

1. STC 66/1989, of 17 April, which established that a non-organic statute that defines offences and their pecuniary penalties can comply with the SC.
2. As is the case with the PC regulation of civil liability arising from offences, as expressly established in the sixth final provision of the Organic Law 10/1995.

83. It is completely impossible to create felonies or misdemeanours through legislation inferior to statute or by custom. Similarly, regional legislation created by Autonomous Communities is not a suitable means by which to create criminal violations or establish penalties. Criminal legislation is within the exclusive competence of the state (Article 149.1.6th SC).

However, the mechanism of blank criminal laws allows regional legislation and legislation of a rank inferior to statute to play a part in establishing the detail of some offences. A typical example of this is the offence against the environment in Article 325 PC. Certain contaminating conduct is made penal when there is an



infringement of legislation protecting the environment. The legislation that must be infringed for the offence to occur can be regional or be of a rank inferior to statute (see *infra*, paragraph 85).

84. Apart from reserving the regulation of offences and penalties to statute (*nullum crimen, nulla poena, sine lege scripta*), the principle of legality has other manifestations:

- (a) The prohibition of retroactivity of the law (*sine lege previa*), which will be analyzed in the section on the effects of criminal statutes in time (see *infra*, paragraph 93).
- (b) The requirement of determination (*sine lege scripta*): The law must be certain and ambiguous, indeterminate, or excessively open or undefined descriptions are prohibited.
- (c) The prohibition of analogy against the accused (*sine lege stricta*).

The delimitative nature of criminal law is a consequence, although not always scrupulously applied, of the requirement of determination. Criminal law must be precise in its definitions and dispositions in order to enable the citizen to know beforehand what conduct is prohibited and sanctioned and the scope of the prohibition. This manifestation of the principle of legality may suffer with blank criminal legislation and those definitions of offences that include an element of judgment.

85. Blank criminal provisions include in the description of the offence legal extra-criminal elements. The criminal conduct is not completely defined by the criminal provision. It is, therefore, necessary to rely on other non-criminal provisions to which the criminal statute expressly or tacitly refers. A common example of a blank criminal provision is that relating to the pollution of the environment. Among its defining elements, in addition to the disposal of waste creating a grave environmental risk, is the requirement that there be a violation of 'laws or provisions of a general character protecting the environment' (Article 325 PC). In this way, criminal conduct is not defined in its totality by the PC. It is necessary to refer to extra-criminal provisions. This provision can be of an inferior rank to that of statute, and it may have been created by an Autonomous Community in application of its regional legislative competence. The attributes of clarity and certainty of criminal law are affected by the dispersion of the sources of legal provisions that must be taken into consideration.

The mechanism of blank criminal provisions has been accepted by the TC,¹ adopting the doctrine known as the theory of essentiality. Criminal statutes may, when defining offences, refer to provisions of other areas even if they have no statutory status and have been created by non-State powers (regional or supranational), if the reference is clear and the essential core of the prohibition is included in a criminal provision. It is argued that if this possibility were banned, criminal protection would be extremely difficult in cases of certain legal interests defined in other areas of law.

However, a description of offending conduct referring solely to extra-criminal provisions for the definition of its core elements would not be considered to



conform to the Constitution.² Blank criminal provisions are constitutional if the reference to other provisions is made expressly and is justified by the interest legally protected, and if the criminal statute provides for the penalty and the essential core of the conduct made penal in such a way that the extra-criminal provision is only complementary to the penal prohibition. Only in this way can the guarantee of the criminal definition of offences be maintained, in order to permit clear knowledge the conduct made penal.³

1. SSTC 127/1990 of 5 July, 111/1993 of 25 March, and 120/1998, of 15 June, among others.
2. STC 24/2004 of 24 February. The decisions dealt with the constitutionality of the offence of unlawful possession of weapons, penalized in Art. 563 of the 1995 PC. This provision penalizes the 'possession of prohibited weapons'. The legal concept of prohibited weapons is contained in a Regulation issued by the government containing a very long list of a great variety of objects such as pen-knives, machetes, or air guns (Art. 4 of the Weapons Regulation passed by Royal Decree 137/1993 of 29 January) and references to other regulations. The TC stated that the provision is constitutional. However, it concluded that possession of an item should not be punished solely because of its inclusion by the government in the catalogue of prohibited weapons. Possession could only be penalized for those that are weapons in a real sense, that create a certain danger, and that are expressly prohibited by the regulation rather than by any other provision of inferior rank.
3. STC 283/2006 of 9 October.

86. The principle of delimitation can also be affected by openly defined offences or those that include ambivalent or unclear elements of evaluation. It is impossible completely to eliminate elements of evaluation in the formulation of offences. However, a good legislation technique will try to find definitions with the greatest possible degree of specificity and avoid generic definitions including subjective elements of interpretation. The doctrine has complained about the proliferation of such provisions in the PC of 1995. In many cases, the distinction between a felony and a misdemeanour or an administrative infraction relies on a blurred and ethereal element such as the 'gravity' of the conduct or result.¹ Deciding whether a conduct should be considered 'grave' is a task that is not easily reduced to strict parameters. In other cases, ethereal concepts such as a quantity 'of considerable importance'² or 'especial [economic] importance',³ or 'especial seriousness' of the damage caused⁴ lead to considerably more serious penalties. Both TC and TS have declared compatible the use of provisions of the kind mentioned previously with the principle of legality, if the judge or tribunal can complement its meaning by reference to logical or experience-based criteria and not by reference to purely arbitrary criteria.⁵ In many cases, the criteria created by jurisprudence have reached such high levels of specificity and detail that the difficulties explained earlier are, to a great extent, resolved.⁶

1. Thus, in the case of negligence offences (Arts 142, 152, 267, and 621 PC) in which the gravity of the negligence determines whether there has been an offence and, if so, whether it was a felony or misdemeanour; similarly with offences against the environment (Arts 325, 328, and 330 PC) in which the gravity of the dangerous condition created or of the damage caused to the environment is the key element in deciding whether to apply criminal law or only to impose an administrative sanction. Many other examples can be found in the PC.
2. Article 369.1.6th PC (drug trafficking offences).
3. Article 305 PC (tax-related offences).
4. Article 251.1.6th PC (fraud and unlawful appropriation).



5. Among many others, STS 1141/1995 of 18 November, or 643/2002, of 17 April and STC 62/1982 of 15 October.
6. For example, the TS has established, subject to the possibility of periodic review, the precise number of Euros giving rise to an 'especial seriousness' in a fraud (Art. 250.1.6th PC); and the precise weight depending on the substances, at which a quantity of drugs becomes 'an amount of considerable importance' in the area of offences contrary to public health (Art. 369.1.6ª PC).

II. Legality and Interpretation

87. As with any other provision, the application of criminal law includes an element of interpretation. The idea of the judge being 'the silent mouth that pronounces the words of the law' is a myth abandoned long ago. The process of interpretation is unavoidable when applying the law. All general theory on interpretation finds full application in the area of criminal law, as do the legal criteria of interpretation established in Article 3.1 of the Civil Code (literal, systematic, historical, sociological, and teleological interpretation).

88. The interpretation of criminal law has one peculiarity derived from the principle of legality. Analogical interpretation is not allowed if it is *in malam partem*,¹ that is against the defendant. A highly restrictive criterion must be applied – *odiosa restringenda sunt*. This rule does not stem from the principle *pro reo*, the validity of which affects only the evaluation of evidence. Strictly speaking, its roots are in the principle of *pro libertate* or *favour libertatis*, which affects the whole legal system subject to the rule of law.

This principle is clearly referred to in two provisions. Article 4.2 of the Civil Code states that 'criminal statutes, exceptional laws and those of a temporary nature will not be applied in cases other than those contained in them'. Article 4.1 PC states similarly that 'criminal statutes will not be applied to cases other than those expressly referred to in them'.

1. Among many others, SSTC 89/1983 of 2 November or 75/1984 of 27 June.

89. However, an analogical interpretation *in bonam partem* is acceptable. Some provisions of the PC are based on this type of analogical interpretation. The clearest example is Article 21.6th, which, after enumerating the mitigating circumstances, includes a generic clause considering mitigating to mean 'any other circumstance of analogous meaning to the above'.

§2. THE PRINCIPLE OF INDIVIDUAL GUILT (MENS REA OR AUTONOMY)

90. The principle of culpability or individual guilt (*nullum crimen sine culpa*) is deemed in criminal doctrine to have an enlightening and limiting effect on criminal legislation and any criminal policies inspiring that legislation. It is legally established in Article 5 PC: 'There will be no punishment without criminal intention or negligence'. The legislator avoided the term 'culpability' and substituted 'criminal intention or negligence' to avoid doctrinal controversy.

The consequences of this principle are very diverse. The requirement of culpability, expressed as criminal intention or negligence is the first of the consequences. But it also results in the need to individualize the punishment and the consequent banning of the sanctioning of acts committed by others. It also requires the eradication of any case in which liability is based on the result, independent of any culpability. Some provisions based on *versari in re illicita*, which existed in earlier Spanish penal codes, disappeared in the PC of 1995. Further, the principle imposes the need to analyze the capacity of the perpetrator to be culpable in the specific case and with respect to the actual act committed.

As criminal liability of legal persons is only recognized in very unclear and cautious terms in Spain, the preceding legal formulation of the principle of culpability or individual guilt is possible with all the preceding derivations. The complete development of this principle is described in Chapter III (see *infra*, paragraphs 253-257).

§3. THE PRINCIPLE OF PROPORTIONALITY

91. This principle is effective in various ways. First, the principle of proportionality is a mandate addressed to the legislator and prohibits the use of criminal laws for any purpose other than the protection of legal rights. This leads to the principle of offensiveness or damaging effect, according to which the creation of an offence with a different purpose must be rejected.

Further, the use of the *ius puniendi* must not be disproportionate or unnecessary. This follows from the principle of minimum intervention. Criminal law is the last resort and must not be used when the objective can be obtained with other, less aggressive, means with respect to individual liberty. When evaluating these factors, the legislator has an ample margin of discretion but cannot surpass certain limits.

The TC¹ has decided that the principle of proportionality was tacitly established by the SC. The imposition of a penalty is constitutionally justified only if it responds to the need to protect legal rights that would not be sufficiently protected by other areas of law.

1. SSTC 111/1993 of 25 March, 55/1996, of 28 March or 161/1997 of 2 October.

92. With respect to the sanction, the principle of proportionality requires that the quantity and nature of the penalty are in proportion to the culpability of the offender and the importance of the legal right protected. A certain harmony must be maintained in the systematic context of the totality of the offences and penalties available. Less serious conduct must not result in a more severe penalty than that for other, clearly more serious, offences. The TC views the Spanish Constitution as being the basis for this aspect of the principle of proportionality.¹

1. SSTC 55/1996 of 28 March, 161/1997 of 2 October and 136/1999 of 22 December.



Chapter 2. Scope of Application of Criminal Statutes

§1. PRINCIPLES CONCERNING THE APPLICABILITY OF CRIMINAL STATUTES WITH RESPECT TO TIME

I. Principle of Non-retroactivity/Prohibition of Retroactive Criminal Law

4

93. The principle of prohibition of retroactive effect of criminal dispositions applies fully in Spanish criminal law, except where it may be favourable to the defendant. This principle has constitutional status: Article 9.3 SC provides for 'the prohibition of retroactive application of unfavourable sanctioning provisions'. On a statutory level, the principle is declared in Article 2 PC: 'No felony or misdemeanour may be punished with a penalty not established by statute prior to its commission. In the same manner, statutes imposing security measures must not have any retroactive effect.' In this way, the principle is repeated and emphasized, because it is also implicit in Article 1.1, which prohibits, as seen in respect of the principle of legality, the criminal sanctioning of acts not defined as an offence by statute *prior* to its commission.

II. Retroactivity of the Milder Statute

94. Article 2 PC further explains that 'those criminal provisions which are favourable to the defendant may have retroactive effect, even if they come into force after a final sentence has been given or when the offender is already serving the sentence'.

Inssofar as it is favourable, the new criminal provision can affect earlier events. The same applies when defendants have already been sentenced. The only cases excluded are those in which the sentence has been served completely.

When a milder statute comes into force, all sentences being served must, if applicable, be revised to adapt to the new legislation. Important reforms of criminal law usually include specific transitional provisions regulating the procedure and forms that may apply as a consequence of any possible retroactivity, which may also include revision of final sentences.

Sometimes it is not easy to decide which statute is more favourable. When this occurs, the PC (Article 2) proposes that the defendant be heard. His opinion is not binding.

95. Temporary statutes are not affected by the principle of retroactivity of favourable provisions (Article 2.2). The position of extra-criminal laws that contribute to the definition of the offence (blank criminal provisions) is assimilated to temporary statutes, although some minor differentiations are necessary and the commentators are not unanimous about this regime. Typical examples are tax provisions necessary to define the delimitations of offences against the Public Revenue. The reduction of tax burden does not cause the revision of earlier criminal sentences based on different tax legislation.¹



1. In decisions of the TS 1688/2000 of 6 November and 1210/2001 of 11 June, it was held that the principle of retroactivity of the more favourable provision also applies to administrative provisions complementing the definition of the offence. In reality, it is not possible to establish a general rule, and every particular case must be analyzed to establish whether the variation contained in the extra-criminal provision entails a new assessment of the unlawfulness of the conduct.

96. For the purpose of determining the criminal provision applicable with respect to time, felonies and misdemeanours are considered to be committed at the moment the perpetrator commits the act or omits to act as he was obliged (Article 7 PC). In this way – and only to this specific effect – the PC applies the theory of action.

Other interpretation problems are, however, unsolved: continuing offences, habitual offences, permanent offences, or offences of continuing extension. The solution with respect to these cases is not uncontroversial. In continuing, permanent, habitual offences and offences of continuing extension (in which the various acts are committed while different criminal provisions are in force), the last provision will generally be applied, although there are particular cases in which this solution may be debatable (e.g., when the new legislation is detrimental or where only one of the number of acts that form the continuing or habitual offence was committed while it was in force).

97. The application of the more favourable statute must be comprehensive. It is not possible to extract different parts from successive statutes to apply whichever provision is more favourable, thereby artificially creating a third statute. Transitional provisions included in criminal law reforms usually establish this principle, which has also repeatedly been applied by case law. However, in some cases a fragmented application of statutes has been allowed when it refers to an autonomous concept (e.g., the application of new rules in relation to the aggravating circumstance of recidivism due to their being more favourable to an offence defined under earlier legislation, which had been in force when the act was committed).

It has been discussed whether the principle of retroactive application of more favourable provisions also affects the changes in interpretation of a statute made by jurisprudence. In contrast with the opinion affirming an effect on jurisprudence, the TS rejected a retroactive effect, referring the affected parties to the institution of pardon to adapt their sentence to the new interpretation.¹

1. STS 16 Oct. 2000, STS 30 Jan. 2001, and STS 10 Jan. 2002.

§2. PRINCIPLES CONCERNING THE APPLICABILITY OF CRIMINAL STATUTES WITH RESPECT TO SPACE

I. The Territorial Principle

98. With respect to location, the territorial principle is the main criterion for the application of criminal law: Criminal statutes are applicable to felonies and misdemeanours committed in Spanish territory or on board Spanish ships or

aircraft' (Article 23.1 Judiciary Act). The nationality of the perpetrator is irrelevant. The Spanish jurisdiction deals with all criminal acts committed in Spanish territory. This means continental territory, territorial sea (which extends to twelve sea miles into the sea measuring from the point closest to the coast: Act of 4 January 1977), and air space (that space located over the national territory and territorial sea: Act of 21 June 1960 on Aviation).

99. For offences committed on board ships and aeroplanes, the criterion is the national flag under which the ship or aircraft is operated: If the ship or aircraft is Spanish, the offences are considered to be committed on Spanish territory, but this is no obstacle to establishing the application of Spanish criminal law to offences committed on board non-Spanish aircraft flying in Spanish airspace, without prejudice to variations resulting from international treaties signed by Spain.

When defining the place where the offence is committed, most recent case law has opted for the principle of ubiquity: The offence is considered to have been committed in all those places where some of the criminal acts or results have taken place.

II. Extraterritorial Criminal Jurisdiction

100. Beside the principle of territoriality, Article 23 of the Judiciary Act establishes other principles for exceptional and very specific cases: the principle of active personality (nationality of the perpetrator of the offence); the so-called royal principle, or principle of protection of interests (which applies to certain offences violating national interests that require protection in any event); and the principle of universal justice (which allows the Spanish jurisdiction to prosecute certain crimes that are considered to be offensive to humanity as a whole, irrespective of where they were committed). A more detailed study of these principles and their application in case law may be found elsewhere (see *infra*, paragraph 410).

§3. PRINCIPLES CONCERNING THE APPLICABILITY OF CRIMINAL STATUTES WITH RESPECT TO PERSONS

101. The general principle is that criminal law must be applied equally to all Spaniards and foreigners (Articles 13.1 and 14 SC) without distinction based on personal circumstances. However, there are exceptions to this rule. The application of criminal law to certain persons may be modulated for various political reasons, thereby determining the impossibility of its applicability.

Although the terminology used by commentators and even statutes is sometimes confusing, because it uses some of these concepts without differentiating between them, it is possible to distinguish among inviolability, immunity, and jurisdictional exemption.

102. *Inviolability* is considered to comprise the absolute impossibility of criminal proceedings against certain persons based on their position. *Immunity* is a privilege

requiring that there be a special authorization before criminal proceedings can be commenced against certain persons. Finally, *jurisdictional exemptions* are cases in which national jurisdiction is excluded for certain persons based on reasons of international law.

103. There is a certain relationship – although no overlap – between immunities and the so-called *privileged jurisdiction*, or cases in which as a consequence of the position of the person, jurisdiction to investigate and adjudicate upon an offence lies not with the general judicial organ but rather with another, superior in hierarchy. Thus, the Spanish Constitution has established the jurisdiction of the Criminal Chamber of the Supreme Court with respect to criminal investigation and adjudication with respect to Members of Congress and Senators or Members of the Government (Articles 71.3 and 102.1 SC). This privileged jurisdiction is not always linked to immunities. In general, all positions benefiting from immunity are subject to a privileged jurisdiction. But this special personal jurisdiction privilege also extends to other positions that lack immunity. A complete list would be too long. The commentators have repeatedly asked for the abolition, or at least a reduction, of these jurisdiction privileges. These privileges may include jurisdictional privileges of members of the Parliamentary Assemblies of the Autonomous Communities and members of the Government Council of Autonomous Communities, judges and public prosecutors, and police officers for offences committed in the exercise of their duties, etc.

I. Inviolabilities Based on National Public Law

104. Inviolabilities may be absolute or relative. They entail the lack of criminal liability. Inviolability is absolute when it covers all acts of the person who enjoys it and relative when it only covers some of his activities.

The only absolute inviolability existent in Spanish national public law is that with respect to the King. As head of state, he is inviolable and is subject to no liability, including criminal liability, as established in Article 56.3 SC. The member of government (the President of the Government or his Ministers: Article 64 SC) responsible for those political acts in which the intervention of the King is mandatory assumes responsibility. The inviolability is defined as a personal basis for the exclusion of liability.

This inviolability has, above all, a symbolic value: It is considered that it would be contradictory for the King to be subject to justice administered in his name. The survival of this privilege is based on historic tradition, however, and is not questioned.

105. Relative inviolabilities are those referring to specific acts of a person in a position of authority, committed in the course of his specific duties and not to all the actions of the person protected. The interpretation of these inviolabilities must be restrictive according to the Constitutional Court and the Supreme Court.

The following are relative inviolabilities:

- (a) The protection of members of parliament, including the Congress and Senate, for opinions expressed in the course of their duties (Article 71 SC). It is based on the need to allow maximum liberty in their function as democratic representatives of the people, without being subject to the pressure of potential prosecution resulting from the exercise of their duties. Parliamentary activity requires that members of parliament have maximum liberty to express themselves during official sessions. The inviolability does not include declarations or opinions expressed outside a parliamentary context.¹
- (b) The Statutes of Autonomy also recognize inviolability for opinions expressed in the course of their duties by members of Autonomous Parliaments, based on the same grounds. The TC, however, declared this immunity of members of Autonomous Parliaments to be unconstitutional.²
- (c) The judges of the Constitutional Court enjoy inviolability for opinions expressed in the course of their duties.³
- (d) The Ombudsman and his deputies enjoy inviolability for acts performed in the course of their duties.⁴

1. However, the TC has further established that inviolability also covers acts outside the Parliament that are, purely and simply, a literal reproduction of a parliamentary act (STC of 28 Nov. 1992).

2. STC 36/1981 of 12 November and STS 12 Jun. 1995.

3. Article 22 of the Organic Law 2/1979 of the Constitutional Court of 3 October.

4. Articles 6.2 et seq. of Organic Law 3/1981 of the Ombudsman of 6 April.

II. Immunities Based on National Public Law

106. In contrast to inviolabilities, immunities usually refer to the need for an authorization to prosecute the person protected. They comprise non-absolute restrictions in the application of the criminal jurisdiction to certain persons: that application is subject to the obtaining of prior authorization. These immunities are also based on historic vestiges, the application of which is nowadays questioned.

The typical example is that of Members of Parliament (Congress or Senate) who may not be judged, charged, or detained during their mandate (except in the case of *flagrante delicto*) without prior authorization of the parliamentary house of which they are a member (Article 71.2 SC).

107. In contrast to inviolability, this privilege is more of a procedural than substantive nature. The purpose is to avoid that powers other than the Legislature intervene in the composition and functioning of the Parliament, manipulating its will.¹ The TC has defined the constitutional legitimacy of the refusal to grant authorization to prosecute in a very strict way. Immunity and inviolability are 'not personal rights but rather derived rights enjoyed by members of parliament in their position as part of the legislature, and which are only justified as far as they are a condition for the efficient and free functioning of this institution' (STC 243/1988 of 19 December and STC 9/1990 of 18 January). On this basis, the Constitutional Court

has been able to reject the legitimacy of a refusal to grant authority to prosecute when it is not based on these grounds. The power of the House when granting authorization is not absolutely discretionary. It is subject to the basis of the institution of immunity. For that reason, the refusal is inadmissible in cases in which these premises are not given. It is necessary for the refusal to be based on a motivation consistent with the objective of the parliamentary privilege,² which is to avoid interference in or manipulation of the functioning of the Legislature. According to constitutional jurisprudence, when deciding on whether to give permission to prosecute, the House must make a decision based on the political intention of the criminal action taken against one of its members and its ability to disturb the functioning of the House or alter its composition. When the authorization is rejected, the proceedings must be dismissed (Article 677 Act on Criminal Procedure and STC 92/1985 of 24 July).

Immunity lasts only for the duration of the mandate (Article 71.2 SC), which is another important difference between immunity and inviolability. Once the status of a Member of Parliament has ended due to the dissolution of Parliament or for any other reason, it will be possible to charge and prosecute the ex-member of Parliament irrespective of whether the proceedings had already been initiated or whether it concerns acts committed during the mandate; this shows the instrumentality of the immunity in relation to the parliamentary function.³

1. STC 243/1988 of 19 December.
2. STC 90/1985 of 22 July and STC 206/1992 of 27 November.
3. STC 22/1997 of 11 February.

III. Immunities Based on Supra-National Provisions

108. The law of the European Union also contains provisions of this nature. Article 5 of the Rules of Procedure of the European Parliament refers to the Protocol on Privileges and Immunities of the European Communities (Annex to the Treaty of 8 April 1965) to establish the privileges and immunities of members of the European Parliament. Article 10 of the aforementioned Protocol provides, 'During sessions of the European Parliament, its members shall enjoy: (a) in the territory of their own State, the immunities accorded to members of their parliament.' Therefore, everything stated with respect to the members of the Spanish national parliament in relation to the waiver necessary for their charging and prosecution is applicable to Spanish members of the European Parliament, with one difference arising from the supra-national nature of that organ: The waiver must be granted by the European Parliament (Articles 6 and 7 of the Rules of Procedure of the European Parliament). According to the aforementioned Protocol, other civil servants of the EU institutions enjoy also certain immunities. The Protocol on the European Court of Justice provides for similar immunities for Judges and Attorneys to the Court.

IV. Jurisdictional Exemptions or Immunities Based on International Public Law

109. Jurisdictional exemptions are also classified as immunities. They are regulated with this terminology in Article 21.2. LOPJ: the ‘immunities of jurisdiction and execution’ established in International Public Law.

Immunities from jurisdiction in relation to diplomatic representatives are established in the Vienna Convention on Diplomatic Relations of 18 April 1961 (Article 31: ‘A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State’); and the Vienna Convention on Consular Relations of 24 April 1963 (Article 43, which limits the immunity of consular officers and employees to the acts performed in the exercise of their consular functions). The sending state may waive this immunity in both cases.

110. Certain representatives or officers of international organizations are also protected by immunities of different scopes, specified for each case: detention immunity, total immunity in relation to demonstrations, and acts performed in compliance with their functions; where applicable, there may exist the possibility of a waiver of immunity, etc.¹ For each case, one must refer to the provisions of the relevant international treaties or instruments. It is even admitted that international customs may be a source of this kind of exemption. It is Customary International Law that establishes the recognized immunity of foreign Heads of State,² which also extends to members of his family and entourage during visits.

Cases in which certain treaties establish the waiver of jurisdiction by Spanish Courts to proceed in relation to certain offences committed on Spanish territory by members of foreign armed forces posted at bases in Spain against other members of the same armed force may also be classified as jurisdictional exemptions.

1. Among others, the Protocol on Privileges and Immunities of the European Communities of 8 Apr. 1965; the Second Protocol to the General Agreement on Privileges and Immunities of the Council of Europe of 15 Dec. 1956; the Agreement on Privileges and Immunities of the Council of Europe of 2 Sep. 1949, and Art. 18 of the Agreement on the Status of the Western European Union, National Representatives and International Staff of 11 May 1955; the Convention on Privileges and Immunities of the United Nations approved by the General Assembly of the United Nations on 13 Feb. 1946, Art. 40 of the Statute of the Council of Europe; and Art. 51 of the Convention for the Protection of Human Rights and Fundamental Freedoms.
2. Spanish Courts have, in some cases, invoked this type of immunity to reject a complaint lodged against a foreign Head of State.

Part II. Criminal Procedure

Chapter 1. Principles, Institutions, and Stages

§1. THE JUDICIAL ORGANIZATION

1

409. The principles governing the judicial organization were already mentioned *supra* when describing the general features of the judicial system in the General Introduction, §1.V. Now we explain with more detail the judicial organization and the rules of jurisdiction and competence.

410. The main rules with regard to the international competence of the Spanish jurisdiction in the criminal field are found in Article 23 of the Judiciary Act. This provision establishes the principle of territoriality as the general rule that governs the jurisdiction of the Spanish courts in criminal matters (Article 23.1 LOPJ). But the Spanish jurisdiction may have extraterritorial range in certain cases. Thus, the principle of territoriality is complemented by the principle of nationality – every Spanish citizen is subject to the Spanish criminal jurisdiction, regardless of the place where the offence has been committed – (Article 23.2); by the principle of defence or national interest (Article 23.3); and by the principle of universal justice (Article 23.4). Under the principle of universality, Spanish courts have jurisdiction to try certain very serious offences, listed in Article 23.4 LOPJ (mainly, genocide, terrorism, child prostitution and abuse, drug trafficking), even in those cases where the offence has been committed outside Spanish borders and where the possible offender is not a Spanish citizen. The application of this principle has been hotly discussed, without reaching a uniform answer to the question. In a very important and extensive decision, the Supreme Court stated that in order to avoid an abuse of jurisdiction and an excessive extension of the extraterritorial jurisdiction, Article 23.4 LOPJ should be applied, taking into account the principles of international law and the real effectiveness of the sentence.¹ According to that decision, and following the trend in other European countries and the Princeton Principles on Universal Jurisdiction (2001), the Supreme Court decided to construe Article 23.4 LOPJ in the sense that only if there was a link with Spain will it be justified for the Spanish Judicial system to prosecute crimes under the principle of universal justice. The absence of any kind of connection with the Spanish territory, citizens, or interests could not only cause international conflicts, but lead to an ineffective sentence. Notwithstanding this sensible reasoning, the Constitutional Court reversed the Supreme Court's decision in 2005, on the grounds that the legal wording of Article 23.4 LOPJ did not include limitations to the application of the principle of

universal justice, nor did it require any kind of connections to the Spanish territory; the Court finally stated that such a restrictive interpretation of Article 23.4 LOPJ was inconsistent with the fundamental right to access to court.²

1. STS 25 Feb. 2003, in the case *Guatemala*.
2. See STC 237/2005, 26 September.

411. Once the jurisdiction of the Spanish courts is established according to the rules contained in Article 23 LOPJ, the rules of matter jurisdiction will determine which kind of judge or court is competent to hold the trial and render judgment on a relevant case: a criminal court (with one Judge), the provincial court (as a rule, with three Magistrates), a Jury Trial, or an Investigating Judge (IJ), if the act as evaluated as a petty offence or misdemeanour; or in a number of petty offences, the Justice of the Peace. The element that usually determines the matter of jurisdiction is the seriousness of the offence, but in certain cases, it will be determined according to the type of offence or *ratione personae*. For example, the National Court will have jurisdiction over certain offences, such as terrorism, regardless of the seriousness of the offence. For *ratione personae*, the subject-matter jurisdiction in a case where the accused is a police officer is attributed to the provincial court, regardless of the seriousness of the offence.

412. The rules of territorial jurisdiction identify which of the different courts with subject-matter jurisdiction will decide the case. As to territorial jurisdiction, the general rule is that each court is limited to the boundaries of its judicial district; the investigating judges can only exercise their jurisdiction within their respective territory (*partido judicial*). However, the CCP allows the judge to act out of his territorial limits if his seat is closer to the place where the investigative act has to be performed than the seat of the investigating judge who would have territorial jurisdiction (Article 323 CCP). On the other hand, the investigating judge that belongs to a court with jurisdiction over the whole Spanish territory – for example, the National Court – may act in any place of the national territory.

The judge responsible for the pre-trial investigation is the investigating judge of the place in which the offence has been committed (*forum commissi delicti*) (Article 14 CCP). If this place is not certain at the beginning, responsibility will be determined according the rules of Article 15 CCP (see *infra*, paragraph 415).

I. Trial Courts

413.

- (1) *Justice of the Peace (Juzgados de Paz)* has jurisdiction in the Municipalities, but only in those where there is no Investigating Judge. They are lay judges appointed for a term of four years by the city council assembly, and they do not require a law degree. As to their functions, they have jurisdiction over civil as well as over criminal matters: in the civil jurisdiction, they decide only over very small claims (less than EUR 90), and as criminal judges, they try a limited number of petty offences (Article 14 CCP) – for example, graffiti paintings

(Article 626 CC), leaving syringes or other dangerous instruments in public places frequented by children (Article 630 CC), cruel mistreatment of animals (Article 632 CC), minor disturbance of the public order (Article 633 CC), or some minor threats (Article 620 CC). Although their subject-matter jurisdiction is very limited, they often cooperate with other judges in carrying out the summons and notifications to citizens resident in their village.

- (2) *Investigating Judge (Juzgados de Instrucción)*, with jurisdiction in the territory of a judicial district, a unit smaller than a province. A judicial district can be a single town or a group of villages, depending on population. A judicial district has one judge, who acts as mainly as Investigating Judge, but such judges also responsible for the habeas corpus procedure and petty offences procedures (Article 87 LOPJ). Petty offences are those sanctioned with a minor penalty – for example, to be deprived of a driving license for a maximum period of one year, to be deprived of an arms license for a maximum time of one year, a pecuniary penalty up to two months, a domicile arrest up to a maximum of six weekends, community service, etc. (Article 33.4 Penal Code). Petty offences are regulated in Article 617 et seq. of the Penal Code, for example, minor threats, insults, minor injuries, hitting someone without causing any injury, theft when the stolen property is less than EUR 300, intentional damage when it is not superior than EUR 300, and those that have been already mentioned when describing the responsibilities of the justice of the peace. They also deal with the appeals against the decisions made by the justice of the peace. The same investigating judge is, in many judicial districts, also responsible for civil matters, as the first instance judge.
- (3) *Juvenile Court (Juzgado de Menores)*. Article 97 LOPJ provides that there will be at least one juvenile court in each province and seated in the provincial capital. The juvenile courts are responsible for presiding over the offences committed by minors older than 14 years and younger than 18 years. In these procedures, the public prosecutor (PP) is in charge of the whole investigation, except when investigative measures restrictive of a fundamental right have to be ordered.
- (4) *Criminal Court (Juzgado de lo Penal)*, have jurisdiction in the territory of a province. Criminal Courts with a single judge were created in 1988. They are responsible for first-offence cases where the custodial penalty is lower than five years (Article 14.3 CCP) and with cases sanctioned with any kind of non-custodial penalty. They are responsible for first-instance appeals against the decisions rendered by the investigating judge in the misdemeanour or petty offence procedure.
- (5) *Provincial Court (Audiencia Provincial)*, whose criminal sections – made up of three judges – deal as a first-instance court with cases sanctioned with a penalty higher than five years' imprisonment. In addition, they act as appellate courts with respect to the sentences of the criminal courts within the province (Article 80 et seq. LOPJ).

Since 1995 the Spanish judicial system has a jury trial. The jury tribunal is composed of nine jurors (and two alternates) responsible for questions of fact and guilt, and one professional judge (deciding questions of law and punishment) presides over the court. The jury trial is organized within the provincial

courts, on the basis of the magnitude of the possible punishment, and the presiding judge is a member of the provincial court. Trial by jury is limited to specific types of offences, such as offences committed by public officials in the exercise of their duties; offences against persons, honour, liberty, and security; misappropriation of public funds; and arson. The crimes that fall under the jurisdiction of the National Court are always excluded from the trial by jury (Article 1 LOTJ 5/1995, 22 May).

- (6) *Higher Court of Justice (Tribunal Superior de Justicia)*. Each Autonomous Community has a Higher Court of Justice, which performs as a first-instance court with criminal cases according to their regional statutes. Their realm of responsibility may vary from one region to another, but most statutes say that the authorities of the Autonomous Government and the Autonomous Assembly are subject to the High Court of Justice when accused of an offence committed in the exercise of their functions. They also try the cases of judges, magistrates, or public prosecutors with regard to offences committed in the exercise of their office. They also decide the appellate review of the decisions rendered by the provincial courts (Article 73 LOPJ) and decide the appeals filed against the judgments rendered in the jury trial (Article 846bis a) CCP).
- (7) *National Court (Audiencia Nacional)*. In the criminal field, the National Court is responsible for particularly serious offences that go beyond the borders of several provincial courts. The subject-matter jurisdiction is mainly defined in Article 65 LOPJ: counterfeiting of coins, fraud affecting the national economy or with repercussions in more than one province, money-laundering, offences against the public health committed by organized groups (drug trafficking), offences against the Head of the State, and crimes committed beyond the Spanish borders; terrorism has lately been included. If one of the offences that fall under the responsibility of the National Court is committed by a minor, it will be decided by the Juvenile Central Court (*Juzgado Central de Menores*). Within the National Court, the *Central Criminal Court (Juzgado Central de lo Penal)* – made of one judge – first tries offences of lower than five years' imprisonment (Article 89bis.3 LOPJ); the Criminal Chamber (*Sala de lo Penal*) – divided in sections of three judges each – is the court for first offences with higher than five years' imprisonment (Articles 62 et seq. LOPJ). It also decides the appeals filed against the decisions of the Central Criminal Court. Against the Criminal Chamber's decision, it is possible to file an appeal before the Chamber of Appeals of the National Court (Articles 64 and 64bis LOPJ). These sections of the LOPJ were amended by the Organic Law 19/2003 to comply with Article 14.5 of the International Covenant on Civil and Political Rights, which establishes the right of everyone convicted of a crime to have the conviction and sentence reviewed by a higher tribunal. However, this legal reform is not applicable yet because the procedural precepts for appellate review have not been modified.
- The National Court (*Audiencia Nacional*) is also responsible for the execution of European arrest warrants and the judicial proceedings of passive extradition.
- (8) *Supreme Court (Tribunal Supremo)* is the highest judicial body, except in relation to constitutional rights. The principal functions of the Supreme Court

are to deal with the *cassation* and to review sentences that are already res judicata. The *cassation* does not include a review of the judgment about the facts; the Supreme Court only monitors whether the inferior court's decision has infringed some substantive (*ius in iudicando*) or procedural laws (*ius in procedendo*). If the Supreme Court holds that there has been an infringement of procedural rules, the Court will quash the sentence and remand the case to the lower court to correct the infringement and render a new decision. In all other cases, after quashing the sentence in way of cassation, the Supreme Court will render the final decision. In addition, the Supreme Court has also looks after respecting constitutional guarantees (Article 5.2 LOPJ).

In certain limited cases, the criminal chamber of the Supreme Court acts as a first-instance court in criminal cases where the offender occupies a high position in the state institutions, as, for example, the President of the Government, of the Senate, the members of the General Council of the Judiciary, the President of the Constitutional Court, the Magistrates of the National Court, etc. (Article 57 LOPJ). In those cases, one of the judges of the Criminal Chamber will act as investigating judge and will not form part of the deciding panel.

II. Investigating Judges

414. The investigation is always in the hands of a judge different from the judge who will decide on the case.¹ Contrary to what happens in other legal systems, judicial authorities normally intervene in the criminal investigation at an early stage of the process. As we later explain (see *infra*, paragraphs 0 et seq.), although legally the investigating judge continues to direct the investigation phase, the public prosecutor also has the power to give orders to the judicial police to help clarify the facts of the crime.

1. STC 145/1988, 12 July, stating the rule that the same judge who directs the inquiry cannot decide on that case, because this would impair the principle of impartiality.

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- (1) *Investigating Judge (Juzgados Instruccion)*. The investigating judge is responsible for the investigation of those offences committed within the territory of his competence. The main rule for determining the responsible judge is that of *forum delicti commissi*. When the place the crime was committed is not known, the judge who is responsible for the investigation shall be determined according to the following criteria (Article 15 CCP), which must be applied in this order: (1) the territory where material evidence of the offence has been found, (2) the place where the suspect has been arrested, (3) the place where the suspect has his residence or where he abides. If none of the previous rules are applicable, any judge who has notice of the crime is responsible for initiating the investigation. These rules are applicable only provisionally, because, as soon as there is certainty about where the offence has been committed, the



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judge of that territory shall have the jurisdiction and must be sent the records of the investigation performed until then.

Ratione materiae the investigating judge is responsible for investigating all kinds of criminal cases, where suspicion is reasonably directed towards a possible perpetrator, except those cases that fall under the responsibility of other courts, for example, of the National Court (*Audiencia Nacional*) or the juvenile courts. The investigating judge has to search for incriminating as well as for exonerating evidence. The decisions rendered by the investigating judge can be appealed before the court that will try the case (criminal court or provincial court).

At the same level as the investigating judges, since 2004¹ there is a specialized court in some judicial districts responsible for investigating family violence cases. These courts are called *Juzgados de Violencia sobre la Mujer*, consist of one judge (sometimes the same investigating judge), and have criminal as well as civil jurisdiction in order to provide – in a single procedure – comprehensive and quick protection to women who have suffered these types of violent family attacks. In the criminal field, they act as investigating judges.

- 4
- (2) *Central Investigating Judge (Juzgado Central de Instrucción)* deals with the investigation of the offences that fall under the jurisdiction of the National Court (Article 88 LOPJ). Once the investigative stage is concluded, the trial will take place either before the Central Criminal Court or before the criminal chamber of the National Court, depending on the penalty.
 - (3) In those cases in which responsibility for trying a case as first – and last – corresponds *ratione personae* to the Higher Court of Justice or the Supreme Court, one of the judges of the court will be designated to act as investigating judge. This judge will not be a member of the chamber deciding the case.

1. Established by Organic Law 1/2004, 28 December, Measures for the integral protection against the gender violence (*Medidas de Protección Integral contra la Violencia de Género*).

III. Judicial Cooperation

416. When an investigating judge needs to perform investigative acts out of his jurisdictional limits, he shall request the cooperation of the responsible judge. The request for cooperation (*exhorto*) to another judge is sent directly in writing (Article 274.2 LOPJ) and, except in urgent cases, is not as flexible as communication between public prosecutors, although a computerized system for judges is gradually being created. Co-operation requests can also be transmitted through other channels: tele-fax, mail, or telephone are accepted, provided that the request is subsequently recorded in writing. The judge who receives the cooperation request shall acknowledge its reception and give orders for immediately compliance. In the request for co-operation, it is possible to fix a term within which the action must be performed. If no term is specified, the general understanding is that the action must be performed without delay. In case of unjustified delay, the requesting investigating judge can communicate it to the superior court (Article 191 CCP), although



this is, in practice, rarely done and only in extreme cases. Once the required investigative act has been accomplished, the result shall be sent, as soon as possible, to the requesting investigating judge.

The chambers of the National Court have jurisdiction in the entire national territory; therefore, their judges can move to the relevant places to perform the investigation (i.e., to inspect the crime scene or examine witnesses).

417. Judicial cooperation is a frequent practice, especially with respect to the examination of witnesses. Within the European context, judicial cooperation in criminal matters continues to be articulated mostly through conventions – with an incipient application of those European instruments based on the principle of mutual recognition. The main legal framework of judicial co-operation within the EU is grounded on international law – in particular, on the 1959 Convention,¹ which has been expanded upon by the Schengen Agreement and by the European Convention on Judicial Assistance of 29 May 2000.²

Passive extradition (handing over persons who, being in Spain, are requested by a foreign State) is governed by the provisions of international treaties and, in addition, by the Law on Passive Extradition 4/1985, of 21 March 1985. According to this law, requests of extradition are presented either through diplomatic channels or through the Ministry of Justice. In urgent cases, requests can be sent through Interpol. Extradition procedure is divided into two stages. In the first one, the government decides whether the proceedings should continue. The second stage is of judicial nature and takes place before the *Audiencia Nacional* (National Court); there is a hearing with the presence of the public prosecutor and the person whose extradition is requested, assisted by his legal counsel. The decision adopted by the court is sent to the Ministry of Justice, which in turn shall communicate it to the Ministry of Foreign Affairs so that the latter can inform the requiring State.

1. Convention on Mutual Assistance in Criminal Matters, 20 Apr. 1959 (Council of Europe, Treaties, n. 30), complemented with the protocols of 1978 and 2001 (Council of Europe, Treaties, n. 99 and 182).
2. DO C 197, 12 Jul. 2000 and the protocol passed by act of the Council of 16 Oct. 2001, DO C 326, 21 Nov. 2001. On this Convention, see also Lourido Rico, A.M., *La asistencia judicial penal en la Unión Europea* (Valencia: Tirant lo Blanch, 2004), 54 et seq.; Pérez Gil, J. 'El Convenio de Asistencia Judicial en materia penal entre los Estados miembros de la UE: ¿un instrumento anclado en coordinadas superadas?', *La Ley* 2 (2005): 1547-1560.

§2. THE STAGES OF THE PENAL PROCESS

I. Some Basic Concepts

418. The Spanish model of criminal procedure is strongly inspired by the ideas of the French Revolution; thus, the accused is the subject of the process and not an object to be investigated as another factual element. According to the model of criminal procedure that emerged from the French Revolution, the public prosecutor is given the function of exercising the criminal action according to the principles of legality and impartiality. In defence of the general interest, the public prosecutor must impel the initiation of the proceedings when there are indications of an offence;



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on the contrary, he must urge the ending of any proceedings when there are no elements of the commitment of an offence. This approach put an end to the medieval inquisitorial model of criminal procedure; thus, the accusatory system was enshrined in the Spanish criminal procedure – although some limited features of the old inquisitorial model persisted.

419. For clarification purposes – and particularly for teaching purposes – it is usual to distinguish five basic stages within the criminal proceedings: preliminary inquiry, intermediate stage, oral trial, appeal of the sentence, and execution of the sentence.¹ In this chapter, we deal with the preliminary inquiry and the trial, as well as with the intermediary stage, leaving the appeal and the execution of the sentence for further chapters (see *infra*, paragraphs 661 et seq. and 674 et seq., respectively).

It is traditional to distinguish two main stages in the criminal process: the investigative phase (*instrucción*) – aimed at determining whether the *notitia criminis* must lead to a trial against a certain person, and the oral trial – where the conduct of the accused is judged. The activity related to the ending of the investigative stage and the decision on whether it is necessary to further prosecute are normally termed the ‘intermediate stage’. However, the process for less serious offences and the petty offence proceedings do not respond to this division into two main stages plus an intermediate stage. In the process for petty offences (*juicio de faltas*), there is no proper preliminary investigation stage, and only the trial stage is clearly distinguishable. In the proceeding for lesser offences, the investigation stage and the intermediate stage are concentrated and take place before the investigating judge (*Juzgado de Instrucción*) (see *infra*, paragraphs 620 et seq.).

Contrary to what occurs in other systems of criminal justice – as, for example, in England – the Spanish system is characterized by the fact that there is no (at least formally) preliminary and autonomous police investigation. The preliminary investigation is understood mainly as a jurisdictional activity, directed by the investigating judge and supervised by the public prosecutor. This is the scheme designed by the CCP as reformed since 1988: the police activity, understood as repression of crime, presupposes the existence of a crime and verifies of a committed offence; the police collect the evidence and put it at the disposal of the investigating judge – or the public prosecutor in the abbreviated proceedings. Public prosecutor and investigating judge, after review of the collected evidence, decide whether further evidentiary materials are needed. At any stage, does the law mention, the investigation is to be? performed independently by police units.

1. Aragonese Martínez, S. & Tomé García, J.A. (et al.) *Derecho Procesal Penal* (Madrid: CERA, 2007), 295.

420. In reality, however, there is sometimes a different picture. When developing their functions of security or prevention of criminal activities, the police tend to perform more and more of what can be properly called proactive policing, and they do not necessarily provide detailed information of each single act to the public prosecutor or to the judge. This investigation is deemed to take place within the police sphere and is not specifically regulated by the CCP; it is not strictly an investigation within the realm of process, it is not subject to judicial control, and it does not serve as evidence in court. In any event, it is undeniable that these



investigation activities are of great relevance for criminal repression and, therefore, for the effective functioning of the criminal justice system. In spite of it, the CCP does not specify at which moment the police are obliged to inform the judge or the public prosecutor about an investigation that they are developing on their own initiative. In practice, the police provide the relevant information to the investigating judge (*juez de instrucción*) when they have sufficient indications of a certain offence or when they need to take certain measures that require judicial authorization (i.e., search of dwellings or interception of communication).

The phase of judicial investigation (*instrucción judicial*) begins when the police report is handed to the judicial authority and the judge renders a formal decision ordering the initiation of proceedings to find out the facts described in the report. The judicial police, the public prosecutor, and the investigating judge participate in the pre-trial phase. This phase ends with an explicit decision from the judge by which the investigation is deemed to be completed. At that moment begins what scholars have called the 'intermediate stage', which stretches from the judicial decision that ends the pre-trial investigation until the case is ended or the (investigating?) judge decides to proceed to trial.

In this intermediate stage, it must be determined whether the findings of the pre-trial investigation are adequately grounded and whether there are sufficient elements of evidence to press charges and to proceed to the oral trial. Although the oral trial does not properly begin until the commencement of the oral sessions before the trial court, it is normally deemed to also include those procedural activities that take place from the moment it is decided to advance to trial until the actual opening of public trial. Between those moments, there are other activities such as filing of the accusatory pleadings, preliminary motions like those regarding jurisdiction or the principle of non *bis in id.*, as well as the defendant's agreement with the charges.

II. The Pre-trial Stage

A. The Judicial Inquiry

421. According to the rules of the Spanish Code of Criminal Procedure, the investigating judge with jurisdiction over the place the offence has been committed is in charge of the investigative stage (Article 306 CCP) and will exercise its functions under the supervision of the public prosecutor. The court clerk (*Secretario Judicial*) will bear witness to all judicial acts and maintain the record of the procedural acts. The clerk is a public servant competent to give full faith and credit to judicial acts (Article 452 LOPJ) and has quasi-judicial responsibilities with regard to strictly procedural issues.

Although the legal system still sees the judge as the director of the investigation, in fact, the involvement of the investigating judge and the public prosecutor in the pre-trial stage varies strongly from one procedure to another. In *criminal proceedings for serious crimes*, in which the investigating judge is in charge of the investigation, he will order the police to carry out the preliminary verification of the facts and will direct the investigation under the control of the public prosecutor.

422. In the abbreviated proceedings (offences no more than nine years' imprisonment) introduced in 1988, the public prosecutor may extensively direct the initial preliminary investigation before the judicial criminal proceedings start (Article 773.2 CCP). Once the police have presented the victim's report or their own report to the public prosecutor, this report has the power to give instructions to the judicial police, collect evidence, and conduct a preliminary investigation, which can last a maximum period of six months, except when an extension has been granted. The ability to instruct the police in the investigation stage of the criminal proceedings is also foreseen in the Rules for the Public Prosecution Service (Article 1.5 EOMF and eighteen *bis* for the Anti-Drug Prosecution). With regard to the type of instructions the public prosecutor can give to the police, the guidelines of the Public Prosecution Service 1/1989 (*Circular de la Fiscalía*) explain that these orders are not limited to an investigation already begun or to the investigation of a certain crime that has been committed, but they may give general instructions to the judicial police units as to the crimes that shall be given preference, the way the police shall act when investigating in general, or setting criteria for an effective coordination of the different police units. This does not mean that the public prosecutor plays the role of the 'Chief of Police', but the guidelines insist on one point: The role of the public prosecutor is to direct police activities, not just to approve the investigation that the police may have conducted by themselves. However, these guidelines have not been fully implemented, and the role of the prosecution service varies greatly depending the type of offence and the type of prosecution office. In the vast majority of cases, the public prosecutor does not get actively involved in the investigation.

423. If, as a result of this preliminary investigation, the public prosecutor comes to the conclusion that the facts reported do not constitute an offence, it shall order an end to the case. The prosecutor's decision to end the case shall be communicated to the offended or harmed persons, so that they can make a claim before the investigating judge (Article 773.2 CCP). On the other hand, if the public prosecutor's preliminary verification leads to indications or evidence that an offence has been committed, the public prosecutor shall hand the case over to the investigating judge in order to continue the judicial inquiry (Article 5 EOMF).

In that case, the investigating judge directing the investigation will render a judicial decision ordering that the criminal proceedings be formally opened and that the judicial inquiry be continued. The case shall also be transferred to the investigating judge when the investigation requires the use of coercive measures that imply a restriction of fundamental rights that can only be granted by a judicial warrant. When this is the case, the whole record is handed over to the judge and, from that moment, the investigating judge, and not the public prosecutor, shall give orders to the judicial police. The responsibilities of the public prosecutor and of the investigating judge with regard to the preliminary investigation are successive, never simultaneous, and the judge has always priority.

424. It is not easy, in practice, to define which cases are under the direction of the public prosecutor and which are under the direction of the investigating judge. It cannot be affirmed that in all proceedings for lesser offences (abbreviated proceedings),

the preliminary investigation is initially conducted by the public prosecutor, or that in all ordinary proceedings, the investigating judge is exclusively in charge of the investigation. The distribution of functions depends on a variety of factors that are not always susceptible to a system. I shall endeavour to clarify how the system works in practice following a typical sequence of events in a particular case, but I must note in advance that the legal regulation does not respond to a logical and clear model and can, therefore, appear confusing.

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425. Normally, the police are the first to receive the *notitia criminis*, although the CCP permits that the commission of an offence be reported directly to the investigating judge or to the public prosecutor. Once an offence has been reported, there myriad possible activities to perform depending on the type of offence. If it is certain that a crime has been committed, the police will gather all the information concerning the criminal fact: collect elements or pieces of evidence; take photographs; interrogate and collect information of witnesses and of the victim; request the presence of a physician if there are injured persons; arrest the suspect, if he can be found; and interrogate him. These are the main police acts as regulated by Article 770 CCP. The activities that have been performed, and their results, will be detailed in a written report (the so-called *atestado*). After that, within a maximum time of twenty-four hours, the police must hand the report (*denuncia*), together with their own investigative record (*atestado*), either to the public prosecutor or to the investigating judge. Most often, they pass it on to the judge, except when the subject matter is specific to a specialized prosecution office. One of the reasons the reports are passed on to the judge is because there is an investigating judge in each judicial district (*partido judicial*), while the public prosecutors are usually seated only in the capital city of each province. Another reason is that the investigating judge accords the power to authorize investigative measures that restrict fundamental rights – something that is beyond the power of the public prosecutor. Therefore, although the law provides for the possibility that the public prosecutor will direct the initial inquiry, it does not always happen so in practice, because the police more often pass the report directly to the investigating judge and not to the public prosecutor.

426. After receiving the police report (*atestado*), the investigating judge analyses if the facts reported constitute an offence under the criminal law and whether further investigation is needed. At the same time, the investigating judge shall inform the public prosecutor so that he can intervene in the judicial inquiry. For most criminal cases – those less complex – the police investigation does not need to be complemented. Only in the most complicated cases (referring to serious offences) can it be affirmed that the investigating judge, together with the public prosecutor, conducts an investigation de facto. In these cases, the investigating judge, more often than the public prosecutor, will give orders to the judicial police. As a logical consequence of their expertise, the police determine the method of investigation, but they act always under the supervision of the investigating judge or the public prosecutor, who must be informed in due course about the investigative acts performed and the results obtained.

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427. The public prosecutor scrutinizes or controls the activity of the investigating judge – for instance, attempting to prevent the pre-trial stage from being prolonged unnecessarily and requesting from the judge that investigative acts he deems necessary are performed (Article 311 CCP). The investigating judge is bound to grant the performance of those investigating acts requested by the public prosecutor (Article 780.2.I CCP), while he is free to accept or deny similar requests when filed by other accusing parties. In any event, the investigating judge must act as a *juez de garantías*, that is, a judge who ensures that the defendant's fundamental rights are duly safeguarded in the criminal investigation.

428. In short, the investigation performed by the police on their own motion is 'judicialized' (passed on to the judge) when measures that restrict fundamental rights are needed or when an arrest is made. If the victim's report (*denuncia*) or the police report (*atestado*) is transmitted to the public prosecutor, an initial preliminary investigation can be conducted by the prosecutor in order to decide whether it is necessary to proceed with the inquiry, to press charges, or to order an end to the case. The case and the records are handed over to the investigating judge once the preliminary investigation is completed, or when it is necessary to request judicial authorization for measures that restrict fundamental rights. The investigating judge then assumes the full direction of the investigation, and the public prosecutor can no longer give orders to the police.

429. The police officers shall execute the orders of the public prosecutor or the investigating judge with respect to the investigation of the offence (Article 287 CCP). The police will provide information about the results obtained within the time established in the respective order (296 CCP). If they are not able to accomplish this, they shall immediately inform the prosecutor or judge of this circumstance (Article 289 CCP). Both the investigating judge and the public prosecutor control the activity of the judicial police not only with regard to the criminal investigation, but also on a disciplinary level. The statutory provisions state that they shall report to their superiors about the police's behaviour with regard to the adoption of disciplinary sanctions (Article 298 CCP), but in practice, this rarely happens.

B. Main Features of the Judicial Inquiry

430. The investigating judge as well as the public prosecutor and the police must gather all elements of evidence – be they adverse or favourable to the suspect – and must inform the defendant of his rights (Article 2 CCP). In this sense, we cannot speak of an adversarial model, because the goal of the inquiry is the truth. The preliminary investigation, as a rule, is secret, in the sense that it is not available to the public or to other people who are not a party to the proceedings (Article 301 CCP). The alleged justification to keep the investigation secret to the public is usually the protection of the honour and reputation of the person under criminal investigation, so that he does not suffer any social rejection, at least until his condition as 'accused' is clearly confirmed. However, we can distinguish between an external secrecy – with regard to the general public – and an internal or absolute

secrecy – extending also to the parties, except the public prosecutor. The efficacy of the investigation is normally the justification alleged for the internal secret, which can be declared only by an interlocutory judicial decision (*auto*) and – according to the law – for a maximum period of one month (Article 302 CCP). Reality, however, is often very different from these legal provisions; the media frequently publish information concerning a judicial investigation when the case attracts the attention of public opinion; on the other hand, it is not unusual for the actual duration of the internal secret of the investigation to go far beyond the maximum term of one month established by the law.

When describing the features of the pre-trial investigation stage, scholars usually say that it is a predominantly written phase. All investigation activities performed by the police, the public prosecutor, and the investigating judge must be recorded in writing. Obviously, not all the investigative acts are necessarily written or oral – it depends on the particular nature of each act – but their result must always be recorded in written form.

C. Aims and Content

431. In the pre-trial stage, there are three primary goals: (1) to find out and verify whether an offence was, or was not committed, as well as to gather information about its author and circumstances; (2) when appropriate, to prepare the oral trial; and (3) to ensure and anticipate the penal and civil consequences of the criminal act.¹

After commencement of the criminal proceedings, the investigating judge (in the cases where he is in charge of the investigation) will decide if the evidence already collected by the police – according to the police report handed to the judge – is considered to be sufficient. If it is deemed complete, no further investigative acts will be ordered. Otherwise, the investigating judge may interrogate the suspect, examine the witnesses, visit the crime scene, request expert opinions, and give instructions to the judicial police to carry out further investigative acts. The investigating judge may also authorize the police to carry out coercive measures, such as the interception of communication or the search of dwellings or premises, or AND tests. However, only when strictly necessary, and when the goal of the measure justifies the restriction of fundamental rights and the proportionality test defined by the ECHR is met, then may a judicial warrant authorizing coercive measures be issued.

1. Armenta Deu, T., *Lecciones de Derecho Procesal Penal* (Madrid-Barcelona: Marcial Pons, 2003), 139.

432. As indicated, in addition to ascertaining the criminal fact and discovering its possible author, the pre-trial stage is aimed at preparing the oral trial, for two reasons: to determine whether the oral trial must or must not take place and to collect evidence as well as to make sure that this evidence does not disappear and can be produced at the trial. All evidence collected during the pre-trial stage shall have to be produced in court, except when there is the risk, or the certainty, that

some evidence will disappear before the trial; it is then possible to provide it in advance (see *infra*, paragraph 506): for example, when there is a real risk that a witness will not be able to appear at the date set for trial, the cross-examination of that witness may be done in advance respecting the right to confrontation and the right to legal assistance.

433. Within the pre-trial stage, precautionary measures with regard to the defendant can also be adopted. Thus, after examining the police report (*atestado*), if the suspect is under arrest, the investigating judge shall decide whether he must be remanded into custody or, on the contrary, must be left free (on conditional bail or not) (Article 505.4 CCP). As a rule, the investigating judge can take the decision of holding the suspect on remand only upon application of either of the accusing parties, but not on his own motion (Article 502 CCP) (see *infra*, paragraph 569). Moreover, the investigating judge has the power to attach property to secure the civil damages (see *infra*, paragraphs 590 and 591).

D. Beginning of the Judicial Inquiry

434. The investigating judge always has the final say as to opening a criminal proceeding to investigate an offence. The judicial inquiry commences with a formal judicial decision (*auto de de incoación de la instrucción*). This decision is not subject to discretionary powers, but is the result of the application of the principle of legality: In every case where the facts constitute a crime, and there is a probable cause that an offence has been committed, the criminal procedure has to be opened in order to carry out a thorough investigation. The *notitia criminis* reach the investigating judge through several channels.

- (1) Through the report of a citizen (*denuncia*) of the facts that prima facie appear to be an offence. The person reporting can be any individual who has witnessed the facts or has known them in another way (e.g., the physician curing some injuries). The underlying idea in the CCP (Articles 259 et seq.) is that every individual who acquires knowledge of a possible offence or crime is obliged to report it – although not complying with this legal obligation is very rarely sanctioned in practice. By reason of their family relationship with the author of the crime, some persons are exempted from this legal obligation (Article 261 CCP). The offence must be reported, in the first place, to the investigating judge, but it can be also reported to the public prosecutor or to the police – this latter channel is the most commonly used by the citizens. Unless the report is blatantly false or the reported facts manifestly do not constitute an offence, the recipient of the report – the police, the PP, or the IJ – shall perform the first verifications of the reported facts. After that, if there are indications of an offence, the investigating judge shall formally order the commencement of the judicial inquiry (*auto de incoación de la instrucción*).
- (2) Filing accusatory pleadings (*querrela*) (Articles 270 et seq. CCP). With it, the party who files the pleadings not only gives the judge information about some facts that have the appearance of a crime but also expresses his will to

constitute himself as an accusing party in the process. The accusatory pleadings (*querrela*) must clearly identify the person who press the charges (*querellante*), it must be signed by attorney, and, as a rule, must be handed in to the investigating judge by a court representative (*procurador*). The person presenting accusatory pleadings is entitled to obtain from the investigating judge a decision on the legal evaluation of the facts.¹

- (3) Through the judge's direct knowledge of the offence, because he has witnessed them, because they are well-known facts, or he gets knowledge by other ways.² Most often, however, the *notitia criminis* reaches the judge through third parties, via one of the other two channels just mentioned.

1. STC 175/89, 30 October.

2. Aragonese Martínez, S. (et al.) *Derecho Procesal Penal* (Madrid: CERA, 2007), 314.

E. Closing of the Judicial Inquiry and Intermediary Stage

435. A formal judicial decision, entered upon the application of the public prosecutor or on the investigating judge's own motion (Article 622 CCP), puts an end to the pre-trial stage. Once the pre-trial inquiry is declared ended, the intermediary stage deals with two questions:

- (1) If the accusing parties agree to the closing of the investigation. The accusers may ask for further investigative measures or agree with the closing of the investigation and ask to proceed to trial. At this stage, the investigation can be reopened on the evidentiary motions presented by accusers if the investigating judge or the court considers them appropriate. Otherwise, the investigation stage will be closed, and the investigating judge or the court will enter the decision whether to set the case for trial or not.
- (2) If the case should be tried or not. The intermediary stage deals with the question of whether the case shall proceed to trial or be ended. The decision about ending the case or opening the oral trial is taken by the investigating judge in the abbreviated proceedings and by the trial court in the ordinary proceedings. Legal scholars have stressed the question of the possible incompatibility of the court that has expressed an evaluation on the merits of the case at this stage, and later tries the case and renders the sentence.¹

1. See, Ormazábal Sánchez, G., *El período intermedio del proceso penal* (Madrid: McGraw-Hill, 1997), 102 et seq.; Villamarín López, M.L., *EL sobreseimiento provisional en el proceso penal* (Madrid: CERA, 2003), 209-212. For another opinión, see Montero Aroca, J., *Sobre la imparcialidad del Juez y la incompatibilidad de funciones procesales* (Valencia: Tirant lo Blanch, 1999), 308-313.

436. The defendant can object at this moment to the closing of the judicial inquiry, on the grounds that further evidence should be collected. Although the CCP does not explicitly foresee that the defendant takes part in this stage, the Constitutional Court has held, since 1989, that he has the right to be heard in the ordinary proceedings.¹ However, the solution adopted by the Constitutional

Court within the proceedings for less serious offences does not allow the defendant to be heard with regard to the ending of the investigation.²

1. STC 66/1989, 17 April.
2. STC 186/1990, 15 November.

437. The public prosecutor may request the withdrawal of the case once the investigative stage has been completed, if he considers that no offence has been committed. The public prosecutor will request the provisional ending of the case, and thus decide not to proceed to trial after examining the legal merits and on the basis of insufficient evidence. The application of the public prosecutor as to the ending of the case has to be communicated to the offender and to the offended, so that the latter may request that the investigating judge continue the proceedings (Article 773.2 CCP). As we have seen, the prosecutor is not completely free to bring to an end the case because his decision can be reviewed by the investigating judge (or the deciding court, in serious offences proceedings). The investigating judge, as master of the investigation – according to the statutory provisions – is empowered to proceed with the investigation even if the public prosecutor may decide to discontinue the inquiries.

If there is probable cause to believe that an offence has been committed and the defendant has committed it, the investigating judge or the court will decide to set the case for trial. Otherwise, it will decide on the provisional ending of the case, which can be reopened when new evidence is found.

438. The causes for ending the proceedings in the investigating stage – and thus not proceeding to trial – are legally stipulated. A definitive ending (*sobreseimiento definitivo*) – with *res iudicata* – will take place (1) when there is no evidence that the investigated crime has been committed; (2) when the facts do not constitute an offence punished under the Penal Code; and (3) if the possible offenders are exempt from criminal liability (Article 637 CCP). The ending of the case will be provisional with the possibility that it can be reopened in the future (*sobreseimiento provisional*) in the following cases: (1) in evidentially insufficient cases and (2) when there is enough evidence as to the commission of an offence, but there is not enough evidence to bring charges against a person. At this point, remember that the public prosecutor is not the only one who can press charges in the criminal proceeding. Thus, a case can proceed to trial based on the accusatory pleadings filed by the offended or any citizen (popular accusation).

If all parties – the public prosecutor and the other accusers – ask for an ending of the case, the court is bound to the request of the parties and has to decide on the disposal. If the public prosecutor is the only party in the proceedings (no other accusers are in the proceedings) and applies for an ending of the case, the investigating judge may, prior to making a decision, inform the interested parties (the offended or the aggrieved), so that they may submit their accusatory pleadings to the investigating judge, who then will render the final decision about whether to end the case (Article 642 CCP). In those cases where the public prosecutor is the only party and the investigating judge does not agree with the prosecutor's request to drop the case, the investigating judge or the court, before deciding, can hand over

the case to the hierarchical superior of the particular public prosecutor (Articles 644 and 782 CCP). The hierarchical superior may confirm or reverse the decision of the inferior. These provisions constitute legal safeguards in order to avoid a discretionary power of the prosecutor in dropping the case.

439. When the public prosecutor, or other accusing party, requests the opening of the oral trial, the judge or the court shall grant it, except when the fact does not constitute a crime or when there are no rational indications of the existence of an offence (Article 783 CCP). If the public prosecutor and the private or popular accusation request the ending (*sobreseimiento*) of the case, the judge or court shall grant it, except when the proceedings must continue in order to apply security measures.

III. The Prosecution

A. The Attribution of the Right to Prosecute

440. According to Spanish statutory provisions, the public prosecutor does not have a monopoly on prosecution. The right to prosecute is attributed primarily to the public prosecutor, but every Spanish citizen, in addition to the victim, can constitute himself as an accusing party. So, when analyzing the prosecution, we first explain the organization and functions of the Public Prosecution Service and afterwards focus on the other persons who are accorded power to press charges within the criminal proceedings.

1. The Public Prosecutor

441. The Public Prosecution Service is a hierarchically ordered agency with an Attorney General (*Fiscal General del Estado*) at the top of the institution. It is an institution that is not integrated in the judicial power, but it is very closely linked to it. The Spanish Constitution mentions the public prosecutor under the chapter titled 'Of the Judicial Power', and its members are recruited in the same way as the judges. The main task of the public prosecutor consists in 'promoting the justice in the defence of the rule of law, the rights of the citizens and of the public interest safeguarded by the law' (Article 124.1 SC and 534 LOPJ). They are impartial civil servants with an essential role in the criminal proceeding, and they are not viewed as an executing body of the criminal policy. Within the criminal procedure they primarily exercise the right to prosecute, but as protectors of the rule of law, they may also act to oppose the charges pressed by another accusing party.

442. The public prosecutor's tasks are subject to the so-called principle of unity (also called indivisibility) in order to safeguard a uniform application of the law along the whole Spanish territory (Article 124.2 SC and Article 2 EOMF). This means that there is only one public prosecutor's service with power over the whole

country, and each of its members always act in the name of the Prosecution Service and follow the orders or instructions of their superiors. The conduct of every public prosecutor follows the same guidelines and instructions, regardless of the territory in which each member is seated. In each criminal court, except in the examining courts, there is a public prosecution unit. The hierarchical structure corresponds mainly to the territorial division of the courts and is divided into the following units: (1) Public Prosecution of the Supreme Court; (2) of the Higher Justice Courts; (3) of the Provincial Courts; (4) and of the National Court. Each PP unit is only responsible for acting within the territory of its jurisdiction, and consequently, for the acts that have to be performed out of their district, they must request the cooperation of the responsible prosecutor in the relevant area. At the top of each unit, there is a Chief Public Prosecutor who coordinates the members of the unit and gives the general instructions as well as particular orders relating to a case (Article 22.3 EOMF). If the inferior prosecutor considers an order received to be unlawful or not adequate, he may not simply disregard the order. In these cases, he has to inform his superior in a written report and the superior will decide confirming the order or hand over the question to the Board of Prosecutors (*Consejo Fiscal*). In any case, the superior has the final say.

443. The Public Prosecution Service does not depend on the executive. As stated in the statute of the public prosecution, the prosecutors shall act according to the principles of impartiality and independency. Nevertheless, because the General Attorney is appointed by the King on the government's proposal (Article 124.4 SC), the institution is not completely free of some political influence. The government, through the Ministry of Justice, has the power to give orders to the prosecution service with regard to the defence of the public interest. The President of the Government can also communicate directly with the State Attorney, and, although the public prosecutor is not subservient of the government, there is no transparency with respect to possible instructions given by the executive.

The members of the Public Prosecution Service feel themselves more as being responsible for defending the law and, particularly, the fundamental rights rather than defending the accuser. According to the legal provisions, they are an objective party who guarantees that the principle of legality is respected: that every criminal action is prosecuted according to the law and that no innocent citizen is subject to a criminal investigation or has to undergo a criminal trial. The majority clamor for more independence and agree that the influence of politics should be banished.

444. As a difference with regard to other European legal systems, in Spanish law the public prosecutor does not assume the function of investigating the crime. According to the law, as pointed out *supra*, the investigating judge is in charge of the pre-trial stage, although the public prosecutor has a relevant intervention in that stage, which varies depending on the particular type of proceedings. Within the legal design of the ordinary process – whose structure has not been virtually altered since the nineteenth century – the investigation is conducted by the investigating judge, but the judge must keep the public prosecutor informed from the very beginning (Article 308 CCP), and allow him to inspect and control the development of

the pre-trial investigation. In 1988, an important reform of the Spanish procedural system introduced the so-called abbreviated process (*proceso abreviado*) for crimes punished with a maximum penalty of prison of nine years. Within this process, the PP has been tasked with the functions of giving orders to the judicial police within the initial preliminary investigation, as we have already discussed (see *supra*, paragraphs 422 and 423). In juvenile proceedings, the pre-trial investigation is totally in the hands of the public prosecutor.

445. There is a significant scholarly debate in Spain about the appropriate position of the public prosecutor in the pre-trial investigation. While some claim that the entire investigation should be in the hands of the public prosecutor, others maintain that an investigation controlled by the investigating judge grants better protection to the constitutional and procedural safeguards. The discussion is still ongoing, and a deeper reform of the Spanish model of criminal procedure has been requested by a large number of scholars and practitioners see *supra* part Antonio trends!

The main function of the public prosecutor in promoting the application of justice is to exercise the criminal action and those civil actions deriving from offences (Article 3.4 EOMF). The Spanish Constitution (Article 124.1) states that the Public Prosecution Service's action is governed by the principle of legality. As a consequence, it has no discretion to decide whether to prosecute or not and cannot come to a decision to drop a case for policy reasons. In accordance with the CCP, the exercise of the criminal action is conceived as a legal duty (Article 105 LECrim) and not as a right or a decision that can be taken on criteria of opportunity. The grounds to drop a case definitively (*sobreseimiento definitivo* with *res iudicata*) are legally specified: (1) where there is no evidence that the reported crime has been committed; (2) when the act does not amount to a criminal offence; and (3) if the accused is not criminally liable (Article 637 CCP). A provisional ending of the case (with the possibility of reopening in the future) will take place; where there is insufficient evidence; where there is circumstantial evidence as to the commitment of the crime, but the prospect of a conviction is lacking; or where there are not enough evidentiary elements to press charges against a person.

446. The prosecution of certain offences – the so-called private offences or *delitos privados* – is not subject to the ‘principle of officiality’ (*principio de oficialidad*); that is, these offences cannot be prosecuted *ex officio*, on the public prosecutor's or the investigating judge's own motion. Consequently, the criminal procedure can be started only if the offended person files a complaint, and the pardon of the victim puts an end to the prosecution. In other cases, the prosecution is dependent on the presentation of a previous report by the victim (‘semi-public crimes’ or *delitos semi-públicos*), but after this condition has been fulfilled, the criminal procedure follows its ordinary development.

447. The civil action within the criminal procedure has a particular characteristic: The public prosecutor has the legal duty to exercise, together with the criminal action, the civil action *ex delicto*, unless the offended party explicitly renounces that action or prefers to sue in a subsequent civil process (Article 112 CCP).

448. Within the process, the PP also must adopt precautionary measures with regard to the suspect (Article 3.5 EOMF), as well as look after the due protection of the victims.

2. Other Accusing Parties

449. As we have already noted, the public prosecutor does not have the monopoly on the right to prosecute. The criminal procedure can commence and – if founded – proceed to trial based on the accusatory pleadings filed by the offended person or even by any Spanish citizen.

450. *Popular accusation (Acusación popular)*. As stated in Article 125 of the Spanish Constitution, every citizen has the right to be accusing party and press charges in a criminal proceeding. This is called popular action (*acción popular*); any citizen is recognized as a subject able to represent the public interest and therefore granted *locus standi*. The popular accusation may serve as a means to control the State's actual exercise of its *ius puniendi*, particularly when there is a conflict between the State's interest in prosecuting certain offences and what the members of the society deem to be the true public interest. Very recently, the Supreme Court rendered a decision limiting the standing of the popular accusation. In a very controversial case – regarding the most important banker of Spain – the Supreme Court states that if the public prosecutor and the offended ask for the case to be dropped, the case cannot proceed to trial on the sole basis of the indictment filed by the popular accuser.¹ Notwithstanding this decision, in the sentence rendered on 8 April 2008 (Atutxa case), the Supreme Court accepts the standing of the popular accuser (civil servants union called 'Manos Limpias'), even if the public prosecutor has requested an end to the case. The Supreme Court, aware of the change of position with regard to the sentence rendered only a few months before, explains in great detail that both cases are different, and thus a different decision is justified.

In a very few criminal proceedings, there has been a popular accusation present, but it has turned out to be useful in those cases in which there is no identifiable concrete victim that can act as a party in the criminal process (e.g., in cases of embezzlement of public money or in cases of political connotations).

The concept of 'citizen' in this sense has been broadly interpreted and thus includes not only single individuals, but also associations² within the realm of their interests defined in their rules: for example, association for consumer protection has standing only to file an indictment in a case that affects the interests of the consumers, or the association for the victims of terrorism can only file a popular accusation in the precise terrorism cases. These accusatory pleadings are equivalent to the indictment filed by the public prosecutor. Furthermore, the popular accuser may ask for investigative measures to be ordered, and the Examining Judge will order them if they are adequate. The admission of the popular indictment is subject to judicial control and posting of a bond. The filing of a false indictment constitutes a crime with a sanction of up to two years of custodial penalty (Article 456 PC). If a person has already been convicted twice for false accusation, he no longer has the right to act as popular accuser.

Part III. Execution and Extinction of Sanctions

Chapter 1. Sources of Penitentiary Law and the Nature of Regulations

674. The body of legal provisions regulating the execution of penalties and liberty-depriving security measures is known as penitentiary law.

Despite its close relationship with criminal law, penitentiary law is considered to be an autonomous area due to its having its own sources, objectives, principles, and jurisdiction.¹ The substantive nature of penitentiary law is further enhanced in legal systems such as the Spanish, where specific penitentiary law exists.

The majority of Spanish commentators support this autonomy² when studying the nature of penitentiary provisions. These provisions are not purely administrative or of internal character. Nor is it considered to be appropriate to include these provisions in procedural law. Certainly, the execution of sanctions has a procedural character. However, the execution of liberty-depriving penalties must be separated from procedural law. Its regulation goes beyond a purely procedural character. The commentators also insist on the need to differentiate between penitentiary law and substantive criminal law.

Some pieces of international law have also contributed to the consolidation of the autonomy of penitentiary law. The Standard Minimum Rules for the Treatment of Prisoners, created by the United Nations in Geneva in 1955, may be highlighted. At a European level, the Council of Europe Committee of Ministers' Recommendation No. 87 on the European Prison Rules, of 12 February 1987, is of special importance.

1. García Valdés, C., *Derecho Penitenciario español. Comentarios a la Legislación Penal* (Penitenciaria, Madrid: Ley Orgánica 1986).
2. For all, Mapelli Caffarena, B. & Terradillos Basoco, J., *Las consecuencias jurídicas del delito* (Madrid: Civitas, 1996), 114-116.

675. On a national level, Article 25 of the Spanish Constitution is the main provision in the regulation of penitentiary law:

Liberty-depriving penalties and security measures must be aimed at re-education and social re-integration and may not consist of forced labour. A person sentenced to imprisonment and serving the same will enjoy the fundamental rights in this Chapter, with the exception of those expressly restricted by the sentence, the nature of the penalty, and penitentiary law. In any case, the right to remunerated work and to the corresponding social security benefits exists, as does that of access to culture and integral personal development.

**2**

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Part III, Ch. 1, Sources of Penitentiary Law

This provision, as repeatedly stated by the Constitutional Court,¹ does not guarantee a presumed right to social re-integration with constitutional protection. It is, rather, a direction addressed at the legislator for the orientation of penal and penitentiary policy. The objectives of Article 25.2 SC of re-education and re-integration are not the only objectives of the penitentiary system. Other functions that may and should be covered by penalties or liberty-depriving security measures are the retention and custody of prisoners, convicted and arrested persons, general and specific preventions, and the prevention of private vengeance (see *supra*, part II paragraph 239 Although.....).²

3

1. Among others, STC 28/1988, 23 February; STC 172/1989, 19 February; STC 112/1996, 25 June; STC 2/1997, 13 January; STC 81/1997, 22 April; STC 204/1999, 8 November; and STC 8/2001, 15 January.
2. STC 55/1996, 28 March; and STC 18/1998, 26 January.

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676. These constitutional principles were legally developed by the General Penitentiary Organic Law (LOGP) 1/1979 of 27 September. In its nearly thirty years of existence it has been subject to very few modifications. The law consists of eighty articles divided into a Preliminary Title setting out the principles guiding the penitentiary system and six further titles regulating, respectively, establishments and material resources (Articles 7-14), the prison regime (Articles 15-58), treatment (Articles 59-72), post-prison assistance (Articles 73-75), the Supervising Prison Judge (Articles 76-78), and prison officers (Articles 79-80).

In short, the goal of this law is to regulate three major areas: the legal regime of the prisoners, the functions and duties of the prison administration, and the supervising prison judge and his responsibilities.

The law was passed with rare unanimity in Parliament. It awoke great hopes of a renovation of the prison system. It has achieved acceptable results but has sometimes been criticized for its well-meant idealism detached from reality.

The creation of supervising judges was one of the most significant innovations of the law. There is, however, a lack of complementary regulation of the procedural aspects of the supervisory prison jurisdiction. Attempts at covering this *lacuna* by creation of a clear procedural framework for the operation of this jurisdiction have so far failed. The only area that has been regulated is that of legal remedies and appeals against the decisions of supervising prison judges. The legal void has been filled by procedural guidelines gradually created by the supervising prison judges themselves, in periodic meetings in which experiences and points of view are discussed and agreements reached with respect to the most appropriate interpretation of unclear areas of prison legislation. The goal is to achieve some consistency in the application of the provisions. These guidelines are periodically reviewed and updated. They are circulated with an indication the level of consensus reached (unanimous or otherwise). Although they are neither binding nor of any legal effect, they cannot be ignored because they show the manner in which prison legislation is generally applied and interpreted.

677. The regulatory development of the General Penitentiary Organic Law was carried out by Regulation by Royal Decree 1201/1981. That has since been superseded by the current Penitentiary Regulations (Royal Decree 190/1996 of



9 February). Using a legislative technique open to criticism for creating confusion, it has retained some provisions of the old Regulations with respect to the disciplinary regime.

678. To complete this overview of sources of prison legislation, the parallel provisions applicable for military penal law must be mentioned. Military prison law is based on two basic specific norms that must be combined with the General Penitentiary Organic Law: Organic Law 2/1989 of 13 April, on Military Proceedings (regulating certain matters), and Royal Decree 1396/1992 of 20 November, which approved the Regulations of Military Prison Institutions.

There is substantial similarity between the military regulations and the general prison system with respect to the guiding principles, the judicial control of prison activity by supervising judges and the institutions.

Article 348 of the Law on Military Proceedings states:

Liberty-depriving penalties will be executed with the duration and regime of service established in general criminal and prison legislation when those penalties are to be served in general prison institutions, in accordance with Article 42 of the Military Penal Code. Penalties that must be served in military prison institutions in accordance with the aforementioned Article 42 will be served in accordance with the provisions of the Law and Regulations on Military Prison Institutions, which will be based on the principles of the General Prison Organic Law adapted to the special structure of the Armed Forces.

The singularities of the regime result from the military status of the convicted offender. This peculiarity adds a specific purpose to the concept of the military prison, which must be combined with the general objectives of re-socialization: the 'reinstatement into the Armed Forces' of the convicted person.¹

Military personnel sentenced to liberty-depriving penalties are subject to this prison subsystem, independently of whether the conviction was for a common offence or for a military offence. It is the military status of the convicted offender rather than the nature of the offence that determines the applicable prison regime.² The loss of military status results in the applicability of the general prison regime.

1. Article 1 of the Regulations on Military Prison Institutions.
2. Article 42 of the Military Penal Code.

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Chapter 2. Fundamental Principles of the Prison System

679. The fundamental principles of the Spanish prison system are based, to a great extent, on the development of the sources referred to earlier. They may be summarized as follows:

- (a) The principle of legality of prison activity. Article 2 LOGP provides that, 'prison activity will be carried out subject to the guarantees and within the limits established by the law, regulations, and judicial sentences'.
- (b) The objective of re-integration and re-education of the convicted offender is an orienting but not excluding principle of the system. The LOGP, following the constitutional mandate, reiterates this feature: 'prison institutions' primary aims are the re-education and social re-integration of those sentenced to liberty-depriving penalties'.
- (c) Respect for the prisoner's dignity and personality, and the prohibition of discrimination, established in Article 3 LOGP: 'prison activity will be carried out regarding in any case the human personality of the prisoners, and their legal rights and interests not affected by the sentence, without distinction based on race, political opinion, religious belief, social condition, or any other analogous circumstance'.
- (d) Judicial control of the activity of the prison administration, articulated in a specialized jurisdiction. The responsibilities of prison supervising judges are set out in Articles 76 and 77 LOGP, without prejudice to some functions directly established in the PC. The responsibilities work in two areas. On one hand, the supervising prison judges control and supervise the performance of the prison administration in the matters for which they are responsible due to the law's requirement, in some cases, of the notification or authority of the judge (i.e., certain particularly severe sanctions, the use of coercive measures, and some authorizations), or by virtue of prisoner-lodged complaint or appeal (with respect to sanctions, authorizations, and other matters). On the other hand, they are directly involved in deciding questions of the execution of penalties (including the concession of prison privileges such as conditional release).

Chapter 3. The Prison System

§1. ORGANIZATIONAL STRUCTURE

I. Prison Administration

680. The prison administration and the Directorate-General of Penitentiary Institutions are parts of the organizational structure of the Ministry of the Interior. The traditional location in the Ministry of Justice was modified in two successive steps. First, although the short-lived, f both ministries were unified into a single ministry of 'Justice and the Interior'. Later, when it was divided again into two ministries in 1996, this area was assigned to the Ministry of the Interior.

The Spanish Constitution gives exclusive responsibility over penitentiary legislation to the State (Article 149.1.6th). At the same time, it allows the Autonomous Communities to assume responsibility for the execution and administration of prison activity. Although several Autonomy Statutes include the possibility of transfer of this area, currently only the Autonomous Community of Catalonia has assumed this responsibility.¹ Everything relating to direction, organization, and inspection of penitentiary institutions located in Catalonia is within the Department of Justice of the Autonomous Government. In this Autonomous Community, the legislation referred to earlier applies, together with Decree 329/2006 of 5 September, of the Government of Catalonia approving the Regulations on Organization and Function of the Criminal Enforcement Services in Catalonia.

An expansive decentralization of prison administration has been held back, mainly for political reasons. The risk of disparity of criteria associated with decentralization would be mitigated both by the exclusive legislative competence of the state and by the supervisory functions of the supervising jurisdiction, which cannot be transferred. The administration of justice is also within the exclusive responsibility of the central state.

1. Article 68 of Organic Law 6/2006, approving the Statutes of Catalonia; and Royal Decree 3482/1983.

II. Types and Organizational Regimes of Penitentiaries

681. Penitentiary institutions may be remand, sentence-executing, or special prisons (Article 7 LOGP). They are organized separately for men and women.¹ Moreover, offenders under 21 years old should also be separated, either by placement in different centres or, at the least, in different departments. In some special cases, they may be joined by offenders under age 25, depending on their personality.

The remand institutions are used for the detention and remand of arrested persons and, in particular, for those in provisional detention. Legally, these institutions may also be used for serving prison sentences when the remainder of the sentence to be served does not exceed six months (Article 8 LOGP).

The institutions for sentence execution are intended for the service of prison sentences. They may have an ordinary, open, or closed regime. In practice, this legal

differentiation is weakened by the existence of multipurpose institutions (Article 12 of the Prison Regulations (RP)). These may have different purposes assigned to each type of institution, while always maintaining the necessary separation between the open, closed, or ordinary regime departments and between convicted and remand prisoners.

Closed-regime executive institutions or special departments are intended for convicted prisoners classified as extremely dangerous and prisoners who are not suitable for ordinary and open regimes. In these institutions, the common activities of the prisoners are restricted, and the supervision and control regime is enhanced (Article 10 LOGP).

Special institutions are those in which care and assistance prevail. They may be hospitals or psychiatric or social rehabilitation institutions (Article 11 LOGP).

The legal *desideratum*, which is not always achieved, is that no institution should have more than 350 prisoners per unit and that each prisoner should have his own cell. The reality is often different from these legal guidelines.

There are mothers' units for female prisoners under an ordinary or semi-free regime, equipped to allow their minor children to stay with them (Articles 178 et. seq. RP).

The internal organization consists of a Director and various committees that share the responsibilities among themselves: the Management Board, Treatment Board, Disciplinary Commission, and Financial Management Board.

In January 2008, the Spanish penitentiary system had seventy-seven penitentiary institutions.

1. In one penitentiary institution, there is a mixed family unit where, after a process of selection, the convicted couple may stay with their children until the children reach the age of 3 (Art. 168 RP).

§2. PENITENTIARY TREATMENT

I. Scientific Individualization System

682. The re-socializing purpose of penitentiary institutions is predominantly pursued through the penitentiary treatment. This comprises a body of activities directly aimed at achieving the re-education and rehabilitation of prisoners. The objective is to transform the prisoner into 'a person with the intention and ability to live respecting Criminal Law, while meeting his needs' (Article 59 LOGP).

The treatment is channelled through the classification of the prisoners in successive grades of execution (the progressive system), in accordance with the proximity of the objectives of the treatment. The penitentiary classification is a key element of the scientific individualization system that, by law, must guide the execution of liberty-depriving sentences. 'Liberty-depriving penalties will be executed according to the scientific individualization system, divided into grades, the last of which being conditional release in accordance with the PC' (Article 72 LOGP). The philosophy of the system rests on the differentiation among prisoners. The prisoner's specific circumstances and personality must determine the specific penitentiary response and an individualized treatment suitable to his social and psychological profile. Thus arises the need for a penitentiary classification carried out using supposedly scientific criteria.

II. Classification by Grades

683. Penitentiary classification is divided into three grades (first, second, and third grade). Additionally, there is a fourth grade that is served outside the penitentiary institution (conditional release).

First-grade prisoners are those of manifest dangerousness or who are clearly and gravely maladjusted to the general rules of ordered prison life (Article 102 RP). This regime is served in closed institutions (Article 72 LOGP).

Second-grade prisoners are those of normal personal and prison living circumstances, but who are currently not fit to live in a semi-free regime (Article 102 RP). They serve their sentences in ordinary-regime institutions (Article 72 LOGP).

The third grade is applied by progression or occasionally directly at those prisoners who, due to their personal circumstances, are fit to live in a semi-free regime (Article 102 RP). This regime is applied in open institutions where the prisoner may leave every day to go to work.

684. Conditional release is the final grade and consists of release prior to the completion of the sentence under the condition not to re-offend during this time and to observe imposed rules of conduct (see *infra*, paragraph 697).

685. The classification into one grade or another is made taking into account 'not only the personality and individual, family, social and criminal history of the prisoner, but also the duration of the sentence or criminal measure as applicable, the environment to which he will probably return, the means, possibilities and difficulties existent in every case and the best time for the success of the treatment' (Article 63 LOGP). A prisoner should never remain in an inferior-grade regime when he merits progression given the development of the treatment (Article 72.4 LOGP).

Responsibility for classification lies with the prison administration, which has two months, which may be extended to four, to fulfil this task (Article 103 RP). Its decisions may be appealed at the Court of Prison Supervision.

The system is subordinate to the requirements of treatment, which leads to great flexibility. It is therefore not necessary that the prisoner follow each and every one of the three penitentiary grades. The most common case is an initial classification as second grade, with progress to the third grade when the development is favourable.

686. The requirements for attaining the regime of semi-liberty (third degree) have been toughened through the reform carried out in 2003 with respect to the effective and complete service of sentences. The new formulation of Article 36 PC introduced a requirement with respect to time that did not exist before. This is the 'period of security', which results in the requirement that prisoners sentenced to more than five years must serve at least half of the sentence imposed in order to be able to progress to the third grade. Only in cases in which there is a favourable prediction of social re-integration and in which the conviction was not for terrorism offences or offences committed within a criminal organization, may the supervising prison judge exempt the prisoner from this prerequisite. It is the predominant view



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that this limitation only operates when one of the prison sentences exceeds five years and not when five years is the result of adding together several sentences of shorter duration.

687. Moreover, through the same reform, a new indispensable requirement was introduced in Article 72 LOGP for access to the third grade: Civil liabilities must have been paid, although the reparative effort made when the offender lacks the financial means to pay the total sum of liabilities will also be taken into account to that end.

A very extraordinary case is regulated in Article 104.4 RP, which covers convicted persons with a very grave illness and incurable suffering for whom access to the third grade is made easier for humanitarian reasons. When it has been confirmed that the illness is unlikely to be reversible or curable, the prisoner may be allowed to progress to the third grade without any further requirement except that he lack dangerousness.

Regression in grade is also possible. The flexibility of the system goes so far as to occasionally allow the prisoner to be subjected to a specific form of execution of sentence combining characteristic elements of different grades. In this case, the approval of the supervising prison judge is always necessary (Article 100.2 RP).

Everything related to the place of serving a sentence and potential transfers is within the responsibility of the penitentiary administration.

§3. PENITENTIARY REGIME

I. Introduction

688. The differentiation between regime and treatment is one of the successes of the General Penitentiary Organic Law (LOGP). The penitentiary regime is conceived as the body of rules and measures aimed at a peaceful and ordered prison life, allowing the creation of a suitable atmosphere for the success of treatment, detention, and custody of the prisoners (Article 73 RP).

II. Aspects of Living Conditions

A. Health Care

689. Article 3.4 LOGP establishes the obligation of the prison administration to protect the life, safety, and health of the prisoners, who must be guaranteed medical and health care similar to that available for the general population. The institutions have available all the services at the primary health care level. Specialized care will be carried out by public centres of the national health system.

This special obligation on the prison administration was the basis on which the TC based its decision to allow the obligatory parenteral alimentation of prisoners whose life was in danger as a result of a hunger strike entered into to demand specific objectives.¹



The high percentage of drug-addicted prisoners explains the presence of specific rehabilitation programmes in all penitentiary institutions.

The RP contain specific provisions aimed at ensuring hygiene, healthiness, and appropriate alimentation (Articles 221 et seq.).

1. STC 120/1990, 27 June; and STC 137/1990, 19 July.

B. Communications

690. Prisoners' communications with the outside world must be treated with the utmost respect for their privacy (Article 51 LOGP). The communication may be face to face, written, or using the prison telephone system. The use of mobile phones and the Internet are not allowed.

Communications between a prisoner and his lawyer may not be suspended or intercepted, except with a court order and in cases of terrorism (Article 51.2 LOGP). Oral or written communications with the Ombudsman, his deputies, or delegates may not be intercepted either. The same applies to communications with analogous institutions of the Autonomous Communities, judicial authorities or members of the prosecution service (Article 49. RP). All other oral or written communications may be suspended or intercepted by the director of the institution, subject to informing the responsible judicial authority (Article 51.5 LOGP).

The ordinary regime for oral communication is two per week, which may be accumulated, with a minimum duration of 20 minutes (Article 42 RP). Some intimate communication in specially designed premises is also allowed, taking place on a monthly basis with a duration of between one and three hours (Article 45 RP).

Written communications are not ordinarily subject to any restriction with respect to volume, although the director may order their interception subject to notification of the prisoner and the supervising prison judge (Article 46 RP).

Communication by telephone is subject to authorization. The maximum frequency is five calls per week (Article 47 RP). The prisoner must pay for the calls.

C. Work

691. Prison work is a right and an obligation of the prisoner. It is a fundamental element of the treatment (Article 26 LOGP). It must not be upsetting or be applied as a corrective measure; it must not violate the prisoner's dignity; it must be of formative or creative character or aimed at maintaining a work habit as preparation for work outside prison. It must be provided by the prison administration and cannot be subject to financial objectives of the administration. Prison work is covered by the protection of social security legislation.

Despite the wording of Article 25.2 SC, the reality is very far from providing a workplace for all prisoners. The proclaimed 'right to remunerated work' is interpreted in case law of the Constitutional Court as a right, which is not directly enforceable but is of progressive application, 'the effectiveness of which is subject to the means the administration has at each moment'.¹

Work activity in production workshops of penitentiary institutions is classified as a special work relationship² between the prisoners and the Autonomous Organ for Prison Work and Formation for Employment.³

For the distribution of workplaces, a certain order of priorities is taken into account: prisoners whose treatment programme includes carrying out work, convicted prisoners have preference over those on remand, the suitability of the prisoner for the specific workplace, prison conduct, duration of imprisonment, family dependents, and having held a work place for more than one year.

The services of prison shops and kitchens may be managed by the Autonomous Organ for Prison Work (Article 300 RP).

1. STC 172/1989, 19 October; and STC 17/1993, 18 January.
2. Royal Decree 782/2001.
3. Royal Decree 868/2005.

D. Security and Disciplinary Regime

692. Internal security must be safeguarded by the officers of the penitentiary institutions through monitoring the prisoners, counting, cell and body searches, seizures, controls, and inspections (Articles 65 et seq. RP). All these measures, which are regulated in detailed rules, must conform with the principles of necessity and proportionality (Article 71 RP).

Prison officers cannot carry arms; they may only use the coercive measures provided for in Article 45 LOGP and further developed in Article 72 RP: temporary isolation, personal physical force, rubber defensive weapons, appropriate sprays, and handcuffs. These means may only be used when indispensable in order to prevent acts of escape or violence, to overcome resistance to compliance with orders, or to prevent prisoners from harming themselves or others or causing damage. Their use is subject to the director's authorization, except in emergencies. The supervising prison judge must be informed in any case.

When necessary to deal with grave disruptions of the prison order, the director may temporarily request the assistance of the security forces on duty in the institution (Article 72 RP).

The disciplinary regime is aimed at guaranteeing security and ordered prison life (Article 41 LOGP). Regulations provide a list of infringements classified as very grave, grave, and minor (Articles 108-110 RP of 1981, which is still applicable in this area). The sanctions available are isolation in a cell, which cannot exceed fourteen days for each sanction (with an accumulated maximum of forty-two days), isolation for up to seven weekends, cancellation of leave not exceeding two months, restriction of oral communication to the monthly minimum, cancellation of walks and common recreational activities, and reprimands (Article 42.2 LOGP). There are rules to deal with the concurrence of infringements, limitation periods for infringements, and sanctions and other relevant questions.

The sanctioning procedure is regulated thoroughly (Articles 251 et seq. RP), guaranteeing the prisoner's right to defend himself. The sanctioning decision may be appealed against to the supervising prison judge.

E. Leave from Prison

693. Two types of leave may be distinguished: ordinary and extraordinary leave (Articles 47 and 48 LOGP and 154-162 RP).¹ Leave is considered to be ordinary when it can be given to all prisoners classified as second or third grade. The duration is between two and seven days. Although the LOGP regulates leave within the penitentiary regime, commentators and the Constitutional Court² have pointed out its connection with the treatment, because this leave is part of the treatment's goal of gradual adaptation to life in liberty.

To be eligible for this type of leave, it is necessary that the prisoner has served one-quarter of his sentence, except when he is classified as third grade. The existence of bad conduct will hinder the granting of leave. Article 156.1 RP establishes that the mandatory report from the technical assessment team must be unfavourable towards the granting of leave when the prisoner's specific criminal history, abnormal personality, or the existence of unfavourable quantitative variables point to a likely breach of the sentence, to the commission of new offences, or to a negative impact of the leave on the prisoner with respect to his preparation for his life in liberty or his individual programme of treatment.

A maximum of thirty-six days of this kind of leave may be enjoyed per year if the prisoner is in the second grade; forty-eight days if he is in the third grade. Except for third-grade prisoners, leave exceeding two days needs authorization from the supervising prison judge, which is subject to a report from the prosecution service.

Extraordinary leave is available when certain exceptional circumstances require it. The circumstances are listed in Article 47 LOGP: death or grave illness of parents, spouse, children, sibling, or other persons with a close relationship with the prisoner; giving birth by the spouse; or other grounds of an analogous nature.

Extraordinary leave may be granted to any prisoner independently of his penitentiary classification. It is also available for remand prisoners. The measures of security and custody deemed necessary must be provided. The duration of the leave will depend on what is strictly necessary with respect to the circumstance for which it was granted. The leave requires the authorization of the supervising prison judge, except in cases of emergency or with respect to remand prisoners, or of the judge or tribunal dealing with his case.

The rejection of leave by the prison administration may be appealed to the supervising prison judge.

1. Instruction 22/96, of 16 December, of the Directorate-General of Penitentiary Institutions analyzes the criteria used by the prison administration to authorize or reject leave from prison.
2. STC 19/1988, 16 February; STC 112/96, 24 June; STC 2/1997, 13 January; and 204/1999, 8 November.

F. Other

694. Prisoners have the right to wear their own clothes or wear those provided by the institution, which must not contain any element that may affect their dignity. In case of leave from prison, any sign identifying the status of the person as a prisoner must be avoided (Article 20 LOGP).

Prisoners may suggest sociocultural or sports activities they wish to pursue. The prison administration must encourage maximum participation in them.

They may have at their disposal books, newspapers, and magazines in free circulation outside the prison, with restrictions that may be appropriate in specific cases due to specific requirements of the treatment. Every institution has a library (Article 127 RP). Possession and use in the cells of television sets or radios and authorized personal computers is allowed (Articles 128 et seq. RP).

Three levels of formation and education are provided: regulated education at pre-university level (basic and secondary education), university education, and education based on non-regulated programmes (Articles 122 et seq.). For this purpose, the prison administration may enter into agreements with public and private educational institutions.

A system of rewards exists for 'acts that demonstrate good conduct, work spirit, and a sense of responsibility' (Article 46 LOGP). The rewards may consist of additional special and extraordinary communication, study grants, gifts of books or similar measures, priority in taking part in planned excursions for cultural activities, reductions of sanctions, cash prizes, certificates of merit, or similar rewards (Article 263 RP).

§4. JUDICIAL CONTROL: THE SUPERVISING PRISON JUDGE

695. Supervising prison judges are responsible for the majority of judicial functions with respect to the execution of liberty-depriving penalties and security measures. Although the sentencing judges and tribunals retain some responsibilities, such as the approval of final release, the majority of the responsibilities have been transferred to these specialized judicial organs created by the LOGP. Supervising prison judges are also responsible for the judicial control of the disciplinary authority of the prison administration and for the protection and safeguarding of the prisoners' rights.

Without being exhaustive, Article 76 LOGP enumerates some responsibilities of the supervising prison judges: they make decisions necessary for the execution of liberty-depriving sentences; they decide on proposals for and revocation of conditional release and other prison privileges; they approve sanctions of confinement to a cell for periods exceeding fourteen days; they deal with the appeals of the prisoners against disciplinary sanctions, initial classification, and progression and regression in grade; they make decisions on petitions and complaints of the prisoners with respect to the prison regime and treatment; they carry out scheduled visits to the penitentiary institutions; they authorize leave from prison exceeding two days; and they deal with the transfer of prisoners to closed-regime institutions.

Article 77 includes the list of responsibilities attributed to the supervising prison judges by adding the responsibility to address prison administration proposals with respect to the organization and development of prison services, including areas for which they are not responsible. These proposals are mere, albeit qualified, suggestions. They are not binding on the prison administration.¹

To this list of attributions, other responsibilities included in the PC and other legislation must be added (community work, periodic review of liberty-depriving security measures, suspension of the sentence due to mental disturbance, etc.).

The regime of appeals against the decisions of the supervising prison judges is laid out in the fifth additional provision of the LOPJ. It sets out a complicated system that differentiates between matters with respect to the execution of liberty-depriving penalties and matters with respect to the prison regime. In the first area, responsibility to deal with the appeals is attributed to the sentencing judge or tribunal. In the second matter, potential appeals against the decision of the supervising prison judge are dealt with in the provincial high court of the territory in which the institution is located. The decisions by the supervising prison judge with respect to appeals against disciplinary sanctions may not be subject to further appeal. The right to appeal is restricted to the convicted prisoner and the public prosecution service.

Cassation for the unification of doctrine is also possible in some very limited circumstances, because it requires that the appellant invoke contradicting resolutions of different bodies in substantially identical matters.

1. Fernández Aparicio, J.M., *Derecho Penitenciario. Comentarios Prácticos* (Madrid: Sepín, 2007), 149.

§5. PRISON PRIVILEGES

696. The 1995 PC abolished the redemption of penalties through labour, which had been implemented during the first years of General Franco's regime. This consisted of the reduction of the sentence by one day for every two days of labour in prison. Since abandoning this concept, current legislation lists prison privileges such as conditional release in its various forms and the individual pardon (Article 202 RP). Some textbooks and comparative law, sometimes applying a broader meaning of prison privileges, classify as privileges other concepts such as the third grade and leave from prison, which may also result in an improvement of the prisoner's life and that have been explained earlier.

I. Conditional Release

A. Ordinary Regime

697. Conditional release is the last of the prison grades (Article 72.1 LOGP). It consists of release before the final completion of the sentence under the conditions of not re-offending for that period and of observing any rules of conduct that may have been imposed.

The pre-requisites for conditional release are the following (Article 90 PC):

- (1) Classification within the third grade of prison treatment.
- (2) Three-quarters of the sentence must have been served. This time requirement may not apply in special cases, as discussed later (see *infra*, paragraph 697).
- (3) Good conduct and the existence of a favourable individual prognosis with respect to social re-integration, issued by the experts considered appropriate by the supervising prison judge.

Organic Law 7/2003 has effectively added a fourth requirement when it declared that the condition of favourable prognosis is only complied with if civil liabilities have been discharged. A serious reparation effort that did not result in complete payment of liabilities due to a lack of financial means will be viewed equivalently.

The duration of conditional release will be the remainder of the complete prison sentence. During this time, there will be specific monitoring of the released prisoner by the penitentiary social services.

Conditional release must be authorized by the supervising prison judge. The judge may impose one or more rules of conduct or security measures regulated in Article 83 and 96.3 PC (prohibition from attending certain places or establishments; from approaching the victim, relatives, or other persons; from leaving home without authorization; an obligation to appear before the public authority or office periodically as established; to attend formative, work-training, road safety, sexual education, or similar programmes; subjection to familial custody; disqualification from driving motor vehicles and mopeds; obligatory outpatient treatment; professional disqualification; and compliance with any other obligations the judge may deem appropriate).

If, during conditional release, the offender re-offends or fails to comply with the imposed rules of conduct, the supervising prison judge will revoke the release and the offender will be returned to prison, for and within the appropriate duration and grade, whereby the time spent on conditional release will be taken into account.

B. Special Cases

1. Early Conditional Release

698. Article 91 PC eases the temporal requirement for conditional release, reducing it to two-thirds of the sentence for those convicted of offences other than terrorism or committed through criminal organizations, in accordance with the continual progress shown by the prisoner with respect to work, cultural, and occupational activities (Article 91 CP). If the prisoner has also participated in an efficient and favourable manner in programmes of reparation for victims or treatment or detoxification programmes, conditional release may be granted even earlier: up to ninety days for each year of sentence served, when half of the sentence has been served.

2. Prisoners of 70 or More Years or Who Are Seriously Ill

No condition of a minimum period of the sentences to be served applies in the case of persons who are more than 70 years old at the time of conviction or who become 70 while serving the sentence, or for those with a very serious condition with incurable suffering (Article 92 PC). The judge may authorize conditional release if the danger to the prisoner's life is evident, the only requirement being that the prison provide a prognosis report (Article 92.3).

3. Foreign Nationals

The philosophy behind employing expulsion as a substitute for sentences of imprisonment under six years (see *supra*, paragraph Part II) paragraph. 295 The substitution...also has an impact on RP.

On one hand, Article 197.1 RP admits the possibility that foreign nationals may serve their sentences under conditional release outside Spain. On the other hand, Article 89 PC establishes as the general rule the expulsion of foreign nationals not legally residing in Spain who are sentenced to imprisonment for six years or more, when the third prison grade has been attained or three-quarters of the sentence served, that being the moment at which conditional leave would otherwise be allowed, other than when the judge or tribunal finds that there are grounds to keep the foreign offender in the penitentiary institution (Article 197.2 RP). This measure also results in the prohibition from entering Spanish territory, demonstrating its inexistent re-socializing purpose: progression to the third grade results in expulsion.

II. Individual Pardon

699. With reference to the general regulation of pardons as a cause of the extinction of criminal responsibility (see *infra*, paragraphs 706-708), penitentiary legislation refers to this concept as a specific penitentiary privilege that may be granted by the prison administration itself (Article 206 RP). Pardons are proposed to the supervising prison judge when the prisoner has shown extraordinary good conduct for at least two consecutive years, has performed activities useful for the preparation of his life in liberty, and has participated in social re-education and re-integration activities. The usual procedure is that a partial pardon is proposed. The final decision, as with other forms of pardon, is the responsibility of the Government, on which the proposal is not binding.

§6. OTHER ELEMENTS AFFECTING THE EXECUTION OF LIBERTY-DEPRIVING PENALTIES

I. Crediting of Time Served on Remand for Other Offences

700. Article 58 PC not only establishes the general rule that time served in prison on remand must be taken into account in calculating the duration of the service of the sentence imposed for the offence in question, but also allows time served on remand to be deducted from the sentence imposed in different proceedings when 'that imprisonment on remand was later than the criminal acts for which the penalty is imposed and to which it is intended to be credited'. The chronological condition has a logical reason: nobody should count on having a positive punitive balance allowing him to commit an offence, the penalty of which would already have been served through imprisonment on remand, served for an offence of which he was finally acquitted.

Responsibility with respect to this assessment lies with the supervising prison judge.



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II. Combination of Sentences

701. When the same person has been sentenced to a number of liberty-depriving penalties, a combination of all sentences must be established for their successive service. Two situations are possible:

- 8**
- (a) Where the total duration of the sentences must be subject to a reduction, in accordance with the accumulation criteria for real concurrence of offences regulated in Article 76 PC (see *supra*, Part II paragraph 309 (Where there is more.-310. If the sentences have been imposed by different judicial bodies, the last one will be responsible for fixing the maximum total term after following a simple form of incidental opposition proceedings (Article 988 CCP). The decision may be subject to cassation in the Supreme Court.
 - (b) If those restrictions do not apply, all sentences are added together or combined so that, for the purposes of prison privileges (conditional release, leave, etc.), the total duration is taken into account as if it were only one sentence. This is a simple arithmetic sum without any reductions with respect to the different portions of each of the sentences, which the legislator takes into account for various other matters: one-fourth, two-third, three-fourth, etc. (Article 193 RP).

III. Suspension of the Sentence Due to Later Mental Disorder

702. Article 60 PC provides that if the convicted person enters into an enduring state of serious mental disorder that is so serious as to prevent him from understanding the meaning of the penalty, the supervising prison judge must suspend the liberty-depriving sentence, without prejudice to the provision of necessary medical care. For this purpose and subject to prior opposition proceedings,¹ the imposition of one of the liberty-depriving security measures regulated in the PC (see *supra*, paragraphs 371 et seq.) may be ordered. The measure may not be more severe than the penalty it replaces, and its imposition requires that the subject be considered dangerous (Article 6.1 PC).

If the convicted person recovers his mental health, he will serve the remainder of the sentence if its limitation period has not expired. However, the judge or tribunal may, for reasons of fairness, deem the sentence to be extinguished or reduce its duration if it is considered that serving the sentence would be unnecessary or counter-productive (Article 60.2).

1. Articles 991-994 CCP.

IV. Transfer of Foreign Nationals for the Service of Prison Sentences

703. Foreign nationals sentenced to imprisonment may apply to serve the sentence in their country of origin. A ratified treaty between both States providing for this possibility is an essential prerequisite for the application.

The most important treaty on this subject is Convention 112 of the European Council of 21 March 1983, on the Transfer of Sentenced Persons. This convention was ratified by Spain on 10 June 1985, and has been signed by all the countries of the European Council (among others).

The convention allows for offenders sentenced to liberty-depriving penalties in a country that is not their own to be transferred to their country of origin or residence to serve the sentence. The consent of the convicted offender or his representative, that the sentence is final, and that at least six months of imprisonment have been served are indispensable prerequisites for this. Once the transfer has taken place, the sentence may be subject to variation, depending on whether the procedure of 'continued enforcement' (under which the state in which the sentence will be served – the administering state – is bound by the legal nature and duration of the sanction as established in the sentence) or that of 'conversion' is followed (under which the administering state modifies the sentence to adapt it to one available in its legal system for the same offence, through proceedings which may be judicial or administrative). Spain excludes the practice of conversion when it is the administering state of the sentence (Articles 9 and 10).

Besides this multilateral convention, Spain has signed other bilateral agreements with a similar content (with Argentina, Bolivia, Brazil, Colombia, Costa Rica, Cuba, Ecuador, Egypt, El Salvador, Honduras, Morocco, Mexico, Nicaragua, Panama, Paraguay, Peru, Russia, Thailand, and Venezuela, among others).



General Conclusion

719. Once the democratic system was restored in Spain, one of the first objectives of the government was to undertake a deep revision of the Penal Code. This reform process resulted in the promulgation of the new Penal Code of 1995, which was fully adapted to the new constitutional framework. The so-called penal code of the democracy introduced important changes, including the regulation of the environmental crimes or offences related to the socioeconomic order. Notwithstanding this integral reform, the new penal code has been subject to many amendments, some of them due to technical deficiencies, others to cover new demands or fill lacunae of the 1995 text. Recently, special attention has been paid to the increasing number of domestic violence offences. National terrorism has also been in the background of several reforms, such as the full service of imprisonment sentences, as well as the new regulation with regard to the control of explosives. All in all, the Penal Code has undergone a large number of amendments, and still more are expected in the near future – particularly regarding the process of legal harmonization within the EU. On the other hand, the discussion of the criminal liability of legal persons has not yet concluded, but it is assumed that the reform will be inspired, if not monitored, by the EU institutions.

Curiously, in the Spanish criminal justice system, a relatively young Penal Code coexists with a Criminal Procedure that dates back to the end of the nineteenth century. The Code of Criminal Procedure, greatly inspired by the *Code d'Instruction Criminelle* of 1808, has survived for more than a century and has adapted to the requirements of the Constitution and of the European Convention on Human Rights (ECHR). Also, the CCP has been amended frequently, although the essential structure of the procedural model designed in 1882 remains. The procedure of the CCP is in accordance with the constitutional safeguards and provides a complex and original balance between different accusing parties and the investigating judge. However, the code needs to be updated to adapt to current needs, new tools of investigation, and new forms of criminality in order to be able to make the criminal justice more efficient without reducing the level of procedural guarantees. Modernization of the justice system is part of the political agenda. However, we have already witnessed several attempts to accomplish a far-reaching reform of the CCP, but none of those integral reform proposals succeeded in becoming a new code, due to a lack of political consensus. The reason it is so difficult to provide an efficient and rational tool to handle the criminal cases is the lack of a common idea of what the model should be for the new criminal procedure. The design of the public prosecution service – its tasks, its institutional position, and the principles that should govern the exercise of the criminal action – is one of the issues most





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General Conclusion

hotly discussed. Other issues such as mediation and the agreed solutions to criminal conflicts, which are so much interlinked with the idea of criminal law and the goals of the procedure, are also under debate. However, one thing is without question: It is time to undertake a deep reform of the Criminal Code of Procedure of 1882.



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