

## **Spain: National Report on The Protection of Fundamental Human Rights in Criminal Proces**

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### 1. INTRODUCTION

From the point of view of fundamental rights, criminal process is one of the most sensitive legal issues. The usual reticence of the defendant to collaborate in the inquiry makes it necessary for the State to provide means to prove the offence. These may include, sometimes, the use of force and even limitation of the human rights of the defendant (always under the supervision of the judge) in order to guarantee criminal prosecution.

Spanish law is mainly ruled by statutes. Criminal process in Spain is governed by the 1882 Code of Criminal Procedure. The statutes that rule the proceedings of the other fields of law are more recent: 2000 (civil), 1998 (administrative) and 1995 (labour). Since our Constitution was approved in 1978, all proceedings are governed by post constitutional statutes except for criminal process.

The obsolescence of the Code of Criminal Procedure causes many problems in the judicial process. Probably the most outstanding problem is that since the Constitution is quite recent (it was approved in 1978) it is obvious that the Code of Criminal Procedure does not respond to the constitutional demands concerning human rights. This problem is especially serious if we take into account that criminal enquiries may quite often interfere with the fundamental rights of the defendant.

As a consequence, while in other fields of law the statutes that govern the different proceedings are followed literally by the courts, in the criminal order the application of the statute involves serious difficulties. So it is quite often amended by the courts in order to adequate it to the constitutional guarantees.

The Code of Criminal Procedure has been subjected to several modifications, most of them to adapt some of its sections to the Constitutional requirements, but even though it is obvious that a new Code of Criminal Procedure is needed, and lawyers continuously push

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for it, a new statute is not foreseeable in the near future, since there is, as yet, not even a draft.

## 2. THE NATURE AND REGULATION OF SPANISH CRIMINAL PROCESS.

Spain is party to the most important international treaties dealing with human rights and criminal process. Undoubtedly, the most important is the Universal Declaration of Human Rights. The European Convention of Human Rights (signed 26 September 1979) also plays a decisive role in the development of rights and freedom. More than 180 cases from the Constitutional Court invoke this Convention because of the function of the European Court of Human Rights as main interpreter of the Convention. The International Covenant on Civil and Political Rights (April 27 signed 1977) had also a wide influence in the decisions of the Constitutional Court; the Court cited it in more than one hundred judgments.

As far as international human rights treaties are concerned, we must take into account that Article 10 of the Spanish Constitution establishes that the fundamental rights in the Constitution must be construed according to the Universal Declaration of Human Rights and the international treaties in which Spain is a contracting party.

### A. The Bill of Rights of the Spanish Constitution and Criminal Process.

The Spanish Constitution (Articles 14 to 37) establishes the citizen's rights and duties; Articles 15 to 29 contain a bill of rights. Within these rights the Constitution pays a great deal of attention to procedural human rights. If we also consider the possibility of citizens to appeal before the Constitutional Court whenever there is an infringement of a Constitutional rule by a court, it is obvious that a great deal of case-law emanates from the Constitutional Court<sup>113</sup>.

Article 24 of the Spanish Constitution is devoted only to procedural fundamental rights and the most relevant may be found in this Article: the right to the effective protection of the judges and courts, the right to an ordinary judge predetermined by law, the right to defence and assistance of an attorney, the presumption of innocence, etcetera.

Apart from Article 24, other rights dealing with the criminal process are included in other Articles of the Bill of Rights of the Constitution. For example, Article 15 (right to life)

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<sup>113</sup> A. De la Oliva Santos, *Derecho Procesal Penal*, Madrid, Ed. Universitaria Ramón Areces, 2007, p. 83.

includes the prohibition of the death penalty, torture or degrading punishment or treatment; in Article 17 (personal liberty) the duration of preventive detention as well as *habeas corpus* proceedings, and so on, are regulated.

The legislator does not usually specify whether a procedural fundamental right applies to all fields of law (civil, criminal, administrative or labour) or only to some of them. An interpretation by courts and doctrine is necessary in order to establish if a fundamental right is applicable to all proceedings or not. For example, the right to refrain from self-incrimination concerns criminal processes and has a close relation with the presumption of innocence;<sup>114</sup> but the right to an ordinary judge may be invoked before any court.<sup>115</sup>

Spanish legislation distinguishes between derogable and non-derogable fundamental rights. Derogable fundamental rights are those that a party can voluntarily reject. For example, arbitration implies renouncing the right to a trial; the right to silence is also derogable. However the distinction is usually made by case-law and literature, not by statute.

#### B. The regulation of the criminal process by the Code of Criminal Procedure

As I have already mentioned,<sup>116</sup> one of the main problems of the regulation of Spanish Criminal Process is the obsolescence of the statute that regulates it. As a consequence, some sections of the Code of Criminal Procedure are never applied, for example, those concerning the identification of a corpse. In other cases, the lack of proper regulation in the Code of Criminal Procedure has been substituted by the case-law of the criminal courts. For example, entering a private domicile for an investigation, or the practice of a breathalyzer test and its use when there is no consent by the subject.

Although the main statute in criminal process is the Code of Criminal Procedure, there are other statutes that also regulate matters dealing with criminal proceedings. Two of the most important are the statute that regulates the Jury (from 1995), a consequence of the constitutional provision of Article 125 that requires regulation of citizen participation in the administration of justice, and the statute that regulates the criminal liability of minors, approved in 2000.

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<sup>114</sup> As stated, among others, in Sentences of the Constitutional Court 197/1995, December 21<sup>st</sup> and 103/1985, October 4<sup>th</sup>.

<sup>115</sup> Sentences of the Constitutional Court 74/2004, April 22<sup>nd</sup>, 206/2003 December 1<sup>st</sup>, 37/2003 February 25<sup>th</sup>, 231/2002 December 9<sup>th</sup> and 74/2002 April 22<sup>nd</sup>.

<sup>116</sup> *Supra sub 1.*

### C. Nature of criminal procedure

While in other fields of law, court procedure has a secondary role, as it only comes into play when the citizens do not reach an agreement to solve their disputes, criminal procedure is necessary when there is a criminal offence. The resolution of the conflict is entrusted only to the courts, as is expressed in the aphorism *nulla poena sine iudicio*.<sup>117</sup>

Criminal process has two stages: pre-trial examination and a hearing or trial; each of these stages is entrusted to a different court. This said to be a constitutional requirement, since Spanish case-law considers it a consequence of the right to an impartial court: the examining judge's relation to the object of proceedings is considered an obstacle to the achievement of this right, so held the Constitutional Court (145/1988, July 12th).<sup>118</sup> The procedure can be conducted before one court only in the case of petty offences.

The pre-trial examination in criminal proceedings has three purposes: investigating the facts and the suspects of the crime; guaranteeing the presence of the suspect in the hearing (if necessary with pre-trial custody); and gathering evidence for the hearing. The evidence in the hearing usually comes from the investigation held during the pre-trial examination, although it must be reproduced at trial.

The two different stages of the criminal process are informed by different principles: the pre-trial examination of the criminal proceedings is inquisitorial; but the trial is adversarial. Both phases, pre-trial examination and trial, are official in nature. One of its main consequences is the limitation of availability of the object of the process.<sup>119</sup>

In some cases, the Statute regulates the possibility of obtaining a sentence in which the accused agrees with the conviction the prosecution seeks, and two different possibilities are foreseen in the Code of Criminal Procedure. Both are regulated in the case of abbreviated criminal process, that is, the criminal process that the Code of Criminal Procedure applies to the less severe criminal offences.

The first is the possibility that the defendant agrees with the facts that result from the enquiry held during the pre-trial examination; agreement must also be obtained from the prosecutor and the lawyer of the defendant. In this case, the hearing is quicker, since the deadlines are shorter than usual (sections 779.5 and 800 and following of Code of Criminal

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<sup>117</sup> F. Cordón Moreno, *Las garantías constitucionales del proceso penal*, Navarra, Ed. Aranzadi, 2002, p. 18.

<sup>118</sup> The decisions in this sense of the Constitutional Court are numerous; see also Sentences of the Constitutional Court 45/2006, February 13<sup>rd</sup>, 14/2001 January 29<sup>th</sup> and 55/1990 March 28<sup>th</sup>; and Sentences of the Supreme Court of and 21<sup>st</sup> July 2000, 21<sup>st</sup> December 1999 and 11<sup>th</sup> November 1992.

<sup>119</sup> A. De la Oliva Santos, *Derecho Procesal Penal*, *op cit*, p. 35.

Procedure). The second is the possibility that the offender accepts a sanction requested by the Prosecution within certain limits: the crime must not be punishable by more than 6 years of imprisonment, the person accused must agree to appear before the court, and the judge must approve the settlement (section 655 Code of Criminal Procedure). In this case the sentence may be delivered by the court at the very beginning of the hearing, and is usually the result of “negotiations” between the prosecutor and the defendant’s lawyer.

### 3. ACTORS IN CRIMINAL PROCESS

#### A. Judiciary.

Judges in Spain are civil servants; there are three categories in the judicial career: judge, magistrate and magistrate of the Supreme Court. Entrance into the judiciary is based on the principles of merit and ability (section 301 Organic Law of the Judiciary). There is no single way of entering the judicial career, as the Spanish legislation foresees a plurality of entrance systems. However, the normal way of entering is to pass a free competitive examination and a subsequent course in the Judiciary School.

Under Organic Law 9/2000 of 22 December 2000, on urgent measures to speed up the Administration of Justice, which modified the Organic Law of the Judiciary approved in 1985, entrance by means of a competitive examination into the judicial career coincides with entrance to a career in the public prosecution service, so the tests, as well as the tribunals that judge them, are common for both careers. After passing the examination, each candidate may choose, before the deadline established by the judging committee and depending on the marks they have obtained, to either enter the Judicial School (in the event that they opt for the judiciary) or the Centre for Legal Studies of the Administration of Justice (if they have chosen the public prosecution service -section 301 Organic Law of the Judiciary-).

Professional judges serve the main criminal courts. There are two exceptions: the jury and a court called *juzgado de paz* (justice of the peace court). The jury was regulated in Spain in 1995. It is comprised of nine citizens sitting with a judge (in the category of Spanish magistrate). The jury delivers a verdict whenever a crime under section 1 of the Organic Law of the Jury (murder, arson, assault, etcetera) has been committed. The verdict of the

jury is limited to the facts and the judge must deliver a sentence according to the facts that have been fixed in the verdict. The second exception is the court called *juzgado de paz* that is served by a layperson. These courts are located in small towns and have civil and criminal competence. The competence of a *juzgado de paz* in criminal jurisdiction is over some petty offences only.

The judge in criminal procedure has wider powers than in other fields of law: he can practice proofs *ex officio* and he can also introduce new facts. The examining judge must investigate facts and the alleged suspicious. He must also monitor the police investigation of the crime, and the police need a judicial warrant for any action that may infringe a fundamental right. Once the pre-trial examination is up, the examining judge, before hearing the parties and the prosecutor, has to decide either to file the case (implying the end of the criminal process) or begin the hearing. Both decisions can be appealed before the court in charge of the hearing.

Judges are subject to civil, criminal and disciplinary liability as established in sections 405 and following of the Organic Law of the Judiciary. Criminal and civil liabilities are decided in common criminal and civil procedure, and disciplinary liability by the General Council of the Judiciary; since it is an administrative sanction it is compatible with criminal and civil liability.

The State has liability too for the actions of the Administration of Justice (section 292 Organic Law of the Judiciary); this allows the citizen to claim for damages and to sue before the courts of the judicial order in which the illegal action was committed. Nevertheless, the proceeding is the same since it follows the regulation of the revision of the civil sentence established in sections 509 and following of Code of Civil Procedure. The responsibility of the State is added to the judge's personal responsibility, so the citizen may claim either from one or from both.

a. The right to bring one's case before an independent and impartial court.

The right to an independent and impartial court is similar for the four jurisdictional orders, therefore it is regulated in the Spanish Constitution and in the Organic Law of the Judiciary. The legal system establishes a series of mechanisms, the aim of which is to guarantee that the judiciary can exercise its judicial function, subject only to the "rule of Law" (Article

117.1 Spanish Constitution). The right to an independent and impartial court is considered one of the most important rights related to the judicial function.<sup>120</sup>

Some of the safeguards of independence are included in the Constitution, such as the prerogative of the Organic Law to regulate the statute of judges and Spanish magistrates (Article 122.1 Spanish Constitution) or the current existence of a self-governing body for the Spanish Magistracy: the General Counsel of the Judiciary (Article 122 Spanish Constitution).

However, the majority of the legal provisions aimed at safeguarding judges' independence are found in sections 378 and following within the Organic Law of the Judiciary: non removability (sections 378 and following), incompatibilities and prohibitions (sections 389 and following), judicial immunity (sections 398 and following), professional association system (sections 401 and following) and economic independence (sections 402 and following). To this could be added recusal and challenge, which are also regulated in the Organic Law of the Judiciary (sections 217 and following). Finally, and although it is not the subject of systematic treatment in law as are the aforementioned safeguards, the legal rules that refer to the independence of judges with respect to their own governing body and other judicial bodies should not be forgotten.

The grounds for recusal and challenge are mentioned in section 219 Organic Law of the Judiciary, which contains a list of up to 16 sub-sections that describe the circumstances in which the judge's abstention is required. Within these grounds we find some that refer to the judge's family relationship with the parties, with their representatives or with the judge that heard the matter in a previous procedural phase and whose decision must be reviewed (sections 219. 1, 2 and 15); other grounds refer to the pending situation of a lawsuit or the existence of disciplinary measures in which the judge and the parties are involved as interested parties (section 219. 4, 5, 7, 8); and finally, there are those grounds whereby the judge's previous profession or his knowledge of previous procedural phases may mean that he has a previous relationship with the subject or litigious object (section 219. 3, 6, 11, 12, 13, 14 and 16). Obviously, the Law also includes friendship with or hostility towards any of the parties (section 219.9 Organic Law of the Judiciary) or interest in the lawsuit (section 219.10 Organic Law of the Judiciary) in the list of grounds for abstention.

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<sup>120</sup> Sentence of the Constitutional Court 60/1995, March 16<sup>th</sup>.

## b. Special courts in criminal jurisdiction

There are some special courts in Spain. Some of them are the courts that judge the crimes established in section 65 of the Organic Law of the Judiciary. These are indictable offences: certain assassinations, drug-dealing when the deal takes place throughout all the country, etcetera; but the most important crimes in section 65 concern terrorism. Crimes under section 65 of the Organic Law of the Judiciary are investigated by the Central Instruction Judges; the Central Criminal Judge or the *Audiencia Nacional* is in charge of the hearing (depending on the seriousness of the crime), and even the Central Penitentiary Court is in charge of the surveillance of the convicted. All of these courts are in Madrid and have jurisdiction in the whole country. Although the courts that judge crimes under section 65 of the Organic Law of the Judiciary are special, the proceedings followed by these courts are common criminal proceedings.

Other special courts are the Juvenile Courts, one in each province (one of the administrative divisions within the Autonomous Community), and they judge the crimes committed by minors (from the age of 14 to 18). In this case, not only the courts but also the proceedings are special. Minors cannot be imprisoned but when they commit a crime they can be subject to certain administrative measures. For the minors who commit the crime of terrorism there is a Juvenile Central Court in Madrid.

The latest special court has been created under the aegis of the Organic Law of Measures to Protect Women against Gender Violence (Organic Law 1/2004): the Court of Violence against Women, with civil and criminal competence. These courts can intervene only when the victim is a woman and the offender is a man; although the proceedings are the general proceedings regulated in the Code of Criminal Procedure. The scope of these courts is to coordinate the protection of women who are victims of gender violence.<sup>121</sup> The Constitutional Court has proclaimed several times in the respect of these courts the fundamental right to a judge predetermined by law; since the content of this right requires

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<sup>121</sup> The Organic Law of Measures to Protect Women against Gender Violence also established a very quick proceeding to adopt measures to protect the victim against the offender in gender crimes. This Organic Law was suppose to protect women against crimes committed in a domestic environment; however, although in 2005 (the first year of application of the new legislation) gender criminality decreased, in 2006 and 2007 it raised again and now is higher than it was before the new legislation.

the pre-existence of the court, as well as its composition and the definition of its competences, it is necessary in order to judge the crime.<sup>122</sup>

## B. Prosecution

In Spain there is a Public Prosecution Service called *Ministerio Fiscal*. The Public Prosecution depends on the Executive, and the person in charge of the Public Prosecution is the General Public Prosecutor (*Fiscal General del Estado*) who is appointed by the Government. The entrance, training and requirements are the same as for the judiciary.<sup>123</sup>

The organisation of the Public Prosecution Service is hierarchical and the General Public Prosecutor can give general instructions to all the public prosecutors. If a prosecutor considers that one of the instructions given may be illegal, he can complain to his superior (section 28 Organic Statute of the Public Prosecution). Even in that case, he can be obliged to follow the instructions, but the complaint will avoid liability. Public prosecutors are subjected to legality, so their decisions about prosecution must be taken on the basis of the legality principle and the defence of public interests.

The role of the Public Prosecution Service in criminal process mainly concerns two important tasks; first of all, the public prosecutor acts as a party in the criminal process. The public prosecutor usually acts to uphold the accusation or prosecution in the criminal process but if the public prosecutor considers that the suspect is not guilty, as a consequence of the legality principle he can claim an acquittal (or that the case be filed, if the hearing has not begun). Consequently, the public prosecutor the criminal process acts as a party, usually with the victim, and holding similar interests (although those of the victim are private and the interest of the Public Prosecution is public); but even if the victim decides not to act as a party in the criminal process, the prosecution must continue as a party.

The second task of the Public Prosecution is to survey the pre-trial examination held by the examining judge.<sup>124</sup> The role of the public prosecutor during pre-trial examination is that of monitor, but he cannot initiate an investigation. The investigation of the crime during pre-trial examination is undertaken by the police under the orders of the examining judge. Since

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<sup>122</sup> See Sentence of the Constitutional Court 199/1987 December 16<sup>th</sup>, the sentence quotes the Article 14 of the International Covenant on Civil and Political Rights and Article 6.1 of the European Convention on Human Rights to reinforce its arguments. In the same sense, see also Sentence of the Constitutional Court 47/1983, May 1<sup>st</sup>.

<sup>123</sup> See *supra* 3.A.

<sup>124</sup> A. De la Oliva Santos, *Derecho Procesal Penal*, *op cit*, p. 149.

public prosecutors have no pre-trial examination functions, they are not supposed to give orders to the police. Nevertheless, recent legal reforms are changing the functions of the public prosecution in this sense. In the year 2000, the statute that regulated the criminal liability of minors assigned the public prosecutor a new function of pre-trial examination. This innovative measure was not welcomed in the legal literature.<sup>125</sup>

Public prosecutors are submitted to civil, criminal and disciplinary liability (section 60 Organic Statute of the Public Prosecution); civil and criminal liability are ruled by the same statute as judges' liability (Organic Law of the Judiciary), but disciplinary liability is regulated in sections 61 and following of the Organic Statute of the Public Prosecution.

### C. Defence

Defence lawyers in criminal process need the same qualification as any other lawyer: they need a law degree and to belong to the lawyer's association. No requirement is needed to exercise the right of audience in courts, but lawyer's associations require, before registration, a training course held either at the association or at a School of Law. A training period with an experienced lawyer is not legally required but is a common practice among lawyers.

Although every lawyer is allowed to defend their client in any field of law; lawyers are actually specialized in one legal branch: civil law, criminal law, labour law etcetera. In criminal cases all suspects have a right to legal advice and defence, and the Constitution recognizes this as a fundamental right (Article 24.2)<sup>126</sup>. The main problem, as far as the right to defence is concerned, is the moment at which the assistance of a lawyer is compulsory to meet the requirements of this fundamental right.

Of course, free legal advice is one of the rights of the person under detention (section 520 Code of Criminal Procedure); but apart from detention, the rule established in section 118 of Code of Criminal Procedure to settle the moment at which legal counsel becomes imperative is highly indeterminate: it is compulsory to appoint a lawyer as soon as "it is necessary" for the defendant. Nowadays it is widely accepted that any inquiry by the judge

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<sup>125</sup> Eight years after this first regulation of the possibility to entrust investigative functions to the Public Prosecutor, a hard argument between defenders and detractors of this possibility is now taking place. The Instruction 1/2008, 7<sup>th</sup> March, given by the General Public Prosecutor, allows the Public Prosecutor to give orders to the police during a criminal process; judges consider this permission an intolerable invasion of their functions in the pre-trial examination of a crime, forbidden by the Code of Criminal Procedure. See. J. Damián Moreno, *¿Qué queremos cuando pedimos que instruya el Ministerio Fiscal?*, in *La Ley*, nº 7032, 13<sup>rd</sup> October 2008, p. 2.

<sup>126</sup> This right is considered a non-renounceable right except in case of detention for traffic criminal offences, in this case, the defendant may renounce to the right to appoint a lawyer (section 520.5 Code of Criminal Procedure).

into the alleged suspicious requires the “necessary” appointment of a lawyer.<sup>127</sup> The lawyer will be freely appointed by the defendant, but if he does not want to appoint one, the lawyer’s association will be required by the judge to assign a defence lawyer.<sup>128</sup> This lawyer is called lawyer *ex officio*. Taking part in the list of lawyers *ex officio* is a free decision for all the lawyers who belong to the lawyer’s association. Inclusion (or not) in the list has no professional or economic consequences, and it is the defendant’s duty to pay the assigned lawyer in such way.

The lawyer has a duty of confidentiality with regard to any circumstance revealed by his client. There is no restriction regarding the interviews between client and lawyer. In terrorism crimes, as an exception, if the judge decides on isolation, the lawyer cannot be appointed by the suspect terrorist but by the Bar.<sup>129</sup>

There is a system of legal aid for indigent defendants. For a person to be accepted as indigent, they must be examined by a commission formed by representatives of the Ministry of Justice, the Bar, and the Judiciary. Statute 1/1996 establishes the minimum incomes in order to benefit from free assistance in any procedure, which are fixed at double the minimum wage that is officially established each year.

The lawyer is supposed to be a partisan representative of the client, and he is supposed to present evidence in the client’s case.

#### 4. THE PROTECTION OF HUMAN RIGHTS IN CRIMINAL PROCEEDINGS

##### A. The Right to a Public Trial without Delay

In general, the right to a public hearing is regulated in Article 24.2 of the Spanish Constitution and in the Organic Law of the Judiciary (sections 232 and following). This regulation is common in all fields of law. According to these rules, all procedures are public, that is to say, parties that have no relation at all with the process can freely attend the oral sessions.

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<sup>127</sup> See J. A. Del Olmo del Olmo, *Garantías y tratamiento del imputado en el proceso penal*, Madrid, Ed. Trivium, 1999, p. 166.

<sup>128</sup> To fulfil the right to the defence it is necessary not only to appoint a lawyer to defend the party but also to inform the defendant of this appointment in a comprehensible way. See Sentence of the Constitutional Court 53/1990, March 26<sup>th</sup>.

<sup>129</sup> Since the prohibition to appoint freely a lawyer is a limit to the right to defence, it must only be used in cases of terrorism, given that these are the only cases in which the Code of Criminal Procedure foresees it; but in these cases it is not considered a violation of the right to defence since it is not a disproportionate limitation. See Sentence of the Constitutional Court 7/2004, February 9<sup>th</sup>.

However, the right to a public process is not an absolute fundamental right;<sup>130</sup> so, closed doors can be declared on several grounds: to protect fundamental rights or rights of minors, and whenever the judge may consider it convenient. Although the parties may ask the judge to hold oral sessions behind closed doors, it is the judge who takes the final decision (which may also be *ex officio*). Closing the doors only implies that third parties cannot attend the sessions. Parties must have knowledge of all the acts in the proceedings, since the right to defence and counter action depend on knowing the evidence and claims to the contrary.

This general rule about publicity of Article 24 of the Spanish Constitution and sections 238 and following of the Organic Law of the Judiciary has an exception in the pre-trial examination phase in criminal process. Pre-trial examination in criminal process is secret, but the secret of the pre-trial examination has a different meaning than usual, since it also includes the suspect. This therefore implies that in the pre-trial examination the suspected will not be informed of the activity of the judge in the gathering of evidence. The aim of this measure is to avoid the suspect's unduly hampering the investigation.

Secrecy during the pre-trial examination is considered compatible with the fundamental right to a public trial since the lack of publicity towards the suspect is temporary; it is regulated in section 302 of the Code of Criminal Procedure, which establishes a maximum duration of one month. Ten days before the end, the secrecy of the pre-trial examination must be raised in order to allow the defendant to have enough time to prepare his defence in the hearing (section 302.2 of Code of Criminal Procedure).<sup>131</sup> Once the pre-trial examination is finished, the trial is public and adversarial.

The right to an effective protection of the courts includes the right to a trial without delay. The right to a trial without delay is an indeterminate concept that has been defined by case-law. Spanish Law states that the duration of the trial to achieve the requirements of the Constitution must be proportionate with the difficulty of the case, the attitude of the parties, etcetera.<sup>132</sup>

## B. Rights to Life and to be Protected against Cruel and Humiliating Treatment

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<sup>130</sup> See F. Cerdón Moreno, *Las garantías...*, *op cit*, pp. 184 and following.

<sup>131</sup> The Constitutional Court states that when temporary limits established in section 302.2 of Code of Criminal Procedure are not respected by the court, this implies a violation of the right to defence. See Sentences of the Constitutional Court 100/2002, May 6<sup>th</sup>; 174/2001, July 26<sup>th</sup> and 176/1988, October 4<sup>th</sup>.

<sup>132</sup> Sentences of the Constitutional Court 4/2007, January 15<sup>th</sup>, 220/2004, November 29<sup>th</sup> and 7/2002 January 14<sup>th</sup>. See also the interesting analysis of Pedraz Peña about the different factors that may cause the delay of a process and which of them may be justifiable: *El proceso y sus alternativas*, Arbitraje, mediación, conciliación, Cuadernos de Derecho Judicial, 1995, pp. 26 and following.

The right to life and the right to be protected against cruel and humiliating treatment are among the most essential rights of human beings.<sup>133</sup>

The death penalty is forbidden in Article 15 of the Spanish Constitution. This Article contains an exception where it refers to the decisions by military criminal law in case of war. However, a reform of the Military Criminal Code in 1995 abolished all reference to the death penalty in the event of war; so now the prohibition of the death penalty has no exception.<sup>134</sup>

The right to be protected against torture and cruel and humiliating treatment is also established in Article 15 of the Spanish Constitution. The numerous applications of this Article, and respect of this right in the different investigative measures that can be adopted during a criminal process, have been considered by case-law. For example, the obtaining of a sample (of hair or blood) in order to carry out medical tests is not considered humiliating treatment.<sup>135</sup>

Moreover, the regulation of the interrogation of suspects is established in sections 385 and following of the Code of Criminal Procedure, and contains some measures to avoid torture or cruel and humiliating treatment. The examining judge is in charge of interrogation. The Code of Criminal Procedure does not regulate a maximum duration for the interrogations, but establishes (section 393) that they may be exhausting for the suspect, and the time they last must always be recorded.<sup>136</sup> The case-law considers the use of narcotics during interrogation as a cruel and humiliating treatment and therefore forbidden (Sentence of the Supreme Court 22nd May 1982). Any physical measures such as frisking or body search do not contravene the right to be protected against cruel and humiliating treatment if certain conditions are met.<sup>137</sup>

### C. Deprivation of Liberty

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<sup>133</sup> Sentences of the Constitutional Court 137/1990, July 19<sup>th</sup>, 89/1987 June 3<sup>rd</sup> and 65/1986, May 22<sup>nd</sup>. The resolution of the Constitutional Court about the right to life frequently uses arguments from the case-law of the European Court of Human Rights.

<sup>134</sup> We can find some sections in the Code of Criminal Procedure establishing rules about when the death penalty may be imposed (for example, sections 145 or 947 and following); however, these rules are a consequence of the age of the regulation of the criminal process and they must be considered tacitly abrogated.

<sup>135</sup> Sentences of the Constitutional Court 196/2006, July 3<sup>rd</sup> and 207/1996 December 16<sup>th</sup>.

<sup>136</sup> The Code of Criminal Procedure establishes that the interrogation minutes must include the total duration of the interrogation; but the Sentence of the Supreme Court 25<sup>th</sup> May 1990 does not consider the omission of this information a violation of the right to be protected against cruel humiliating treatment if the lawyer attend the interrogation; the attendance of the lawyer is considered a real guarantee, much more important than the formal requisite of including the duration of the interrogation in the minutes.

<sup>137</sup> See *infra* sub 4.F.

During the criminal process some security measures may be adopted in order to ensure the presence of the defendant during the process and during the execution of sentence. These measures may imply a deprivation of liberty of the defendant.<sup>138</sup>

As far as detention is concerned, its duration is established in Article 17 of the Spanish Constitution. According to this rule the duration of the detention must be that which is strictly necessary to fulfil the judicial or police enquiries. In any event, the maximum period of detention is established as seventy-two hours in Article 17 of the Constitution. The delay of seventy-two hours is the maximum time under police surveillance, after which the detainee must be under the jurisdiction of a judge. The judge has another seventy-two hours to take a decision about the liberty or custody of the person under detention. According to this double limit of Article 17 of the Spanish Constitution, a detention can be illegal if the objective limit (seventy-two hours under the police surveillance and seventy-two hours under the jurisdiction of the criminal court) or the relative limit (more than it is strictly necessary) is exceeded.<sup>139</sup> Detention is legal only on the grounds of sections 490 and 491 of the Code of Criminal Procedure: an offender who intends to commit an offence, a convicted person escaped from prison, a person under a search order, etcetera.

The offender may be detained by the police, but also by a private citizen in some cases: if the offender intends to commit an offence or if the crime is being committed (in flagrant crimes).

The rights of the detainee are established in Article 17 of the Constitution and more widely in section 520 of the Code of Criminal Procedure. The detainee has the right to be informed of the cause of the detention,<sup>140</sup> of the right to remain silent, the right to the assistance of a lawyer, to have a person (the consulate if he is a foreigner) informed of the detention and the place where he is, to an interpreter and to medical examination.

Article 520 bis Code of Criminal Procedure, establishes a special regime for detention in case of terrorism. Detention for terrorist crimes can be extended for a further 48 hours, and the detainee can be isolated. The isolation (as lack of communication) does not exclude the

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<sup>138</sup> These measures must correspond to a criterion of "reasonability" so that they can serve their purpose according to the circumstances (Sentence of the Constitutional Court 108/1984 November 26<sup>th</sup>).

<sup>139</sup> The Sentence of the Constitutional Court 224/2002 November 25<sup>th</sup> considers that the detention of the defendant, even if it lasted less than 24 hours, may be considered illegal, since the police enquiries were already fulfilled before that time and the detention was not ended.

<sup>140</sup> This right is different from the right to know all the charges, established in Article 24 of Spanish Constitution; the right to know all the charges concerns the charges stated by the prosecution when the oral trial starts, when the arrest is ordered no charges have been formally presented yet before the court. F. Cerdón Moreno, *Las garantías...*, *op cit*, p. 160. See *infra* 4.E.1.

right of defence but the right to freely appoint an advocate. Both decisions must be taken through a judicial decision that must give reasons for their justification.<sup>141</sup>

The police have the power of “retention”, different from the detention. Retention is permitted only when it is necessary for the protection of citizen security and implies that a person can be obliged to go to the police office if he cannot be identified by means of an identity card or any other means. Retention is not regulated in the Code of Criminal Procedure, since it is not necessarily in relation to the commission of a crime, but in the Organic Law 1/1992 of Protection of Citizens Security, approved 21st February. This regulation was quite controversial since it does not limit the duration of retention, but only establishes that it must be strictly no longer than is necessary for identification.

Pre-trial custody can only be adopted at the request of the public prosecutor or the defence lawyer during criminal proceedings. The legal duration of pre-trial custody is proportional to the imprisonment that will be imposed on the offender if he is eventually proved guilty. The judicial decision about pre-trial custody or its duration may be appealed. The measure of pre-trial custody can be adopted whether there are valid reasons to consider that the accused has committed the crime, which must be punishable by a term of imprisonment of more than three years. If the offender is eventually proved not guilty, he can claim for damages.

#### D. The Presumption of Innocence

The presumption of innocence is applicable in all legal fields where a sanction can be imposed, and as a consequence, it includes the criminal process.<sup>142</sup> The presumption of innocence is established as a fundamental right in Article 24.2 of the Spanish Constitution. The presumption of innocence must be respected in the wording of statutes and in its construction, but this right concerns mainly criminal process in which it is considered, at the same time, a rule that must be applicable to the treatment of the defendant.<sup>143</sup> The right to the presumption of innocence belongs to the defendant in any case, no matter how horrendous the crime.<sup>144</sup>

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<sup>141</sup> See *supra* sub 3.C.

<sup>142</sup> F. Cordon Moreno, *Las garantías...*, *op. cit.*, p. 173.

<sup>143</sup> Sentence of the Constitutional Court 107/1997, June 2<sup>nd</sup>.

<sup>144</sup> A. De Vega Ruiz., *Proceso penal y derechos fundamentales desde la perspectiva jurisprudencial*, Madrid, Ed. Colex, 1994, p. 46.

The main consequences of the presumption of innocence concern the evidence.<sup>145</sup> The presumption of innocence means that the conviction must be based on proof and mere suspicion or doubt must lead to an acquittal, as stated in the principle *in dubio pro reo*.<sup>146</sup> But not just any kind of proof is sufficient to satisfy the presumption of innocence, since the proof for the purpose criminal process must be legal and respectful to human rights in order to be taken into account in the criminal sentence. Finally, this right also means that the burden of proof belongs to the prosecution and never to the defendant.

## E. Defence rights

### a. The right to know the charges

The right of the defendant to know the charges against him is established in Article 24 of the Spanish Constitution; the right to know all the charges is closely related to the prohibition of the lack of defence, since it is impossible for the defendant to prepare his own defence without knowing exactly what the charges are.

This right has a different consideration in the two phases of the criminal process. The pre-trial examination of the criminal process is secret, so the investigation of the crime is done at this moment without informing the defendant.<sup>147</sup> When the trial is about to begin, the secrecy must come to an end and the trial starts when the prosecution sets an accusation in writing. Only at this moment does the right to know the charges become effective, since it is now that the charges are formally presented before the court.

There are two references in the Spanish Constitution about the information that must be given to the defendant. Following the order of the Articles of the Constitution, the first one is the right of the detainee to know the cause of his detention, stated in Article 17148. Secondly, Article 24 establishes the right to know the charges when the trial begins. These two rights are considered fundamental rights.

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<sup>145</sup> The case-law about the right to the presumption of innocence and its consequences as far as proof in criminal process is concerned, is very abundant. See as an example, Sentences of the Constitutional Court 56/2003, March 4<sup>th</sup>; 219/2002, November 25<sup>th</sup>; 222/2001, November 5<sup>th</sup>; 41/1998, February 24<sup>th</sup>; and 145/1987, September 23<sup>rd</sup>. Also Sentences of the Supreme court 29<sup>th</sup> April 1999, 22<sup>nd</sup> December 1998, 24<sup>th</sup> May 1996 and 27<sup>th</sup> October 1987.

<sup>146</sup> Case law in Spain uses the term: "minimum proof activity", to refer to the exigency of sufficient proof to satisfy the presumption of innocence. See. Sentence of the Constitutional Court 30/2005, February 14<sup>th</sup>. In any case the right to the presumption of innocence and the principle *in dubio pro reo* differ in that the first deals with the absolute lack of proof, while the latter applies when the proof still permits some doubt in the judge's mind; it must also be noted that the presumption of innocence is a fundamental right, while the principle *in dubio pro reo* is a non codified rule that must be taken into account by the judge weighing up the evidence. See J.A. Tomé García, *Derecho Procesal Penal*, *op cit*, p. 490 and J.A. De Vega Ruiz, *Proceso penal...*, *op cit*, p. 47.

<sup>147</sup> *Supra sub 4.A.*

<sup>148</sup> *Supra sub 4.C.*

In the Code of Criminal Procedure there is a broader reference to the right of the defendant to know any procedural act against him, even if there is no detention or the charges have not been formally stated (section 118 of the Code of Criminal Procedure). But only the information on the cause of the detention and the charges of the prosecution at the beginning of the trial are considered fundamental rights. Any other information about the procedure must be given to the defendant, but if it is not given, it is not considered an infringement of the Code of Criminal Procedure.<sup>149</sup>

The charges must be stated in a comprehensible way, which includes the right to an interpreter. Although this right is not expressly recognised in the Spanish Constitution as a fundamental right, it must be considered part of the right to defence. Therefore the Code of Criminal Procedure establishes some rules (sections 440 and following) in case the defendant or the witness does not speak and understand Spanish.<sup>150</sup> These rules are followed either if the defendant is a foreigner, or if he is Spanish but speaks one of the official languages in Spain apart from Spanish (or if he does not want to speak it, as everyone has the right to speak any of the official languages in Spain in court). The interpreter must be appointed by the State.

The regulation of interpretation and translation is contained in the Code of Criminal Procedure but it is completely outdated; the profession of official interpreter acting in the courts is regulated in an Instruction of year the 2002 (Orden Ministerial 1971/2002, July 12th). This Instruction establishes an interpreter must have a bachelor's degree and take an official examination. The same rules apply if the defendant or the witnesses are deaf-mute. The charge against the offender can be amended only within certain limits; the judge may suggest a new charge but this is at the prosecutions discretion, that is, the judge cannot change the charges *ex officio*.

b. Participation of the defendant in the gathering of evidence: right to know and contest the evidence and right to silence.

The evidence that the prosecution and the defence want to introduce into the procedure must be mentioned in their written statements at the beginning of the trial. Both parties can make use of the same means of proof: witnesses, experts, documents, etcetera and cross-

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<sup>149</sup> F. Cerdón Moreno, *Las garantías...*, *op cit*, p. 160.

<sup>150</sup> Sentence of the Constitutional Court 74/1987, May 25<sup>th</sup>.

examination is possible. The judge has wide powers as far as the evidence is concerned, since he may order that the new evidence be tendered even though the parties have not proposed it.

Although witnesses and experts in any criminal cause can ask for protection, it is the judge who decides whether the protection measures are applicable. The protection of witnesses and experts is regulated by statute (Organic Law 1/1994, December 23rd). Among the measures regulated in Organic Law 1/1994 are the exclusion of the details of witnesses or experts in the court records, and their examination in a way that avoids their identification. The judge is free to adopt any other measure that may seem convenient.

During the trial, the process is adversarial, so the defendant has the right to know the evidence in order to contest it. As a consequence, the presence of the defendant at trial is compulsory; the pre-trial examination (since it is not contradictory) can be done without the defendant, but, once the pre-trial examination is finished, if the defendant is not before the court, the trial must be suspended (section 841 Code of Criminal Procedure). Another important consequence of the right to contest the evidence is the prohibition of using the result of the investigation gathered during the pre-trial examination as evidence, since during the pre-trial examination the trial is inquisitorial and secret, so the defendant cannot exercise the right to defence. The result of the investigation in the pre-trial examination must be reproduced before the defendant at trial in order to allow its contestation.<sup>151</sup>

The suspect has the right to silence from the moment of his detention. He must be cautioned as to his right; if this caution is not given, all the questioning will be considered null. Of course, the defendant can renounce this right. The only negative consequences of the defence's silence may be in civil action, which can be enjoined to in the criminal process. The defendant has also the right to the last word, this is regulated in section 739 of the Code of Criminal Procedure that establishes that the last intervention before the court belongs always to the defendant. Case law considers this right as part of the right to defence established in Article 24 of the Spanish Constitution. However, in order to bring the infringement of the right to defence before a court it is necessary to prove that the omission of the use of the last word caused a real infringement of the defendant's rights.<sup>152</sup>

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<sup>151</sup> J.A. De Vega Ruiz, *Proceso penal...*, *op cit*, p. 48. See also Sentences of the Constitutional Court 10/2007, January 15<sup>th</sup>; 25/2003, February 10<sup>th</sup>; 57/2002, March 11<sup>th</sup> and 137/1988, July 7<sup>th</sup>.

<sup>152</sup> Sentences of the Constitutional Court 258/2007 December 18<sup>th</sup>; 93/2005 April 28 and 29/1995 February 6<sup>th</sup>; and Sentences of the Supreme Court 23<sup>rd</sup> October 2007 and 13<sup>rd</sup> July 2004.

#### F. Investigative measures that imply a limitation of fundamental rights

The use of invasive methods of investigation is allowed in criminal cases: telephone tapping, entry and search in the home, etcetera. Some of them may infringe a fundamental right: inviolability of home, secrecy of communications, right to privacy, but even so they may be legal if they meet the legal requirements.

Apart from the requirements that the Code of Criminal Procedure or case-law may establish for each investigative measure, there are two conditions applicable to all the measures that imply a limitation of a fundamental right. The first is that the measure requires judicial authorization by means of a properly reasoned decision; therefore, the police cannot implement any of these measures without judicial authorization, otherwise the results obtained will be considered void. Secondly, the measure cannot be adopted as a means to prevent criminality but only in the investigation of a particular offence, as a proceeding within a judicial investigation, and the person must be individually determined.

Telephone tapping (that includes the surveillance of mail and internet access) and mail surveillance are regulated in the Code of Criminal Procedure; this regulation is a consequence of a modification of the Code of Criminal Procedure in 1988. The regulation of these measures is contained in sections 579 and following and is decidedly incomplete. As far as mail surveillance is concerned, the development of section 579 in sections 584 and following of the Code of Criminal Procedure establishes that the opening of postal mail must be done in the presence of the defendant. Of course, postal mail includes not only letters but any kind of object that can be posted.

It is in the regulation of telephone tapping that the insufficiency of the contents of the Code of Criminal Procedure is more evident. Indeed, the Constitutional Court considers that the regulation is unconstitutional, due to the omissions of section 579. The Sentence of the Constitutional Court 184/2003, October 23rd establishes that there are some essential requirements that should be included in the regulation of telephone tapping if it is to be in accordance with human rights.<sup>153</sup> The most important of these is the duration of the measure, which cannot be undetermined. At present, the regulation establishes a period of

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<sup>153</sup> In spite of the requirements of the Constitutional Court, the legislator has not yet modified section 579 of the Code of Criminal Procedure.

three months, although it can be prolonged and the Code of Criminal Procedure does not establish a limit for the prolongation.<sup>154</sup>

As far as judicial authorization either for mail surveillance or telephone tapping are concerned, there is an exception concerning terrorism; in such cases, the Director of National Security can provide authorization if the intervention is urgently required, but he must communicate the measure to the court within in a maximum time of seventy-two hours, reasoning the need for the measure, and the court will confirm or revoke it (section 579.4 of the Code of Criminal Procedure).

Entry into a private house can be ordered by the judge in a criminal process. Although the entry is regulated widely in sections 545 and following of the Code of Criminal Procedure, the content of these sections is entirely outdated, so it is case-law that establishes the requirements for legal entry.

Entry may be enforced not only to carry out a search (for example, an entry can be ordered also to carry out a detention), although the entry and search are commonly practiced together: they are regulated jointly in the Code of Criminal Procedure and case-law usually refers to both of them.

The most important subject in this regard is to determine the concept of private domicile; although the Code of Criminal Procedure provides a definition it cannot be taken into account due to its obsolescence. The Sentence of the Constitutional Court 22/1984, February 17th states that the concept of domicile in criminal process cannot be considered the same as the concept provided in the Civil Code – as a place where a person can be legally found – but that it is even broader: any place that is an extension of the privacy of a person and that is used (even temporarily) as an abode or for professional purposes. The concretion of this definition provided by the Constitutional Court is provided by numerous sentences of lower courts in a very casuistic doctrine about domicile; a domicile can be a hotel room, a tent, a toilet etcetera.

Of course, the entry into a private domicile requires the consent of the owner or a judicial warrant authorizing the entry. As an exception, anyone is allowed to enter a private domicile without the consent of the owner or the judge in case of flagrant crimes: if a crime is being committed or about to be committed and in order to avoid it. The entry into a

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<sup>154</sup> The sentence underlined another lack of regulation in section 579 of the Code of Criminal Procedure: the absence of an enunciation of the crimes in which evidence may be gathered by telephone tapping and the undetermined destiny of the recordings obtained by such means.

private domicile must be done according to some other temporal requirements: during the day and not at night except for urgent reasons, and in the presence of the owner (or a member of his family or two witnesses) and the judicial clerk.<sup>155</sup>

Body searches are not regulated in the Code of Criminal Procedure and may be employed when the body is used to commit the crime; the most common case is the use of the body to transport drugs, but this measure can also be adopted in the investigation of an illegal abortion or to obtain a sample for a medical test without the consent of the defendant. Physical interventions must be carried out by a doctor, in a private place (in order to preserve the right to intimacy), and without provoking situations that could be considered humiliating. The adoption of this measure is only allowed for obtaining evidence that may require it. Under these conditions it does not breach the right to privacy or the right to physical integrity.<sup>156</sup>

A breathalyzer test is another measure that can be utilized during criminal process, since drunk driving is considered a crime under the Spanish Criminal Code (section 379). The practice of breathalyzing is not regulated in the Code of Criminal Procedure, so it is governed by case-law. According to these decisions, the breathalyzer does not infringe any fundamental right: neither the right to privacy nor the right to physical and moral integrity, to mention the rights more commonly invoked before the courts. Subsequently, it is possible to use a breathalyzer even without the consent of the defendant, since the interference with his intimacy or physical integrity for the obtaining of the sample is not relevant. However, recent court decisions consider that in some cases it may be an infringement of the right to privacy depending on the way in which the sample is obtained.<sup>157</sup>

#### G. Protection against double jeopardy

A person cannot be judged twice for the same offence. To prevent this situation, anyone who intervenes in the criminal process may give notice of a previous or simultaneous process against the offender for the same crime: the judge, the prosecution and the defence.

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<sup>155</sup> The presence of the clerk can be avoided, with the consent of the court, and be substituted by any other civil servant, even a member of the police, according to section 569 of the Code of Criminal Procedure after its modification in 1992.

<sup>156</sup> J.A. Díaz Cabiale, *Cacheos superficiales, intervenciones corporales y el cuerpo humano como objeto de recogida de muestras para análisis periciales*, en *Medidas restrictivas de derechos fundamentales*, Cuadernos de Derecho Judicial, Madrid, 1996, p. 87. See also Sentences of the Supreme Court 23<sup>rd</sup> February 1994, 31<sup>st</sup> March 2000 and 2<sup>nd</sup> February 1996.

<sup>157</sup> The Sentence of the Constitutional Court 25/2005, February 14<sup>th</sup> considers that the breathalyzer in the case must be considered illegal, that is the family agreed with obtaining the samples, but they were not informed that the samples would be used for the breathalyzer.

If, after the sentence, evidence of a previous procedure against the offender for the same crime appears, the Code of Criminal Procedure considers it as grounds for revision of the sentence. If the decision was taken by a foreign court, Spanish justice must wait until there is a sentence from the foreign judge and the accused person has served a conviction abroad. Then, the Spanish justice can ask for extradition to judge him for the crimes that have not been judged abroad. The double jeopardy is considered by our case-law as a manifestation of the right to effective court protection.<sup>158</sup>

#### H. The Right to Appeal

The possibility to appeal a sentence is generally found in all fields of law. Nevertheless, the right to appeal does not appear among the fundamental rights concerning jurisdiction of Article 24 of the Spanish Constitution. The right to appeal is considered a right established by ordinary law and not by the Constitution, so, in general, it is not considered fundamental right.<sup>159</sup> However, in criminal process the reasoning must be different. Article 10 of the Spanish Constitution requires that human rights established in the Constitution conform to the international treaties ratified by Spain. As a consequence of this requirement, case-law considers that the right to the effective protection of courts established in Article 24 of the Constitution, includes the right to appeal in criminal process in the terms stated in Article 14 of the International Covenant on Civil and Political Rights: the defendant has the right to appeal a conviction before a higher court.<sup>160</sup>

Appeal is generalized in criminal cases. After appeal, cassation before the Supreme Court may be possible, but only on the grounds of cassation contained in sections 847 and following of the Code of Criminal Procedure. As a consequence of Article 24 of the Constitution, appeal must be so construed as not to cause any prejudice to the defendant.

After cassation, there is no possibility to obtain a revision of the trial with two exceptions. The first is the *appeal*, before the Constitutional Court if a fundamental right has been violated in the criminal process. The second exception is the revision appeal regulated in sections 954 and following of the Code of Criminal Procedure. The real nature of this

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<sup>158</sup> Sentence of the Constitutional Court 242/1992, December, 21<sup>st</sup>.

<sup>159</sup> F. Cerdón Moreno *Las garantías...*, *op cit*, p. 202.

<sup>160</sup> See R. Yañez Velasco, *Derecho al recurso en el proceso penal*, Valencia, Ed. Tirant lo Blanch, 2001, pp. 278 and following. Although there is no agreement among legal scholars, some authors consider that appeal in cassation could meet the exigencies of the International Covenant on Civil and Political Rights, so that it is not necessary to establish the appeal since the cassation appeal could achieve the same aim: See. F. Cerdón Moreno, *Las garantías...*, *op cit*, p. 207.

revision “appeal” is a new process that can be initiated only on the grounds of section 954 of the Code of Criminal Procedure: prosecution for perjury against a witness who declared in the criminal process, use of violence during statements made by the accused, new facts that point to the innocence of the accused etcetera. Revision can be initiated by the convicted person or his family (even if the former is already dead) and also by the public prosecutor.

#### I. Consequences of a Violation of Human Rights in Criminal Process

There are different ways to sanction the infringement of a human right during a criminal process. The law foresees the invoking a violation of fundamental rights before the judge, but there is also the extraordinary remedy of *amparo* appeal before the Constitutional Court. And, only for certain cases of deprivation of liberty, there is the possibility to initiate a *habeas corpus* process.

##### a. Invoking an infringement of fundamental rights before the judge

The misuse of power and infringement of fundamental rights during the criminal process has the same regulation as in all processes. The claim must be made before the judge of the process in first instance in which the infringement took place. The defendant has several means to claim infraction of a fundamental right, for example, as an argument in his defence, or in contesting illegal evidence. In addition, the infringement of fundamental rights allows the party to use all appeals foreseen by law: the second instance and then appeal before the Supreme Court by means of the cassation. Some authors consider that when a judge has been involved in an illegal practice with regard to fundamental rights, he should be removed, but this opinion has not been followed in statute or case-law. The party’s claim and its procedural consequences do not exclude the disciplinary liability of the authority who infringed the fundamental right: police or judge. If the infringement was caused by a private person (for example, a citizen arresting a person without cause) the victim can claim (in a civil or penal process) against the person who acted illegally.

##### b. Habeas corpus procedure

There is a *habeas corpus* procedure for persons in detention. It is a requirement of Articles 17.4 of the Spanish Constitution that requires regulation of a *habeas corpus* process by statute. According to the mandate of the Constitution, the *habeas corpus* was regulated by the Organic Law 6/1984, May 24th.

The *habeas corpus* has a very limited objective of merely determining whether a deprivation of liberty is legal or not, so it is a means to protect the right to personal liberty of Article 17 of the Constitution. In fact, it is not considered part of criminal process, since the deprivation of liberty may occur without any relation to criminal process.<sup>161</sup> Moreover, the Constitutional Court rejects *habeas corpus* when the deprivation of liberty has been authorized by a judge.<sup>162</sup>

The detainee, or someone in his behalf (relatives, legal representative and public prosecutor), may apply through a written petition to have the detainee brought before the court in order to examine the legality of the detention by the judge. The maximum duration of the *habeas corpus* process is 24 hours.

### c. Appeal before the Constitutional Court

The Statute that regulates the Constitutional Court (Organic Law 2/1979, October 3rd) foresees an appeal that aims to avoid claims directly before the Constitutional Court in case of infringement of a fundamental right. So, apart from the remedies available in ordinary jurisdiction, citizens have the possibility of bringing the infringement of a fundamental right by any authority of the State directly before the Constitutional Court by means of the *amparo* appeal. The object of this appeal is the violation of any fundamental right of our Constitution (Articles 14 to 29), which obviously includes all the procedural fundamental rights, most of them contained in Article 24.

The regulation of the appeal before the Constitutional Court is subject to certain requirements, but we must underline two of the conditions regulated in section 44 of Organic Law 2/1979 since they govern cases of violation of a fundamental during proceedings. First, the violation of the right must have been caused directly by the judge; it is a consequence of the aim of this appeal, foreseen for the breach of a fundamental right by

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<sup>161</sup> The Sentence of the Constitutional Court 104/1990, June 4<sup>th</sup> recognises the possibility of initiating a *habeas corpus* procedure as a consequence of the deprivation of liberty of a person interned in a psychiatric centre.

<sup>162</sup> Sentence 31/1985, March 5<sup>th</sup>.

an authority of the State, which implies that if the violation of the fundamental right was caused by a private person (even during proceedings) the appeal will not lie. Secondly, the Organic Law 2/79 requires that the violation must be brought before in ordinary appeal. It is not possible to suffer the violation of a fundamental right without claiming. The appeal before the Court is supposed to be an extraordinary remedy, so it is subsidiary to any ordinary remedy.<sup>163</sup>

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<sup>163</sup> The Sentence of the Constitutional Court 524/2005 November 20<sup>th</sup> denies the appeal for infringement of the right to defence due to the omission of the assistance of an interpreter, because the oral trial had not yet begun, so the defendant still had the possibility to bring the omission to the attention of the trial court. See also Sentences of the Constitutional Court 162/90, October 22<sup>nd</sup>, and L. Bachmaier Winter, *Nulidad de actuaciones y agotamiento de la vía judicial previa al recurso de amparo. A propósito de la STC 271/1994 de 17 de octubre*, in *La Ley*, 1996-1, *passim*.