CHAPTER 9

PRE-TRIAL PROCEDURE IN SPAIN

Raquel Borges BLÁZQUEZ*

*PhD. Procedural Law, University of Valencia, Faculty of Law, Department of Administrative and Procedural Law, Valencia, Spain

e-mail: Raquel.Borges@uv.es

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ABSTRACT

The main objective of this chapter is to focus on the rights of the accused on the pre-trial procedure in Spain. The reason to focus on accused's rights is linked to the importance of the pre-trial procedure in ensuring no person faces a trial in the absence of sufficient evidence. Along these lines, this chapter considers the arrest threshold as a precautionary measure and the possibility of the police to use less invasive precautionary measures. The chapter also sets out the limits of the investigation in Spain and the decision to charge. At the end of the chapter there is a brief reference to the oral trial.

Keywords: Spanish criminal procedure, pre-trial procedure, precautionary measures, guarantees, investigation's limits

1. The Criminal Procedure in Spain

We can state with certainty and from a scientific perspective that Spanish Procedural Law finds its origins in Italian Procedural Law in addition to, since the 19th century, German Criminal Procedure. One characteristic of the Spanish criminal process which feels strange to other legal systems, is the fact that the judge in charge of the pre-trial phase cannot also take charge of the trial. The decision to divide the responsibilities of instructing and judging arose when the instruction and judgement performed by the same person was declared unconstitutional. The reason behind this is to guarantee the objectivity in the sentence as much as possible.[1] Criminal Procedural Law of all countries regulate the preparatory activity of the criminal process and provides its public nature. On the other hand, the preparatory activity in the civil process is private. Furthermore, the civil preparatory activity phase in Spain is not even regulated in the LEC ("*Ley de Enjuiciamiento Civil*", which means Civil Procedural Code).[2] Regarding criminal process, the Spanish legislator in 19th Century decided that the only possible way to apply criminal law was the process.[3] Moreover, the Spanish legislator divided the process into two delimited phases. The first is the instruction phase (pre-trial procedure) and the second is the oral hearing phase (trial procedure). This chapter analyses some of the peculiarities of the instruction phase of Spanish criminal procedure.

1.1. The Phases of the Criminal Procedure in Spain

- Preparatory phase or "instruction phase". Its denomination in the LECrim ("*Ley de Enjuiciamiento Criminal"* which means Criminal Procedural Law) is "*sumario*", or "*procedimiento preliminar*". Both concepts can be translated as pre-trial procedure.
- Trial Phase. During this phase the oral hearing takes place.

1 Juan Montero Aroca "La evolución científica" in Juan Montero Aroca, Juan Luis Gómez Colomer and Silvia Barona Vilar, *Derecho Jurisdiccional I. Parte General* (25th edn, Tiranr Lo Blanch 2017) 31.

2 Teresa Armenta Deu, *Lecciones de Derecho procesal penal* (10th edn, Marcial Pons 2017) 34.

3 Juan Montero Aroca, "Los principios del proceso penal" in Juan Montero Aroca, Juan Luis Gómez Colomer and Silvia Barona Vilar, *Derecho Jurisdiccional I. Parte General* (25th edn, Tiranr Lo Blanch 2017) 278.

PREPARATORY PHASE OR "INSTRUCTION PHASE"	TRIAL PHASE
Preparation for the trial phase: The trial phase needs a previous activity in order to find out which crime was committed, who committed it and under which circumstances.[4] Oral trial can only start when there are enough indications in order to think that an act is punished as a crime within Spanish legislation and there are enough signs to assume that the accused performed it. However, this does not mean that the accused will be convicted. These indications will allow the judge to end the investigation and start the oral trial.	In this phase, the competent Judge or Court is the one who will deliver judgement. According to article 694 LECrim, "*When the oral trial is ordered to be opened, the Court Clerk will notify case to the Prosecutor, or the private prosecutor if it is for a crime which cannot be prosecuted ex officio, so that, within a time limit of five days, they classify the facts in writing. Once this decision is issued, all acts in the proceedings will be public*".

1.2. The judge in charge of the pre-trial phase cannot be in charge of the trial phase.

This distinction attends to the incompatibility of functions between "instruct" (investigate the facts to prepare the oral trial)[5] and "judge" (verify the facts in the oral trial to decide) and essentially results in the same person being unable to assume both functions. This situation is different to other European countries, where the prosecutor investigates and the court judges.[6] This is notwithstanding the fact that a prosecutor is used in Spain. However, it is the Judge who manages the investigation in the pre-trial phase. The role of the Spanish prosecutor is to defend the "public interest" and decide whether to accuse or to ask the court to acquit the accused. This is a sign that Spanish Criminal Procedure has is inquisitorial in nature. The Spanish Constitutional Court, in Judgement number 145/1988, on July 12th,[7] declared that it is unconstitutional, where the same judge assumes the role of both instructing and judge and

4 Francisco Ramos Méndez, *El sistema procesal español* (10th edn, Atelier 2016) 256.

5 According to our Organic Act on the Judiciary, these are the duties sphere of the Judge of Instruction:
Article 87: 1. Within the sphere of criminal matters, Examining Magistrate's Courts shall hear: a) The examination of proceedings relating to crimes that are to be tried by the Provincial Courts or Court of Criminal Matters, with the exception of those cases that fall under the competence of the Courts for Violence against Women. b) It also falls to them to issue plea bargained sentences in those cases established by law and in proceedings wherein the sanction proposed by the State Prosecutor is accepted. c) Misdemeanour court hearings, issuing a sentence, except in those cases that fall under the competence of the Justices of the Peace or the Courts for Violence against Women. d) "Habeus corpus" proceedings. e) Appeals established by law against the rulings issued by Justices of the Peace within the administrative area and questions of competence that arise between them. f) The adoption of protection orders for victims of violence against women when they are on police duty and providing that the order cannot be adopted by a Court for Violence against Women. g) The issue and enforcement of instruments for the mutual recognition of criminal rulings within the European Union that are assigned to them by law. h) Independent seizure procedures for those crimes they are competent to hear. 2. In addition, Examining Magistrate's Courts will hear in relation to the authorisation for the internment of foreigners in internment centres, and in relation to the review of their time spent in these centres and in the holding centres at border checkpoints. They will also hear the requests and complaints of those interned where they affect their fundamental rights.

6 Juan Montero Aroca, "La parte acusada y las partes civiles" in Juan Montero Aroca, Juan Luis Gómez Colomer, Silvia Barona Vilar, Iñaki Esparza Leibar and José F. Etxeberría Guridi (eds), *Derecho Jurisdiccional III. Proceso Penal* (27th edn, Tirant Lo Blanch 2019) 44-45.

7 ECLI:ES:TC:1988:145.

trial judge. Consequently, the Organic Act 7/1988 separated the roles. The Judge of Instruction will be competent to manage the instruction phase. The Criminal Trial Judge (less severe crimes will involve only one judge) or the Court (more severe crimes, three judges) will be competent to judge the accused's guilt.[8] In some cases a Public Jury could be the competent to judge. These cases are the crimes enumerated in Article 1 Organic Act 5/1995.

1.3. The Criminal process as a guarantee of freedom

It can be said that the civil procedure guarantees the right of private property and the criminal procedure secures the right of freedom. When speaking of the right to a due process, one is simply stating that no person will be deprived of their life, freedom or property without a fair process. In other words, the political power cannot deprive anybody of these rights without a true process. Nevertheless, due process is not enough to explain the procedural guarantees of the victim and the accused. This gives rise to a need to study the generic and concrete rights and guarantees contained within the Constitutions. The Spanish Constitution places special importance to the right to a technical defense (Articles 17.3 and 24.2 CE – '*Constitución Española*'.[9]

Finally, it can be concluded that Criminal procedure provides the rights that citizens have when facing the criminal law, which is always repressive. The next sections this chapter will examine the thresholds of the arrest in Spain during the preliminary procedure, the limits to the investigation and the decision to charge, with the latter concluding the preliminary procedure and leading to the oral trial.[10]

2. The thresholds of the arrest as a precautionary measure

The Spanish Constitution configures the Court's jurisdictional function as a function that consists in judging and executing what is judged (117.3 CE).[11] Sometimes the duration of the

8 More information about the distinction between Judge and Court: Guillermo Ormazabal Sánchez, *Introducción al Derecho procesal,* (6th edn, Marcial Pons, 2016) 22-30.

9 The right to the defense and assistance does not refer to "a" lawyer. This right refers to "the" lawyer of confidence appointed by the own part. This content had been recognized by the Spanish Constitutional Court in the Judgements 30/1981 of 24 July (ECLI:ES:TC:1991:30), 42/1982 of 5 July (ECLI:ES:TC:1982:42) and 7/1986, of 21 January (ECLI:ES:TC:1986:7). Moreover, this right can be found on article 6.3.c of the European Convention of Human rights of 1950, articles 17.3 and 24.2 CE, article 440.1 LOPJ ("*Ley Orgánica del Poder Judicial*", which means Organic Act of Judicial Power), articles 118.III and 520.c LECrim and article 57 EGA ("Estatuto General de la Abogacía" which means Federal Lawyers' Regulation). Furthermore, it is important to bear in mind that the accused will have the right to have a lawyer from the very first moment there is an accusation against him/her. It goes without saying that f he/she cannot afford a lawyer, he /she can ask a legal aid lawyer. Montero (n 5) 98.

10 Montero "La parte acusada y las partes civiles" (n 5) 46-47.

11 Juan Montero Aroca, "La función jurisdiccional" in Juan Montero Aroca, Juan Luis Gómez Colomer and Silvia Barona Vilar, *Derecho Jurisdiccional I. Parte General* (25th edn, Tiranr Lo Blanch 2017) 114.

pre-trial procedure can be used by the passive subject in order to make the resolution useless. This is the reason why the precautionary function appears.[12] This function serves to guarantee the fulfilment of the others[13] (judging and executing what is judged).[14] The reason for this function is that, on the one hand, the time needed in order to do things well and on the other hand, the necessity to secure people and things.[15]

The characteristics of the precautionary measures are 1) instrumental: the precautionary measures are justified in relation with a main process. Consequently, precautionary measures tend to guarantee its result; 2) provisional: a precautionary measure does not pretend to turn into a definitive one and disappears when it stops being necessary in the main process; 3) temporal: the length is limited; 4) variable: a precautionary measure can be modified when the situation changes; and 5) jurisdictional: this decision can only be adopted by a judge.[16]

According to Spanish legislation there exists the possibility to place the offender in a precautionary arrest for up to 72 hours. According to Article 17 of the Spanish Constitution

> *preventive detention may last no longer than the time strictly required in order to carry out the necessary investigations aimed at establishing the facts; in any case the person arrested must be set free or handed over to the judicial authorities within a maximum period of seventy-two hours.*

Nevertheless, there is an exception in Article 520 bis LECrim for terrorism and organized crime cases. In these cases, preventive detention could last for 120 hours (72 hours + 48 hours prolongation if the judge accepts the extension of the preventive detention). Following this the instruction judge decides whether to place the offender in precautionary imprisonment or to use another measure that is less severe. These measures will be considered later in the chapter. In relation to the threshold of arrest, it should first be noted that *"no Spanish or foreign national may be arrested except in the cases and in the manner provided for by law"* (article 489 LECrim). Furthermore, *"arrests may not be made for simple misdemeanours, unless the alleged guilty party has no known address or does not give enough bail, in the opinion of the*

12 Ormazabal (n 7) 133.

13 José Bonet Navarro, *Litigación y teoría de la prueba* (Tecnos, 2019) 199.

14 Silvia Barona Vilar, "La tutela cautelar. Elementos personales y medidas cautelares" in Juan Montero Aroca, Juan Luis Gómez Colomer, Silvia Barona Vilar, María Pía Calderón Cuadrado, *Derecho Jurisdiccional II. Proceso Civil* (26th edn, Tirant Lo Blanch 2018) 702.

15 Silvia Barona Vilar, *Medidas cautelares en el proceso penal* (Prontuario de Derecho Procesal 3 Honduras, 2015) 46.

16 Silvia Barona Vilar, "Las medidas cautelares" in Juan Montero Aroca, Juan Luis Gómez Colomer, Silvia Barona Vilar, Iñaki Esparza Leibar, José F. Etxeberría Guridi (eds), *Derecho Jurisdiccional III. Proceso Penal* (27th edn, Tirant Lo Blanch 2019) 272-289.

Authority or agent attempting to arrest them" (Article 495 LECrim). Consequently, in order to decide to take a person into arrest two pre-requisits are required: *fumus boni iuris* and *periculum in mora* (the definitions of both concepts are explained in the next section). Taking all these facts into account, it can be concluded that, only where there exists:

i) sufficient evidence[17] to suspect a person of committing a crime; and

ii) there is a real possibility that the accused may disappear before the trial, or that they may endanger the victim or destroy proofs,

can an arrest be issued (articles 489 to 501 LECrim).

2.1. Precautionary imprisonment

The precautionary imprisonment (provisional detention according to the translation of the LECrim) is the most severe personal precautionary measure within Spanish legislation due to the fact that it is a deprivation of the freedom of the subject that suffers it.

2.1.1. Characteristics

As long as precautionary imprisonment is a precautionary measure it must have the characteristics of precautionary measures. Consequently, a precautionary imprisonment is 1) instrumental due to its adoption depending on a future and possible charge. As mentioned above, the purpose of the precautionary imprisonment is simply to guarantee that the accused will not disappear during the instruction phase. 2) Provisional and variable: it is revisable. 3) Temporal: its length is conditioned to a maximum period of time according to the law. 4) Jurisdictional: only a judge can deprive a citizen of his liberty.

Precautionary imprisonment is a personal precautionary measure with an effect on the person that suffers it. One of the purposes of the precautionary imprisonment is to avoid the risk of escape. This measure is regulated from article 502 to article 519 LECrim. The treatment of the precautionary prisoners is regulated from article 520 to article 527 LECrim.

2.1.2. Pre-requisites for arrest

We find the pre-requisites to adopt the precautionary measure in article 503 LECrim:[18]

a) Fumus boni iuris: This means that "*there are sufficient grounds in the case to believe*

17 At this point the fact committed by the offender has to be more likely than unlikely. In order to condemn on the trial phase the fact must be proved "beyond any reasonable doubt". The only requisites that must be taken into account in order to end the pre-trial phase and ask for the trial phase are: enough signs of the existence of a crime and enough signs that a person is guilty of that crime. Furthermore, the author must be imputable according to Spanish Criminal Law.

18 Armenta (n 2) 27-29.

that the person against whom the detention order is ordered is criminally responsible for the crime" (article 503.1.2 LECrim). Furthermore, there is a time limit. In order to be able to enforce a precautionary measure one or several acts should be qualified as:

> *an offence punishable by a maximum penalty of two or more years in prison, or a shorter term where the accused has a criminal record which has not been and is not likely to be cancelled, arising from a conviction for a premeditated crime* (article 503.1.1 LECrim).

b) *Periculum in mora:* The purpose of this measure is to guarantee the presence of the accused, the integrity of the objects and/or the security of the victim. Consequently, the purposes can be divided into:

1º- Risk of escape: "*Guarantee the presence of the investigated party or accused in the proceedings where it is reasonable to assume a risk of them absconding*." (Article 503.3.a LECrim)

2º- Risk of concealment, alteration or destruction of the *"sources of evidence relevant to the proceedings in cases where there is a grounded, specific risk*" (Article 503.3.b LECrim). In order to assess the risk, the following points must be taken into account: 1) the capacity of the accused to have access to the sources of proof on their own or through third parties, to influence other accused, witnesses or experts and the like. 2) the existence of a specific risk. 3) It is important to keep in mind that this risk cannot be based on the right to the defense or the lack of cooperation of the accused during the investigation. In other words, "*Provisional detention will not be ordered on these grounds where such risk is inferred solely with respect to the right to a defence or the accused's failure to cooperate with the investigation in progress*".

3º- Risk of criminal reiteration: to be able to evaluate this risk we will focus on the circumstances of the act and the seriousness of the crime that may have been committed. Whether the criminal act is premeditated should also be considered. Finally, a precautionary imprisonment is possible even though the act is not within the limits provided in Article 503.1 LECrim if:

> *the accused's record and other information or circumstances provided by the Judiciary Police, or arising from the proceedings, may reasonably infer that the accused was acting in collusion with another person or persons in an organised manner to commit criminal offences, or is a habitual offender*. (Article 503 in fine LECrim).

4º- Risk of aggression against the victim's legal rights, particularly if the victim is one of the persons referred to in Article 173.2 CP[19] ("*Código Penal*"(Criminal Code)). In these cases, the limits of article 503.1 LECrim will not apply.[20]

2.1.3. Modes of detention

The LECrim regulates three modes of detention: communicated imprisonment, solitary confinement and attenuated precautionary imprisonment.

a) Communicated imprisonment

Communicated imprisonment is the general rule. This precautionary measure must be carried out in the least detrimental manner for the accused (article 520 LECrim). Communicated imprisonment has to guarantee the personal rights of communication of the accused in its different variables: the accused has the right to communicate to a minister of his or her religion, a family member or a person with whom he or she has an ongoing relationship etc. (Articles 523 to 526 LECrim).

b) Solitary confinement

According to Article 527, in the cases referred in Article 509 LECrim[21] the detainee or prisoner may be deprived of some rights if the circumstances of the case justify this situation. Nevertheless, it is important to keep in mind that solitary confinement can only be used as long as it is strictly necessary in order to take urgent legal measures. The maximum period is usually five days. However in the cases of the crimes referred in article 384.a LECrim[22] solitary confinement may be extended for a further fivedays. The rights that can be deprived are:

1) the right of appointment of a trusted lawyer.
2) The right to communicate with all or any of the persons with whom the accused has the right to do so. However, there are exceptions including the judicial authority, the public prosecutor service and the forensic doctor. The right to communicate with these persons can never be avoided.

19 Partner, ex-partner or a vulnerable person who lives with the aggressor.

20 Silvia Barona Vilar, "Medidas cautelares específicas" in Juan Montero Aroca, Juan Luis Gómez Colomer, Silvia Barona Vilar, Iñaki Esparza Leibar and José F. Etxeberría Guridi (eds), *Derecho Jurisdiccional III. Proceso Penal,* (27th edn, Tirant Lo Blanch 2019) 297-300.

21 "*a) the urgent need to prevent serious consequences which may place the life, liberty or physical integrity of a person in danger, or b) the urgent need for immediate action by the examining magistrates to prevent serious compromise to criminal proceedings".*

22 This article refers to people *"involved or related to armed gangs or terrorist or rebel individuals".*

3) The right to have confidential meetings with their own lawyer.

4) The right to access the documentation of the preliminary phase.

c) Attenuated precautionary imprisonment

Article 508 LECrim includes two options to serve the precautionary imprisonment outside of prison.

The first situation refers to those cases where, due to illness, imprisonment could entail a serious risk to the accused's health. In this case, the judge or the court may order a provisional detention of the accused at their own residence. Security measures are necessary in order to assure the effective compliance of the measure. Furthermore, the Judge or the Court may *'authorise the accused to leave their residence during the time needed to treat their illness, subject to the required security'*.

The second situation refers to those cases were the accused is on drug or alcohol rehabilitation treatment and imprisonment may interfere with the results. Consequently, in these cases:

> *provisional detention may be replaced by admission to an official centre, or legally recognised institution, to continue treatment, as long as the events subject to the proceedings took place prior to starting treatment. In this case, the accused may not leave the centre without authorisation from the judge or court ordering the measure.*

2.1.4. Duration of Detention

According to Article 504.1 LECrim, '*Provisional detention will last for as long as it is essential to achieve any of the purposes provided for in the previous article and for as long as grounds still exist justifying its order'*

Provisional detention cannot exceed one year if the crime carries a sentence of three years' imprisonment or less. If the crime carries a sentence of more than three years of imprisonment, provisional detention cannot exceed two years. However, a single extension is possible. The scope of the extension depends on the crime. If the punishment of a crime does not exceed three years, the single extension could be up to six months. If the punishment of a crime exceeds three years, the single extension could be up to another two years. It should also be borne in mind that "*if the accused is convicted, provisional detention may be extended up to a maximum of half the sentence effectively imposed in the judgment, where this is appealed*" (article 504.2 LECrim).

Furthermore, if the reason of the precautionary imprisonment is to avoid the risk of concealment, alteration or destruction it is still possible to make a single extension of six months.

2.1.5. Compensation

According to article 294.1 LOPJ ("Ley Orgánica del Poder Judicial", which means Organic Law on the Judiciary), "*individuals who have been under preventive imprisonment and are subsequently absolved from the alleged charge or if a non-suit writ has been issued with regard to those criminal proceedings may claim compensation, provided that they have sustained any damages therefrom*". This article only allows compensation if there is an absolving judgement.[23] However, there are other cases where a precautionary imprisonment could be unfair. In these cases, there could also be a compensation for unfair situations according to article 293 LOPJ (judicial error and damage caused due to an abnormal functioning of the administration of justice).[24]

2.2. Other precautionary measures less severe than precautionary imprisonment

'One way in which protection can be procured is by physically incapacitating violent persons: by placing them in detention they can be prevented from attacking or harassing their victims again'.[25] Nevertheless, in some cases less severe measures could be adopted in order to guarantee the trial and the victims' security.

2.2.1. Interim release

According to article 520 LECrim, precautionary imprisonment is an exceptional measure. Therefore, if a Judge or Court are able to use less severe measures, they should not use precautionary imprisonment. One of those less severe measures is the interim release, which is a personal protective measure taken during criminal proceedings as an alternative to pre-trial detention. With this measure the presence of the accused in the proceedings is ensured by limiting his or her freedom through the imposition of accessory obligations (outlined below). The purpose of this measure is not to punish the individual, but to safeguard the outcome of the ensuing criminal proceedings.

a) Characteristics

Interim release is an intermediate measure between precautionary imprisonment and

23 Notably, compensation is not automatic. Individuals may claim for that compensation and depending of the circumstances of the case they will achieve it or not. In Spain there is the sadly popular case of 'Rocio Wakkinkhof". Dolores Vázquez, the then former lover of Rocio's mother, was imprisoned for almost two years for Rocio's murder, until the true killer was identified. Despite asking for compensation The Supreme of Spain Court awarded none.

24 Barona (n 18) 306.

25 Suzan Van Der Aa, Johanna Niemi, Lorena Sosa, Ana Ferreira and Anna Baldry, 'Mapping the legislation and assessing the impact of Protection Orders in the European member states' <http://poems-project.com/wp-content/uploads/2015/04/Intervict-Poems-digi-1.pdf> 31. (04.09.2020)

liberty. In other words, interim release is a less severe alternative. As a precautionary measure, interim release is:

1) instrumental due to the main process being mandatory;
2) provisional and variable because it could be removed or changed at any time;
3) temporary; and
4) jurisdictional.

It is regulated by Articles 528 to 544 LECrim. The *proportionality principle* is also consider when considering whether interim release should be granted.

b) Legal requirements

The legal requirements of interim release are complementary to those relating to precautionary imprisonment. According to article 529 LECrim the Instruction Judge will settle an interim release measure in those cases where there are *fumus boni iuris* and *periculum in mora* but precautionary imprisonment is not necessary. Consequently, the judge will impose a less severe measure where this is enough to accomplish its objectives.

It is necessary to consider where these situations arise:

- *Fumus boni iuris*: there is an open investigation due to different acts that may constitute a crime. Furthermore, there are enough reasons in order to think that the passive subject is responsible of those acts.
- *Periculum in mora*: the risk that requires the use of a precautionary measure as interim freedom is the possibility of interference with the investigation. This risk is less severe than the risk of precautionary imprisonment.[26]

c) Obligations

Interim release can include some of these obligations:

- Obligation to post a bail. In this case the Judge will determine the amount:

  > Where provisional detention of the accused is not ordered, the judge or court will, in accordance with the provisions of article 505, order whether or not the accused must post bail to continue in conditional liberty. If the judge or court orders bail, the same court order will set the type and amount that must be posted (article 529 LECrim).

- Obligation of a periodic appearance in front of the court:

26 Jordi Nieva Fenoll, *Derecho Procesal III. Proceso Penal* (Marcial Pons 2017) 260-261.

> The accused who is given conditional liberty, with or without bail, will appear *apud acta* on the days set out in the relevant court order and as many other times as they are called before the judge or court hearing the case.

- Retention of the passport: this measure is complementary to the periodic appearance as Article 530 LECrim stipulates: '*To ensure compliance with this obligation, the judge or court may order, with grounds, retention of their Passport*.'
- Provisional deprivation of the use of the driving license. This measure applies when the crime committed was a result of the accused´s driving.

> Where the prosecution is ordered of a person holding a driving licence for a crime committed as a result of their driving, if the accused must be released, the Judge, at their discretion, may provisionally take away their driving licence, ordering that it is taken from them and included in the proceedings. The Court Clerk will notify the administrative body that issued it (article 529 a LECrim).

- Prohibition to live in certain places or to contact the victim and/or her/his family and friends. This prohibition will only apply if it is one of the crimes mentioned in article 57 CP and it is strictly necessary to protect the victim (Article 544 a LECrim).
- Finally, legal entities may be forced to temporary close their establishments or to suspend their social activities. There is no limit to this measure but action taken must be proportionate.[27]

2.2.2. Measures of protection and security for gender violence victims

Act 27/2003 ("*ley reguladora de la orden de protección para las víctimas de violencia doméstica*" which means regulatory act of the protection order for the protection of domestic violence victims) and Organic Act 1/2004 ("*ley orgánica de medidas de protección integral contra la violencia de género*" which means organic act of measures for the integral protection against gender violence) introduced a series of measures with a different nature. These measures are not only precautionary measures but also preventive measures.[28]

Before we continue, it is important to indicate that gender violence victim's in Organic Act 1/2004 are exclusively women and children that suffer violence within the home. This concept is different from the UN's concept. The reason of having these special measures in our Criminal Code is the risk involved due to the fact that it is specific to these victims and

27 Barona (n 18) 308-310.

28 Armenta (n 2) 242-246.

differs from the risk which victims from other crimes suffer. There are different reasons that make this risk specific. One of the main reasons is the affectivity relationship that exists between the victims and the aggressors. This causes that this kind of victims are not able to assess objectively the risk which they are exposed to because there are sentimental feelings involved. Gender and domestic violence victims are the only ones to love their aggressor.

These measures can be adopted *ex officio* or by a request from the victim, the relatives from the victim, the prosecutor or other institutions. Only the judge can adopt these measures and must justify their proportionality and necessity. Furthermore, these measures can be extended after the conviction if the judge or the court think they are still necessary.[29] In Spain, the most popular of all these measures is the protection order.[30]

3. Limits to the investigation in Spain: Special reference to the statements of the accused and to the illicit proof

It goes without saying that not all evidence is valid when seeking to obtain the truth and the conviction of the accused.[31] The criminal process guarantees freedom to all unless duly convicted by way of a fair and just process. There is not space in this chapter to study all the due process hurdles attributable to a criminal investigation in Spain. As such, this chapter will focus on two situations: the statements of the accused during the pre-trial procedure and the effects of the illicit proof due to its importance in criminal procedure.

3.1. The validity of the statements in the investigation phase

One of the fundamental rights of the citizen is the right to not make a statement against himself/herself and to not confess himself/herself guilty. This right is part of the presumption of innocence.[32] However, it is widely known that the accused´s statements are fundamental in order to know the truth. Therefore, it is important to be sure that the accused´s statements are made in a proper way in order to be able to use them as evidence.

29 *"The Examining Magistrate will issue a protection order for victims of domestic violence in the cases where, as there exist grounded indications of a crime or misdemeanor against the life, physical or moral integrity, sexual freedom, freedom or safety of any of the persons mentioned in article 173.2 of the Criminal Code, there is an objective risk situation for the victim which requires adoption of one of the protection measures regulated by this article"* (article 544 b.1 LECrim).

30 Germán Carrillo Olano, Nuria Méler Ginés and Ana Vela Mouriz, *Esquemas procesales Civiles, Penales y Concursales* (6 edn, Wolters Kluwer 2018) 177.

31 Ramos (n 4) 302.

32 Nieva (n 23) 161.

The Spanish Supreme Court and the Spanish Constitutional Court have had different occasions to set the basis of the value of the statements of the accused in front of the police, especially in those cases when they change their testimony in front of the judge or the court. If the accused changes the testimony during the oral hearing the judge or the court could take into account all the testimonies in order to assess the value of the last testimony. However, in order to be able to hear to the statements that were made before the oral trial two requirements must be met. First, the accused must have been interrogated with respect to all his/her constitutional rights and second, at trial he/she must have been given the chance to explain why he/she has changed the statements (Constitutional Court Judgement 80/1986).[33]

This situation raises another question. What happens if the statement of the accused is the only evidence of guilt? If the only evidence is a statement made during the pre-trial phase and later during the trial phase he/she changes that statement, the only possibility is the acquittal. By contrast, if there is corroborating evidence, according to Article 741 LECrim, *'the Court, appraising the evidence given during the trial in good conscience, the reasons put forward for the prosecution and defence and the statements by the accused themselves, will pass sentence within the time limit set in this Law'*.

It goes without saying that freedom and spontaneity must prevail during all the statements. Both are necessary if we want to ensure our constitutional rights are protected. These rights allow the accused to remain silent, to give evasive answers, to lie and to change his/her previous statements. Furthermore, if these rights are not respected the statements will not be valid.

It is also possible to confess the participation or responsibility in the crime due to guarantees being waivable, even tacitly. Nevertheless, a confession is not enough in order to convict a person if there is no other corroborating evidence. Consequently, a confession does not exclude the need to continue with the investigation if the Judge has doubts about who has committed the crime.

It is also important to bear in mind that the accused will have a lawyer from the very beginning of the investigation.

3.1.1. The Refusal to answer the formulated questions

The refusal to answer the formulated questions is an expression of the rights contained within Article 24.2 CE. According to this article every person, both natural and legal, has

33 ECLI:ES:TC:1986:80.

the right 'to not make self-incriminating statements; to not declare themselves guilty; and to be presumed innocent'. Procedural consequences to this situation are set in Article 698 LECrim: 'The trial will also continue where the accused party, or parties do not wish to answer the questions they are asked by the President'. Nevertheless, the judge or the court could demand previous statements made during the preliminary phase or in front of the police. Those statements can be read during the oral hearing.

Taking into consideration that refusal to answer questions is a prerogative, it cannot be used to condemn. However, in concrete circumstances it could be deemed evidence of guilt. For example, if when confronted by incriminating evidence the accused does not try to defend himself/herself through the provision of sufficient explanations, this attitude may be considered as evidence guilt.

3.1.2. Exculpatory, contradictory or false replies

As a part of the same constitutional right it is also possible to make an explanatory reply. Furthermore, this reply is possible even though the previous statements made during the preliminary procedure. These statements can be corrected, changed or confirmed. This right arises the following questions:

a) How should possible contradictions between previous statements and the statement made during the oral hearing be assessed?

The conclusions of the court must be based on the results of the statements made during the trial. Nevertheless, this does not mean that the only statement that can be considered is the one made during the oral hearing. The court can also base its judgement on statements made during the preliminary procedure. In order to be valid, these statements must have been taken in way which complies with the accused's rights and involve contradictions during the oral trial in order to be valid. It is noteworthy that these statements may or may not have been made in the presence of a lawyer.

b) Is a confession with lies and falsehoods allowable?

Whilst allowable, this may only be a evidence of guilt if it is corroborated by with other evidence.. Taking into consideration that there is no obligation to speak the truth, the oral hearing will continue. In other words, 'if the accused does not plead guilty to the crime they are accused of in the classification, or their defence considers it necessary for the trial to continue, then it will continue*'* (article 696 LECrim).

3.2. The illicit evidence

According to Article 11.1 LOPJ, 'the bona fide principle will be observed in all legal proceedings. Evidence obtained directly or indirectly in breach of fundamental rights or freedoms will not be admissible'.[34]

3.2.1. What rights do we protect by banning the illicit proof?

The rights protected are exclusively those that are constitutionally recognized. Evidences obtained in an illegal way that does not infringe the fundamental rights are not affected by the non-admissibility from Article 11.1 LOPJ. Furthermore, we can distinguish between two types of fundamental rights as below:

The first type are the fundamental rights with absolute character. These rights cannot be limited, even by a judge or court (for example, the right to life or the right to the personal integrity).

On the other hand, there exists a number of fundamental rights which can be limited in three circumstances:

- With the consent of the right holder. This consent must be unambiguous and free. There is a special case for the consent relating to the entry and search of a private home. If one member of a couple consents to the search but the other does not, the search will not be valid due to the conflicting interests between them.[35]
- Judicial permission: In order to secure such permission a number of requirements must fulfilled.
- Where there is a constitutionally legitimate purpose. The restriction of the fundamental right will depend on the purpose and the finality of that restriction. The court will have to put in balance the restriction on the one hand and the purpose on the other. The principle of proportionality is decisive in whether a constitutional right can be restricted.[36]

Last but not least, the limitation of the fundamental right must also respect the following principles:

34 Illicit proof is a difficult topic. The Spanish academic community?has written thousand of articles, chapters and boks. At the beginning not only the evidence obtained but also every evidence that came from the initial evidence where considered illicit. This interpretation is the one that fits the most with Article 11.1 LOPJ. Nevertheless, it was too strict. Nowadays we accept the doctrine of poison fruit after the judgement of our Constitutional Court 114/1984 (ECLI:ES:TC:1984:114). You can find the original judgement in this link below: http://hj.tribunalconstitucional.es/es-ES/Resolucion/Show/367#complete_resolucion&completa (22-5-2020).

35 Julio Banaloche Palao "Capítulo VI. Las diligencias de investigación restrictivas de los Derechos Fundamentales" in Julio Banaloche Palao and Jesús Zarzalejos Nieto (eds), *Aspectos fundamentales de Derecho procesal penal* (3rd edn, Wolters Kluwer 2015) 182-184.

36 Barona (n 18) 401-402.

(i) Legality. There is a need of a specific legal stipulation in order to allow a measure that affects fundamental rights.

(ii) Jurisdictionality. Only a judicial power can limit a fundamental right. Judgement 37/1089 from our Constitutional Court explains this limit. Even though only a judicial authority can authorize the limitation of a fundamental right, it is also possible for the police to make some of those limitations. Furthermore, when taking the decision to limit a fundamental right a judge or court must justify their decision. The motivation of the decisions is part of the fundamental right to an effective judicial relief included in articles 24.1[37] and 120.3 CE.[38] Our Constitutional Court has deeply studied the need of motivation in order to justify the proportionality of the decision (Judgements 128/1995,[39] 158/1996[40], 37/1989,[41] 7/1994[42], 128/1995,[43] 158/1996,[44] 181/1995,[45] and 54/1996[46].)

(iii), Proportionality. The Constitutional Court reiterates that, in order to be granted, any request to restrict fundamental rights needs proportionate in order to be compliant with the Spanish Constitution. (Judgement 56/1996).[47] Some of these measures could involve physical and psychological integrity or privacy (Judgements 120/1990,[48] 7/1994[49] and 143/1994[50]). Keeping in mind that Criminal Procedure protects the right of freedom, it follows that this proportionality must be applied more strictly in Criminal Procedures (Judgements 37/1989,[51] 85/1994[52] and 54/1996[53]).

37 *"Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights and interests, and in no case may he go undefended".*

38 *"Judgments shall be delivered in a public hearing".*

39 ECLI:ES:TC:1995:128.

40 ECLI:ES:TC:1996:158.

41 ECLI:ES:TC:1989:37.

42 ECLI:ES:TC:1994:7.

43 ECLI:ES:TC:1995:128 (n 34).

44 ECLI:ES:TC:1996:158.

45 ECLI:ES:TC:1995:181.

46 ECLI:ES:TC:1996:54.

47 ECLI:ES:TC:1996:56.

48 ECLI:ES:TC:1990:120.

49 ECLI:ES:TC:1994:7 (n 37).

50 ECLI:ES:TC:1994:143.

51 ECLI:ES:TC:1989:37.

52 ECLI:ES:TC:1994:85.

53 ECLI:ES:TC:1996:54.

In order to assess whether a measure is proportionate it is necessary to take into account three conditions: First, the measure must be adequate in order to achieve the objective. Secondly, there must be no other less restrictive measures than the proposed restriction that can achieve that same objective. Thirdly, the use of this measure must provide more benefits than costs.[54] These conditions are much more important in Criminal Procedure.

3.2.2. Inefficiency

Whether evidence is inadmissible depends on the rules that are violated.

On the one hand, non-fundamental rights can be violated?. These cases are studied in Article 238 LOPJ:

> Procedure acts will be null and void in the following cases:
>
> (i) When they take place by or before a court which is not the competent one or lacks, jurisdiction in terms of subject matter or functional capacity,
>
> .(ii) When carried out under duress or threat,
>
> (iii) When the basic rules of procedure have not been observed provided that his may have caused defencelessness,
>
> (iv) When carried out without the assistance of a legal counsel when it is mandatory by law,
>
> (v) When hearings are conducted without the mandatory presence of the Court Registrar,
>
> (vi)In all other cases established by procedural laws. Only this specific evidence will be nullified due to the fact that no fundamental rights are involved in these cases.

On the other hand, if constitutional legality is violated Article 11. LOPJ indicates: 'Evidence obtained directly or indirectly in breach of fundamental rights or freedoms will not be admissible'. According to this Article, if an evidence collection procedure does not pass a legality control (for example, in order to obtain evidence the fundamental right to confidential communications is violated)[55] this failure will also infer that other evidence directly related to the that which was collected in violation of the fundamental rights should also be inadmissible. In other words, a violation of a non-fundamental right only causes the specific evidence where that violation was committed to be inadmissible. However, a violation of a fundamental right will render all evidence collected that is linked to said violation inadmissible. The possibility to extend the affect from an illicit proof is called "*fruit of the poisonous tree"* doctrine. In order

54 Banaloche (n 35) 167-170.

55 Article 18.3 Spanish Constitution: *"Secrecy of communications is guaranteed, particularly of postal, telegraphic and telephonic communications, except in the event of a court order to the contrary".*

to soften the impact of this theory the "*doctrine of the inevitable discovery*"[56] was created.[57] According to this theory, in those cases where the instructor judge would have arrived to the same conclusion without the illicit proof *the inevitable discovery* is valid evidence (Spanish Supreme Court Judgement 4735/2012).[58]

4. The decision to charge

There is a turning point between the investigation phase and the moment when the instructor judge decides that there is enough evidence to end the investigation phase and initiate the trial phase. In the next lines we will analyse the moment of the decision regarding the opening of the oral trial and its alternative.

4.1. The Instruction Phase

Criminal procedure starts with the instruction phase.[59] Even though the procedure starts when there is a decision to charge against certain person/s, an investigation is necessary prior to that decision. During the instruction phase the judge will try to clarify the circumstances of the crime and who its authors were. This phase will take place during a maximum period of six months. Nevertheless, the public prosecutor may request an extension if the circumstances of the case justify it (Article 324 LECrim).

4.1.1. Functions

According to Article 299 LECrim "*Pre-trial proceedings are the proceedings directed at preparing the case and practised to investigate and prove the perpetration of the crimes, with all the circumstances that may influence their classification and the guilt of the offenders, securing the persons and their pecuniary liabilities*".

Consequently, pre-trial proceedings have two aims as follows:

The first one is to prepare the oral trial if there are enough signs to believe that someone committed a crime. During pre-trial procedure the accusation and the defense will set the terms of the debate. Secondly, preventing the oral trial from starting. No one should confront an oral

56 The Fruit of the poisonous tree doctrine was created in EEUU. We can find its origins in case Silverthorne Lumber vs. EEUU, 26 of January of 1920 and case Nardone vs EEUU, 11 of December of 1939.

57 Silvia Barona Vilar, "La prueba" in Juan Montero Aroca, Juan Luis Gómez Colomer, Silvia Barona Vilar, Iñaki Esparza Leibar and José F. Etxeberría Guridi (eds), *Derecho Jurisdiccional III. Proceso Penal* (27th edn, Tirant Lo Blanch 2019) 402-405.

58 ECLI: ES:TSJAND:2012:4735.

59 Armenta (n 2) 162-183.

trial if there are not enough signs to believe that he/she may be guilty.[60] As a consequence, if these signs do not exist the procedure must stop in the instruction phase.

4.1.2. Content

The content of pre-trial procedure is diverse. During pre-trial phase we find the acts of initial accusatory pleadings, investigation acts, acts to take evidence in advance (in special cases), acts to ask for preliminary measures, etc.[61]

5. Concluding thoughts

In Spain the Judge who leads the criminal investigations at the pre-trial phase is a different Judge from the one of the trial procedures, a characteristic that is unique to the Spanish legal system when compared with other Member States of the European Union. By having different judges investigate and decide guilt is a the accused's rights are protected. Even though in other European countries the judge of instruction exists, the role of the Spanish judge of instruction is arguably unique. Indeed, whilst in other jurisdictions the role of the prosecutor is to manage and direct a criminal investigation, this role falls to the judge of instruction in Spanish criminal procedure. The role Spanish prosecutor is to defend the "public interest" and decide whether to accuse or to ask for acquittal.

Whilst the divergence of responsibilities between the judge of instruction and the prosecutor can be heralded, particularly in relation to the protection of accused's rights, the coming into force of Regulation 2017/1939/EU and the creation of a European Prosecutor it could place the future of this system at risk.[62] However, this does present the opportunity for the Spanish system to align to other European countries in order to create an ideal model. In light of Britain's exit from the European Union, it is naive think the creation of a European Criminal Code is likely. The creation of a European Criminal Code does not present technical problems. The challenges associated to the harmonisation of EU criminal procedure are political problems due to the complication that involves all the States to give up their different legislative histories in order to create common juridical categories. Nevertheless, Member States, including Spain need to be ready to look forward, rather than backwards, in order to secure a real European Union with a real and effective judicial cooperation between countries.

60 In order to confront an oral trial the fact must be more likely than unlikely. When the accused is confronting the conviction, it must be beyond any reasonable doubt.

61 María Luisa Cuerda Arnau (dir), Antonio Fernández Hernández (coord), José Luis González Cussac, Elena Górriz Royo, Cristina Guisasola Lerma, María Jesús Blasco Mayor, Idoia Olloquiegui Sucunza, Juan José Periago Morant and Javier Zaldívar Robles, *Vistas penales. Casos resueltos y guías de actuación en sala,* (2nd edn, Tirant Lo Blanch 2015) 180-181.

62 Ana Montesinos García, "La nueva fiscalía antifraude europea" (2018), Revista General de Derecho Europeo 46.

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*Note: The official version of these laws is in Spanish. There are English translations available but none of them are official.

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Ley Orgánica 5/1995, de 22 de mayo, del Tribunal del Jurado.	Organic Act of the Jury Court	https://www.boe.es/buscar/act.php?id=BOE-A-1995-12095
Constitución Española.	Spanish Constitution	https://www.boe.es/diario_boe/txt.php?id=BOE-A-1978-31229
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Real Decreto 658/2001, de 22 de junio, por el que se aprueba el Estatuto General de la Abogacía Española.	Federal Lawyers' Regulation	https://www.boe.es/buscar/act.php?id=BOE-A-2001-13270
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