

**THIRD PARTIES IN CRIMINAL PROCEEDINGS.  
REPORT FROM SPAIN**

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## Report from Spain

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### Abstract

This paper aims to study the protection of third parties in Spanish criminal proceedings. In particular, it analyses the status and rights of third parties in criminal investigations, the adoption of pre-trial measures, the criminal trial, the decision-making process, appeals and the execution and effects of criminal judgments. Special attention is given to the recent case law of the Constitutional Court in this area.

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## 1 Introduction. General Features of Spanish Criminal Justice

The Spanish criminal procedure is mainly governed by the Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*, CCP-Spain hereinafter). It was initially approved in 1882 and has been successively amended. Some relevant features of Spanish criminal procedural law set important differences if compared to other legal systems and are relevant for the purposes of this report.

### 1.1 Legal Standing to Accuse

It shall first be borne in mind that in the Spanish procedural system there is no monopoly of the State, through the Public Prosecutor’s Office, in the exercise of the accusation. On the contrary, the power to accuse is open to any citizen (*acusación popular*) and, especially, to any person who has been offended by the crime (*acusación particular*).<sup>2</sup> This is a very special feature of Spanish criminal proceedings if compared to most systems in the civil law tradition and entails, as a consequence, a blurring in terms of defining the status of parties and third parties: the victim, for instance, may be considered as a party, if she decides to press charges and sustain her accusation; but she will remain a third party if she does not.

### 1.2 Scope Of Criminal Proceedings: Criminal and Civil Liability

A second crucial issue in relation to the legal design of criminal proceedings in Spain regards their scope.

In Spanish criminal proceedings, in addition to criminal liability, the civil action derived from the crime can also be and is usually prosecuted.<sup>3</sup> This has been the system since at least 1882 and it is based on reasons of procedural economy: given that there is an open judicial process, it is reasonable to take advantage of it to try to resolve all the consequences associated with the commission of the crime.

The civil claim *ex delicto* is defined in Art. 110 of the Spanish Criminal Code as encompassing restitution, reparation of the damage and compensation for material and non-material damages.

In criminal proceedings, however, the Public Prosecutor's Office also has the standing – and usually the duty – to bring a civil action on behalf of the victim, even if the victim herself has joined the proceedings to bring it.<sup>4</sup> The civil claim *ex delicto* is governed by the principle of party disposition. Therefore, the situation regarding the victim's control over the civil action could be summarised in the following terms:

- The victim, at any time during the criminal proceedings, may, generally, waive the civil action *ex delicto*. This waiver does not affect the criminal prosecution - except for certain offences against honour - but it usually

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<sup>2</sup> Arts. 101 and 270 CCP-Spain.

<sup>3</sup> Arts. 100 and 108 CCP-Spain.

<sup>4</sup> Pursuant to Art. 108 CCP-Spain, “The civil action must be brought jointly with the criminal action by the Public Prosecutor's Office, whether or not there is a private prosecutor in the process; but if the offended party expressly waives his right to restitution, repair or compensation, the Public Prosecutor's Office will limit itself to requesting the punishment of the accused parties.”

extinguishes the civil action for both the victim herself and the Public Prosecutor's Offices.<sup>5</sup>

— The victim may also “reserve” the civil action for subsequent civil proceedings. This reservation excludes the civil action from the criminal proceedings, but allows the victim to bring it separately, in a separate civil proceeding.<sup>6</sup> As the principle of “*le criminel tient le civil en état*” applies in Spain,<sup>7</sup> such civil proceedings can only be brought once the criminal proceedings have been finally terminated.<sup>8</sup> The reservation has the advantage that the civil action receives full and specific attention, rather than being treated among many other issues in the framework of complex proceedings. The counterpart is the need to wait for the completion of the criminal proceedings, as both the law and case law have established certain links between the decisions of the criminal judgement and the development of the civil proceedings.

If the victim does not become a party to the criminal proceedings, the Public Prosecutor's Office shall bring the civil action on behalf of the victim, but it shall do so according to its own criteria. The Public Prosecutor's Office is not entitled to waive the civil action or to negotiate openly about it.

If the victim is a party to the criminal proceedings and brings the civil action, she shall have the burden of determining the amount requested and of making the corresponding allegations and of producing evidence in support of his claim. The victim will concur with the Public Prosecutor's Office in the exercise of both criminal and civil actions. In practice, it is common for the victim to make harsher punitive demands than the prosecution and to request higher compensation than the prosecution. Sometimes the presence of victims in the proceedings is perceived as a kind of “control” over the public prosecution.

The exercise of civil actions in criminal proceedings also contributes to blurring the dividing line between parties and third parties. In terms of standing, the victim may choose to pursue only civil actions and not criminal actions, or vice versa. On the other hand, very often the civil action arising from the crime involves an insurance company, when the crime prosecuted has been committed on the occasion of conduct covered by insurance (e.g. traffic offences or offences against workers' safety).<sup>9</sup> This means that insurance companies will also be parties to the criminal proceedings. Likewise, the State, the autonomous communities (regions) and other public entities, which are civilly liable for offences committed by civil servants, may also become (civil) parties to the criminal proceedings.<sup>10</sup>

### ***1.3 Structure and Development of Proceedings***

Spanish criminal proceedings are divided into two main phases, one of investigation and the other of trial in the proper sense.

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<sup>5</sup> Arts. 107 and 108 CCP-Spain. According to Art. 112 II CCP-Spain, this waiver may be revoked in specific situations.

<sup>6</sup> Art. 112 CCP-Spain.

<sup>7</sup> Art. 114 CCP-Spain.

<sup>8</sup> Art. 112 CCP-Spain.

<sup>9</sup> Art. 117 of the Spanish Criminal Code.

<sup>10</sup> Art. 121 of the Spanish Criminal Code.

The first phase –the investigation phase or *instrucción*–, is conducted under the direction of an examining magistrate (*juez de instrucción*). It is therefore a judge, and not a public prosecutor, who is in charge of leading criminal investigations in Spain.

The second phase of criminal proceedings is the trial phase. A trial will only take place if the investigation has established with sufficient accuracy and evidentiary support the existence of a criminal offence and their apparent authors. The Public Prosecutor or a private person needs to sustain the accusation, in order for the trial phase to be opened. The trial is conducted by a court different to the one in charge of the investigation. Depending on the seriousness of the sanction established in the Criminal Code the trial will be held before a single judge or before a panel of three judges. Single-judge courts are competent to deal with criminal offences punished with imprisonment up to five years, with a fine or with other sanctions up to ten years. Beyond these limits, the case will be in the hands of collegiate courts.<sup>11</sup>

Criminal proceedings are formally opened when an examining magistrate is informed of the apparent existence of a criminal offence. The purposes of proceedings at this stage are to ascertain the relevant facts, to determine the responsible persons, to access the sources of evidence and to adopt provisional and protective measures, both with respect to the criminal action and to the civil action *ex delicto*. This phase is rather adversarial in nature: the parties may intervene and sustain their claims in relation to the aforementioned issues. The examining magistrate will declare the investigative stage of proceedings concluded once he considers that all necessary investigative measures have been taken and it is concluded that there is evidence of an offence and that the persons to whom the offence can be attributed have been identified.<sup>12</sup>

At this point, the magistrate's investigation is subject to the scrutiny of the parties entitled to prosecute. The Public Prosecutor's Office and the other parties who have decided to intervene as accusers and/or civil actors during the investigation phase must decide whether to ask the investigating judge to formally open the oral trial phase or whether, on the contrary, the proceedings should be dismissed or discontinued. If they want a trial to be opened against all or some of those under investigation, they must request this by directly presenting a written accusation, regulated in Art. 781 CCP-Spain (with reference to Art. 650 CCP-Spain). In this indictment or statement of accusation, they will have to establish the facts of which they are accusing, the requests for conviction that they make to the court and the evidence to be taken at the trial.

If an accusing party has so requested, the examining magistrate will agree to open the oral trial if he considers that there are rational indications of criminality against the accused.<sup>13</sup> At the same time as agreeing to move on to the oral trial phase, the same examining magistrate can also adopt, modify, suspend or revoke precautionary measures with respect to the civilly liable parties.<sup>14</sup> In practice, it is common to wait until that moment to ask third parties to provide security if the accused has not done so within the time limit set.

Once the oral trial has been opened, the court will communicate all the proceedings to those designated as accused, defendants and responsible third parties in the indictments, so that they may present their statements of defence.<sup>15</sup> Failure to submit a statement of

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<sup>11</sup> Art. 14 CCP-Spain.

<sup>12</sup> Art. 779.1.4 CCP-Spain.

<sup>13</sup> Art. 783.1 CCP-Spain.

<sup>14</sup> Art. 783.2 CCP-Spain.

<sup>15</sup> Art. 784.1 CCP-Spain.

defence does not constitute acquiescence, but rather a presumption that the accused or the civilly liable party opposes what is being sought in respect of them.

Although formally the oral trial phase is already open, the presentation of the statements of defence is carried out before the examining magistrate. Once the pleadings have been received or, where applicable, once the time limit for doing so has expired, all the proceedings will be sent to the court responsible for the trial.

The trial phase is mainly devoted to the taking of the evidence proposed by the parties. At the beginning of the main oral hearing, the parties may still raise procedural issues and produce new evidence. The core of the hearing will be devoted to an adversarial taking of evidence, with the accused, witnesses and experts being examined and cross-examined by the parties. After all evidence has been elicited, the parties will be required to formulate their final submissions in light of the results of the trial.

In its judgment, the court will decide both on the criminal and on the civil liability of the accused parties, considering these final claims and defences formulated by all parties.

Following a relevant reform enacted in 2015, all judgments given by criminal courts in proceedings which started after the reform entered into force may be subject of ‘ordinary’ appeal proceedings, meaning that both accusing and accused parties may bring an appeal and also that the appeal may be founded on any infringement attributed to the judgment: ‘ordinary’ appeals may be based on the wrong assessment of evidence by the court, on the infringement of procedural rules and safeguards, or on the infringement of material law. Some judgments given after an ordinary appeal may be subject of a further appeal for cassation before the Spanish Supreme Court. This second appeal shall only be based on legal infringements, either of procedural or material provisions.

Finally, and according to the Spanish constitutional system, if a party deems that a final judgment has been given infringing a fundamental right as enshrined in the Spanish Constitution, she may lodge a specific recourse with the Spanish Constitutional Court, the so-called “recurso de amparo”. This “recurso de amparo” allows the Constitutional Court to assess whether the decision has infringed a fundamental right and, eventually, to annul it.

#### ***1.4 Formal Participants in Criminal Proceedings***

All that has been described so far explains how, in Spanish criminal proceedings, the list of possible participants is vast.

From the active point of view, the following subjects can be parties:

(i) The Public Prosecutor's Office, which will usually hold the status of prosecuting party. However, there are two exceptions to this:

- It is possible for the Public Prosecutor, in a specific case, to request the acquittal of the accused. This is possible if the accusation is brought by another party, since the State does not have a monopoly on the accusation.

- Certain crimes (very few: libel and defamation against private individuals) can only be validly prosecuted by the victim, who is the only one entitled to bring charges: the public prosecutor is not a party to these proceedings.

(ii) The victim of the offence, when she has decided to bring a criminal and/or civil action.

(iii) Any Spanish citizen, who is not a victim, but who has decided to bring a public prosecution.

From the passive point of view, in addition to the accused, those who are civilly liable, even if they are not criminally liable, will also be parties to the proceedings if the civil

action *ex delicto* is brought against them: it has already been mentioned for insurance companies and the State and other public entities, but this position can also be occupied by any person potentially considered as civilly liable, like the parents of the incompetent person who committed the crime and who were negligent in supervising him/her, for example.<sup>16</sup>

### ***1.5 Third Parties to Criminal Proceedings***

The extent to which several categories of persons and legal entities may reach the status of formal parties in the Spanish criminal procedure system must be taken into account when drawing up the catalogue of third parties. For these purposes, third parties are understood to be those subjects who do not formally hold the status of a party, because they do not formulate claims - criminal or civil - nor are claims brought against them - again, criminal or civil - but who have some kind of intervention or leading role in the criminal proceedings, or whose legal position is taken into account by the criminal procedural system.

In a rather instinctive manner, the first third parties coming to our mind are witnesses and expert witnesses, who gain relevance for evidentiary purposes.

Witnesses may deserve, at least some of them, specific attention when they are interrogated, both during the investigation phase and during trial: this is the case, namely, with vulnerable witnesses, like minors, and with victims that have not decide to bring their own accusation. Both witnesses and expert witnesses may also request measures to protect them, their relatives and their assets, when they are the scope of threatens intended at preventing them to provide evidence against the accused.

However, for the purposes of this study, it will also be important to direct the focus on third parties whose rights, legal interests or even factual situation may be affected by criminal proceedings lead by others and/or against others.

This is the case of the owners of goods and assets that may be frozen and confiscated as a result of criminal proceedings – although it may also be argued that, insofar as the claim for confiscation affects them directly, they should be considered as formal defendant parties to the proceedings.

It is also the case of natural persons employed by legal entities, where an accusation is brought against the legal entity and there is the risk that the court suspends or closes its activity (as a precautionary measure or as a penalty).

In this very same vein, the notion of third parties encompasses the persons that may be affected by an investigative measure, without being accused: this is the case of the owner of a premise where a search is performed; this is also what happens when a wiretap is granted in regard to persons, unconnected to the criminal activity, who talk to the person under investigation and whose privacy may be compromised.

Finally, it is also possible that the personal data of third parties is processed during criminal proceedings. Pursuant to Art. 9 of the Organic Law 7/2021, the person in charge of processing the data in criminal proceedings should distinguish the status of the person whose data is treated.<sup>17</sup> These categories include the victims or those who may be affected by the criminal offense, third parties involved in a criminal proceeding, such as witnesses, and persons who may provide information about such offenses, among others. All these

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<sup>16</sup> Arts. 118 and 120 of the Spanish Criminal Code.

<sup>17</sup> Ley Orgánica 7/2021, de 26 de mayo, de protección de datos personales tratados para fines de prevención, detección, investigación y enjuiciamiento de infracciones penales y de ejecución de sanciones penales [<https://www.boe.es/buscar/act.php?id=BOE-A-2021-8806&p=20210527&tn=1>]

persons are entitled to exercise the substantive rights recognized by the law: right of access, right to rectification, right to erasure or right to restriction of processing (Arts. 22 and 23 of Organic Law 7/2021). In addition, they will have the right to compensation for any damages arising from the processing of their data —regardless of whether the processing is carried out by a public or private entity— (Arts. 53 and 54 of Organic Law 7/2021).

## 2 Fundamental Rights and Safeguards of Third Parties

### 2.1 Constitutional Law

The fundamental rights and public liberties are recognized in Arts. 14 to 29 of the Spanish Constitution (CE, hereinafter)<sup>18</sup> and protected by specific safeguards. According to Art. 53 CE, these rights «are binding for all public authorities. [...] Any citizen may assert his or her claim to protect the liberties and rights recognized [...] through a preferential and summary procedure in the ordinary courts and, when appropriate, by submitting an individual appeal for protection («recurso de amparo») to the Constitutional Court [...]». Art. 9 CE also establishes the general subjection of the state and citizens to the Constitution: «[c]itizens and public authorities are bound by the Constitution and all other legal provisions».

Therefore, fundamental rights and public liberties are directly invocable by third parties in criminal inquiries and proceedings. The main fundamental rights and public liberties of third parties at stake in criminal matters could be the right to personal freedom (Art. 17 CE), the freedom of speech (Art. 20 CE), the rights to privacy –including intimacy, home inviolability and secrecy of communications, for instance– (Art. 18 CE) and the right to an effective judicial relief (Art. 24 CE). As mentioned, in addition to the ordinary remedies established by the law –namely by the CCP-Spain and by other specific legislation on criminal procedure–, the special protection provided by Art. 53 CE means that thirds parties can eventually file an individual appeal for protection before the Constitutional Court for any violation of their rights in criminal proceedings, as was the case in Ruling 30/2022 of the Constitutional Court that will be discussed later on.

### 2.2 Domestication of International Law

In general terms, it can be said that the Spanish criminal procedure system complies with the standards set by international treaties and European law. The European Convention on Human Rights is also part of the Spanish legal system, and its jurisprudence is taken into account by Spanish courts when applying national laws. The same applies to the International Covenant on Civil and Political Rights and the guarantees set out in its Art. 14. In fact, one of the most recent structural reforms in recent years, undertaken in 2015, generalised the appeal against all criminal judgments, precisely to ensure better compliance with the right of everyone convicted of a crime to have his conviction and sentence being reviewed by a higher tribunal according to law, enshrined in Art. 14(5) of the Covenant.

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<sup>18</sup> The English version of the Spanish Constitution is available here: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>

### 2.3 Implementation of EU Law

Within the general framework of implementation of EU law, two main instruments of EU law have a direct relation with third parties in criminal matters: Directive 2012/29/UE establishing minimum standards on the rights, support and protection of victims of crime and Directive 2014/42/UE on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.<sup>19</sup>

As has been said, the victims should have the consideration of third parties in criminal proceedings when they do not exercise the criminal action —*i.e.*, when they are not formal parties to the proceedings—. Directive 2012/29/UE has been transposed in the Spanish national legal order by Law 4/2015 of the Crime Victim Statute —*Estatuto de la Víctima del Delito*—. <sup>20</sup> This Law is formed by 35 articles. and is divided into four titles that deal with the basic rights of the victims (Title I), the participation of the victim in criminal proceedings (Title II), the protection of the victim (Title III) and common provisions related to the victims' assistance offices, cooperation and best practices between administrations, among others (Title IV). The Preamble states that the Law «not only responds to the minimum requirements set by the European lawmaker with the text finally approved in the aforementioned Directive 2012/29/EU, but also tries to be more ambitious [...] is intended to be a general catalog of the procedural and extra-procedural rights of all crime victims [...] It is based on a broad concept of a victim, for any crime and whatever the nature of the physical, moral or material damage caused to her. It includes the direct victim, but also indirect victims, such as family members or similar».

On the other side, Directive 2014/42/UE on the freezing and confiscation of instrumentalities and proceeds of crime has been transposed into national legal order through Law 41/2015.<sup>21</sup> The Law introduces in the Spanish Criminal Procedure Act (CCP-Spain) a section regulating the intervention in criminal proceedings of third parties that may be affected by the freezing and confiscation of instrumentalities and proceeds of crime [Arts. 803 *ter* a) to 803 *ter* d) CCP-Spain] and a «stand-alone» procedure for the freezing and confiscation [Arts. 803 *ter* e) to 803 *ter* u) CCP-Spain]. The «stand-alone» confiscation proceedings «allows for the deprivation of the ownership of the assets derived from the crime even though the perpetrator cannot be tried». As the Preamble of the Law establishes, the rights of the third parties who may be affected by the confiscation «are guaranteed not only [with the possibility of intervening in this procedure] but also with the creation of an appeal for annulment [...] if the decision has been made without considering their status as interested parties in the case».

## 3 Third Parties in Criminal Inquiries

As already explained above, Spanish criminal proceedings are formed by two main phases: the judicial investigation phase —*fase de instrucción*— and the trial phase —*fase*

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<sup>19</sup> The latter shall be read together with Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.

<sup>20</sup> Ley 4/2015, de 27 de abril, del Estatuto de la víctima del delito [<https://www.boe.es/buscar/act.php?id=BOE-A-2015-4606>]

<sup>21</sup> Ley 41/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para la agilización de la justicia penal y el fortalecimiento de las garantías procesales [<https://www.boe.es/buscar/doc.php?id=BOE-A-2015-10726>].

*de enjuiciamiento*—. Both are carried out by a judge or a court. The first one by the examining magistrate/investigation judge —*juez de instrucción*— and the second one by the trial judge or court —*juez o tribunal de enjuiciamiento*—. <sup>22</sup> Formally, criminal proceedings start with a judicial decision in which the examining magistrate identifies some facts with criminal appearance —*auto de incoación de las diligencias previas o del sumario*—. But, as can be imagined, previously it is possible that some investigation measures —of non-judicial nature— may be carried out by the police or the public prosecutor's office to establish with a sufficient level of detail the *notitia criminis* that must be communicated to the examining magistrate in a criminal report. <sup>23</sup> Therefore, criminal inquires may have a non-judicial and “pre-procedural” nature —police and prosecutorial inquires—, but also, and more normally, a judicial and procedural nature —when they are carried out within the investigation phase of the proceedings.

### 3.1 Police and Law Enforcement Investigations

We will address first the rights of victims. At this moment the criminal proceedings have not been yet initiated and, therefore, all victims should usually be considered third parties to any law enforcement activity. Art. 4 of the Law 4/2015 of the Crime Victim Statute recognizes the so-called right of the victim to understand and be understood «*from the filing of a police report and during the criminal proceedings*». This includes (i) the right to a clear, easy and plain language that considers the age or the sensory, intellectual or mental disability of the victim; (ii) the right to interpretation in legally recognized sign languages and means of oral communication support for deaf, hard of hearing and deaf-blind people; and (iii) the right of the victim to be accompanied by a trusted person from the first contact with the police. Art. 5 recognizes the right to information about available assistance and support measures—whether medical, psychological or of any other kind—, the right to file a criminal complaint and the procedure for filing it, the right to provide evidence to the investigating authorities, legal aid, the right to request protective measures, contact details of the authority in charge of handling the procedure, restorative justice services available, among others. The Crime Victim Statute also regulates the rights of the victim to the translation and interpretation if they do not speak or understand Spanish (Art. 9 Law 4/2015) and the right of access to assistance and support services (Art. 10 Law 4/2015). The victims are also recognized the right to file in Spain complaints relating to criminal offenses committed in the territory of other EU Member States (Art. 17 Law 4/2015).

Secondly, we will analyze the *position of third parties—other than victims— during a police investigation*. At this stage it is sometimes difficult to establish whether a person will remain a third party or he/she will acquire the status of formal party in potential subsequent judicial proceedings.

Police inquiries, previous to a formal judicialized investigation, are limited insofar as only a judge can adopt or authorize investigative measures limiting fundamental rights. Any excessive investigation measure adopted by the police could be controlled through a specific procedure for the protection of the fundamental rights, regulated in Arts. 114 to 122 *quarter* of Law 29/1998 regulating the Administrative Jurisdiction (LJCA). <sup>24</sup>

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<sup>22</sup> GASCÓN INCHAUSTI, F. (2024), pp. 132-142, 223-245.

<sup>23</sup> GASCÓN INCHAUSTI, F. (2024), pp. 132-138.

<sup>24</sup> Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa [<https://www.boe.es/buscar/act.php?id=BOE-A-1998-16718&p=20211012&tn=0>].

The time limit for bringing this action against any police activity that allegedly infringed a fundamental right is 10 days (Art. 115 LJCA). In case of *de facto* activity of the police, a 20 day period will run from the date when the administrative activity started. The proceedings commence with a complaint specifying the rights whose protection is sought and describing their infringement. On the same day or in the following, the police shall be required to refer to the tribunal the files together with the reports and data (Art. 116 LJCA). Upon receipt of the file, if so, the court clerk will admit the action (Art. 117 LJCA) and the person will have 8 days to formalize the claim (Art. 118 LJCA). The Prosecutor’s Office and the police will have another 8 days to reply to the claim (Art. 119 LJCA). The court will decide on the evidence presented (Art. 120 LJCA) and will give its judgment (Art. 121 LJCA) which could declare that the police activity infringed the fundamental right at stake.

It should be noted that, although in theory this is a way of protection against police activity, it is not used very often in practice. This is probably due to the length and formality of this procedure and, more probably, because the affected person only knows that she has been subject to police investigations once judicial criminal proceedings have already been initiated.

Another ordinary way of protecting individuals during police investigations is the *habeas corpus* proceedings recognized in Art. 17.4 CE and developed in Organic Law 6/1984.<sup>25</sup> As it is commonly known, the aim of these proceedings is to obtain the immediate delivery of any person illegally arrested to the competent judicial authority — i.e., the court of the place where the person is being held, where there are details about her detention or where the latest news on the person has been known (Art. 2 of the Organic Law 6/1984)—. In some cases, the *habeas corpus* itself is a way of protecting third parties that do not have any relation with the *notitia criminis* that is being investigated.

### 3.2 *Prosecutorial Inquiry*

As mentioned, the investigations before the formal start of criminal proceedings may be carried out by the police or by the Public Prosecutor's Office—who may start an inquiry on its own motion, but also upon receiving a complaint. There are no formal differences between police and prosecutorial inquiries as far as the positions of victims and suspects are concerned. For that reason, what has been discussed above applies accordingly.

### 3.3 *Judicial Investigation*

Starting with *the rights of victims*, we shall recall that they shall only be considered as third parties if they do not exercise or intend to exercise the criminal action —*i.e.*, if they choose not to participate formally in the criminal proceedings—.

In this phase all the rights enshrined in Law 4/2015 of the Crime Victim Statute, mentioned above, will apply, in a similar way as they do during the police or prosecutorial investigations: the so-called right to understand and be understood, the right to information, the rights to translation and interpretation, or the right of access to assistance and support services (*vid. supra*). In addition to these, some rights are specifically applicable in the procedural sphere. This is the case, for example, of the right to receive

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<sup>25</sup> Ley Orgánica 6/1984, de 24 de mayo, reguladora del procedimiento de «Habeas Corpus» [<https://www.boe.es/buscar/act.php?id=BOE-A-1984-11620>]

information about the criminal case (Art. 7 Law 4/2015). If the victim has requested it, and irrespective of their formal participation in the process, the victim has the right to know the following judicial decision: (i) the decision about the initiation or not of the criminal proceedings; (ii) the judgment or any other judicial resolution that ends the proceedings; (iii) information related to the imprisonment or subsequent release of the offender, as well of his escape; and (iv) any decision of the judicial or penitentiary authority in certain cases. Therefore, the right of information goes beyond the (mere) criminal proceedings and includes also measures related to the enforcement of the judgment itself (Arts. 7 and 13 of Law 4/2015). The victim also has the right to an active participation in the criminal proceedings exercising the criminal action (Art. 11 Law 4/2015), the right to be informed of and to lodge an appeal against the dismissal order of the judicial investigation —*auto de sobreesimiento*—, or the right to obtain the return of any object that may have been seized during the proceedings (Art. 18 with relation to Arts. 284.4 and 334 CCP-Spain). In addition, in judicial investigations the victims have special rights of protection. In particular, the right to the necessary measures to guarantee their life and of their family members, their physical and psychological integrity, freedom, security and sexual freedom (Art. 19 Law 4/2015), the right to avoid contact with the offender during criminal proceedings (Art. 20 Law 4/2015), the right to be heard in the proceedings and to be examined as few times as possible and only when strictly necessary, to be always accompanied with a person of their election—in addition to the lawyer— (Art. 21 Law 4/2015) and the right to the protection of privacy during the investigation (Art. 22 Law 4/2015), among other protective measures specifically regulated for the judicial investigation phase (Art. 25 Law 4/2015). Finally, the Law incorporates certain protection measures for minors and persons with disabilities or needed of special protection (Art. 26 Law 4/2015).

Given that criminal proceedings have already begun, it is easier to identify *third parties* —*others than victims*— during the judicial investigation. More specifically, we will address the status of individuals (i) whose objects or assets have been seized during the police or judicial investigation phase; (ii) that are being affected by any judicial investigation measure —*diligencia de investigación*—; and, in particular, (iii) their possibility of intervening and participating in the proceedings to defend themselves.

During the police or judicial investigations some objects property of third parties related to the crime or crime scene may be seized. These objects could be used as proof in the future trial or may just be necessary for the practice of additional judicial investigation measures. Therefore, these are not cases of freezing and confiscation of instrumentalities and proceeds of crime (Arts. 803 *ter a* to 803 *ter d* CCP-Spain), but objects (merely) related to the crime or to its investigation. Pursuant to Art. 334 CCP-Spain, any person affected by the confiscation «may appeal the measure before the Court at any time. This appeal will not require intervention by a lawyer when it is submitted by third parties other than the accused. The appeal will be taken as lodged when the person affected by the measure, or one of their family members, of legal age, have stated their disagreement at the time it is taken».

Other third parties may be also affected by judicial investigation measures. This affectation could be indirect—e.g., the entry in the home of the suspect where third parties also live or the interception of telephone and telematic communications that he is having with third parties— or directly—e.g., the entry in the home of the suspect’s mother to search for evidence of the crime or the interception of the telephone of a suspect’s friend, when it is clear that the suspect is frequently using it—. The potential of this «collateral» damages of criminal proceedings is nowadays intensified by the technological investigation measures that can be adopted by the examining magistrate

(*vid. infra*). It is necessary, therefore, to examine to what extent the fundamental rights of third parties can be validly limited or restricted during the judicial investigation and what remedies are available to them to protect their fundamental rights.

We shall recall, from the outset, that any judicial investigation measure that supposes a limitation of any fundamental right—not only of those of the suspect or accused—is subject to specific controls and standards that have been developed in the case law and recently in the law itself. First of all, the investigation measure must be previously authorized by the law and by the court in the specific case. Among other issues, the judge must perform the corresponding proportionality assessment when deciding on the adoption of the investigation measure itself.<sup>26</sup> A recent reform of the CCP-Spain in 2015, aimed at regulating technological investigation measures, expressly incorporates these guiding principles, required for their adoption. Pursuant to Art. 588 *bis a*) CCP-Spain, the investigation measure «may be ordered, as long as judicial authorization is issued fully subject to the principles of specialty, adequacy, exceptionality, necessity and proportionality of the measure [...] The investigative measures regulated in this chapter will only be considered proportionate when, considering all the circumstances of the case, the sacrifice of the affected rights and interests is not greater than the benefit that their adoption provides for public interest and third parties». In this regard, the judge must take into consideration the existence of third parties that may be affected by the measure. This affectation is a criterion that the examining magistrate must balance when deciding on the adoption of this kind of measures. Therefore, technically *the affectation of third parties must be balanced in the referred proportionality test*.<sup>27</sup>

We will turn now to the procedural instruments and remedies that the third parties affected by an investigation measure have available to protect their legal sphere and to control the action of the State. The CCP-Spain has not created any specific mechanism for this purpose. This legal vacuum, nevertheless, has been solved by the Constitutional Court in a very recent decision (Judgment 30/2022, of 7 March).<sup>28</sup> This ruling is of great importance, insofar as it could be applied by analogy to the other situations that will be examined and in which a judicial measure could directly or indirectly affect third parties (*vid. infra*).

This judgment has set relevant precedent on the standing of third parties—in the strict sense of the term, encompassing subjects who are not formal parties to the criminal proceedings—to intervene in it and to lodge an appeal against judicial decisions which are contrary to their rights and/or interests, namely where the interest at stake is relating to the exercise of fundamental rights of “substantive” nature—i.e., not just procedural safeguards—.

The case is of great interest, as it involved a procedure investigating possible leaks in a highly publicised case. The examining magistrate, among other measures, considered it necessary to proceed to the interception, and downloading, of the telephone device and computer of two journalists, who were also requested to provide any judicial or police document related to the investigation of the case in question. To make the measure effective, they were requested to come to the court and hand over their mobile phones and their unlocking codes. Neither journalist was listed as a suspect in the case. Both tried to appeal the decisions, but were denied standing to do so precisely because of their status as third parties.

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<sup>26</sup> GASCÓN INCHAUSTI, F. (2024), pp. 159-163.

<sup>27</sup> BACHMAIER WINTER, L. (2004), pp. 56, 72, 75, 80.

<sup>28</sup> STC 30/2022 de 7 de marzo de 2022 [ECLI:ES:TC:2022:30].

In the case at hand, the standing of third parties and the right of access to jurisdiction are analyzed from the qualified point of view of the impact that the judicial decision has on fundamental rights (press freedom). As the Constitutional Court affirms, the CCP-Spain itself has expressly foreseen the protection of thirds parties and their possibility of directly appealing judicial decisions about property seized during the investigation (Art. 334.1 CCP-Spain) and also in the case of freezing and confiscation of instrumentalities and proceeds of crime [Arts. 803 *ter* a) to 803 *ter* d) CCP-Spain] (*vid. infra*). For that reason, «it must be understood that the reasons that justify the intervention of third parties in the situations described above also apply when recognizing the right of access to jurisdiction when it is justified by the need to defend fundamental rights of substantive content [...] It is not possible to deny the legal standing of third parties when contesting the court decisions when they are affected in the exercise of fundamental rights, it is necessary to require the judicial bodies to provide reinforced reasoning that justifies the denial of the right of access to jurisdiction. The reasoning of the appealed decisions also ignores the case law of the ECtHR when interpreting Art. 6 ECHR and the *pro actione* principle [...] Strasbourg case law has stated that “the effectiveness of the right to effective judicial protection requires that a person enjoys the clear and concrete possibility of challenging an act that constitutes an interference with his rights” [ECHR of 10 January 2017 (ECHR 2017, 1), Aparicio Navarro Revert and García San Miguel y Orueta v. Spain, (§34); and 22 June 2006 (ECHR 2006, 44), Díaz Ochoa v. Spain, (§41)]». In summary, third parties affected by any judicial investigation measure are granted the possibility of intervening in the proceedings for the protection of their rights. This right to access to justice is subject to the *pro actione* principle that must inspire the interpretation of all procedural rules. This right of access to justice is of special importance when, as has been said, the interests at stake are fundamental rights.

Some issues concerning this “newborn” right of intervention of third parties are still open. For instance, it is not clear if the third party acquires the formal status of a party or not; if she can have access to all the files or just to those related to the measure that affects her. In short, the defence possibilities and procedural rights of these subjects are unclear, due to the lack of legal development. One could say that this possibility of intervention is just a fast-track procedure for the protection of their fundamental rights in the specific criminal proceedings.

#### **4 Scientific Developments, New Technologies and the Safeguards of Third Parties**

Technological judicial investigation measures have been introduced in the CCP-Spain by Organic Law 13/2015.<sup>29</sup> The Spanish judges may adopt, for investigation purposes, the following measures:

- Interception of telephone and telematic communications [Arts. 588 *ter* a) to 588 *ter* i) CCP-Spain].
- Access to data needed to identify users, terminals and connectivity devices [Arts. 588 *ter* k) to 588 *ter* m) CCP-Spain].
- Capture and recording of verbal communications using electronic devices [Arts. 588 *quarter* a) to 588 *quarter* m)].

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<sup>29</sup> Ley Orgánica 13/2015, de 5 de octubre, de modificación de la Ley de Enjuiciamiento Criminal para el fortalecimiento de las garantías procesales y la regulación de las medidas de investigación tecnológica [<https://www.boe.es/buscar/doc.php?id=BOE-A-2015-10725>].

- Use of technical devices for image capture, surveillance and localization [Arts. 588 *quinquies* b) a to 588 *quinquies* c) CCP-Spain].
- Search in mass data storage devices [Arts. 588 *sexies* a) to 588 *sexies* c) CCP-Spain].
- Remote search of computer equipment [Arts. 588 *septies* a) to 588 *septies* c) CCP-Spain].

The preamble of the law recalls how this regulation sets a «normative proclamation of the principles that the Constitutional Court has defined as determining the validity of the act of interference. Any measure must comply with the principle of specialty [...] The technological research measures must also satisfy the principles of adequacy, exceptionality, necessity and proportionality, whose concurrence must be sufficiently justified in the enabling judicial decision, where the judge will determine the nature and extent of the measure in relation to the specific research and the expected results».

According to Art. 588 *bis* h) CCP-Spain, technological investigation measures «may be ordered even where they affect third parties in the cases and under the conditions regulated in the specific provisions for each of them». Therefore, the CCP-Spain expressly accepts and recognizes that these measures will almost certainly affect third parties. This is obvious if we consider that, by nature, almost all technological devices and gadgets are used to have contact with others or to store information related (also) to others.

More specifically, and addressing the interception of telephone and telematic communications, Art. 588 *ter* c) CCP-Spain states that these measures «may be [also] ordered for communications emitted from terminals or telematic communication media belonging to a third party provided that (i) there is proof that the individual under investigation uses it to transmit or receive information, or (ii) the owner collaborates with the person under investigation in their illicit purposes or benefits from their activity. Such intervention may also be authorized where the device under investigation is used maliciously by third parties online, without the knowledge of their owner». Thus, either directly or indirectly, third parties may be affected by this technological measure. As already said, this is a circumstance that shall be considered by the court when performing the proportionality assessment required to adopt the measure [Arts. 588 *bis* a) CCP-Spain].

Regarding the possible intervention of third parties in the proceedings to challenge a technological investigation measure adopted by the judge, we can refer to what has been said above about the Judgment of the Constitutional Court 30/2022 (*vid. supra*). The impact of these measures on the fundamental rights of third parties —mainly, the right to privacy (Art. 18 CE)— is a constitutional ground that could underpin their intervention in the judicial investigation phase. This is a possibility that derives from the right to effective judicial relief (Art. 24 CE), which is subject to the *pro actione* principle and reinforced by the fundamental rights whose judicial protection is being sought.

From a different perspective, we should also highlight the obligations and duties of collaboration that are imposed on third parties during the investigation. Following Art. 588 *ter* e) CCP-Spain «all providers of telecommunications services, of access to a telecommunications network or information society services, and any person who, in any way, contributes to facilitating communications via the telephone or by any other online, logic or virtual communication media or system, are under the obligation to provide the judge, the Public Prosecution Service and members of the Police appointed to carry out the measure, with the assistance and cooperation necessary to facilitate the performance of orders for telecommunications’ interception [...] Obligated individuals breaching the

above duties may be committing the offense of disobedience». These duties are also laid down in Art. 7.1 of Organic Law 7/2021.<sup>30</sup>

This kind of «externalization of the criminal investigation» through providers of telecommunications services triggers many problematic issues that are also still open—for instance, about the so-called “horizontal effectiveness of fundamental rights” (*Drittwirkung*) that are being infringed by these providers or the possibility they have of refusing the collaboration they are asked for.<sup>31</sup>

## 5 Pre-Trial Measures and the Protection of Fundamental Rights of Third Parties

In general terms, third parties could be also affected by pre-trial measures adopted during the investigation phase. That is the case, for example, in pre-trial measures adopted against a legal person—e.g., a company or an association—. In accordance with Art. 37.7 of the Criminal Code (CP), «temporary closure of premises or establishments, suspension of corporate activities and judicial intervention may also be agreed by the investigating judge as a precautionary measure during the investigation of the case». In this case, workers, suppliers, creditors or the company's shareholders themselves could be affected by the adopted measures. There is also the possibility of adopting in any criminal proceedings, as provisional measures, garnishments and attachments of money, property or objects belonging to the suspect. It is conceivable that family members, co-owners of the real estate or object or creditors of the investigated person could also be affected by these measures.

There is no regulation in the CCP-Spain addressing the remedies available to these affected third parties. A broad interpretation of the referred Judgment of the Constitutional Court 30/2022 could, nevertheless, justify their intervention in the process in certain cases (*vid. supra*). Although this judgment was issued in the framework of the protection of fundamental rights of third parties affected by judicial investigative measures, its reasoning could be applied by analogy to justify the intervention of any party affected by any other judicial measure—also pre-trial measures—. As it is stated in the ruling, the scope of the constitutional challenge—*recurso de amparo*—was «to rule on the standing of third parties, who are not intervening in a judicial proceeding, to appear in court and appeal against *judicial decisions that are prejudicial to their interests*». As suggested, it is the prejudice itself that justifies the intervention in the proceedings. It should be noted that, although the Constitutional Court declares that the infringement of a (substantive) fundamental right qualifies the importance of the intervention as part of the fundamental right to access to justice (Art. 24 CE), their violation is not the only case in which this interest could be admitted. We cannot rule out the possibility that there are cases in which, although no fundamental rights are at stake, there is a legitimate interest to intervene in the proceedings—e.g., the attachment of immovable property or the closing of the company in which the third party works—.

Thirds parties could be also directly affected by those pre-trial measures adopted in the framework of the freezing and confiscation of instrumentalities and proceeds of crime in the criminal proceedings [Arts. 803 *ter* a) to 803 *ter* d) CCP-Spain] or at a «stand-alone» procedure for freezing and confiscation [Arts. 803 *ter* e) to 803 *ter* u) CCP-Spain]. As already mentioned, third parties could be affected by the confiscation; and it is

<sup>30</sup> Ley Orgánica 7/2021, de 26 de mayo, de protección de datos personales tratados para fines de prevención, detección, investigación y enjuiciamiento de infracciones penales y de ejecución de sanciones penales [<https://www.boe.es/buscar/act.php?id=BOE-A-2021-8806>].

<sup>31</sup> GASCÓN INCHAUSTI, F. (2019), pp. 193-199.

precisely this prejudice that allows them to intervene in the proceedings. Following Art. 803 *ter a*) CCP-Spain, «[t]he judge or the court will order, *ex officio* or at the request of a party, the intervention in the criminal proceedings of such persons as may be affected by confiscation [...] [the] person who may be affected by the confiscation may take part in the criminal proceedings once their intervention is ordered, although this intervention will be limited to such aspects that directly affect their assets» [Art. 803 *ter b*) CCP-Spain].<sup>32</sup> It shall also be recalled that the adoption of pre-trial measures against the assets of the third party is also possible during criminal or «stand-alone» proceedings. Under Art. 127 *octies* CP «[i]n order to guarantee the effectiveness of the confiscation, the goods, means, instruments and gains may be apprehended or seized and placed in storage by the judicial authority from the outset of the proceedings». For that reason, the claim for confiscation may include «the application for precautionary measures, justifying the suitability of their adoption to ensure effective confiscation, as appropriate» [Art. 803.1 *ter h*) CCP-Spain]. The third party has the burden to invoke all available reasons against that measure in their statement of defence against the claim for confiscation.

## 6 Third Parties and the Decision to Charge (or to Terminate the Proceedings)

When the investigation phase has been concluded, the examining magistrate must decide on the termination of the proceedings —*sobreseimiento*— or their continuation —*apertura de juicio oral*—. Depending on the circumstances, the termination of the proceedings could be final —*sobreseimiento libre*— (Art. 637 CCP-Spain) or provisional —*sobreseimiento provisional*— (Art. 641 CCP-Spain). The continuation of the proceedings will only be possible if at least one party decides to press charges and exercise the criminal action and the examining magistrate considers that there is sufficient evidentiary support to go to trial.<sup>33</sup>

The judicial decision terminating proceedings can be challenged by any formal party. In addition, and upon implementation of the EU 2012 Directive, the victim may also challenge that decision, even if she was not a formal party to the proceedings. According to Art. 12 of the Crime Victim Statute (*vid. supra*), «[t]he decision of dismissal will be communicated [...] to the direct victims of the crime who had denounced the facts, as well as to the rest of the direct victims whose identity and domicile are known [...] The judicial decision terminating proceedings can be challenged by any formal party. In addition, and upon implementation of the EU 2012 Directive, the victim may also challenge that decision, even if she was not a formal party to the proceedings. Regarding the continuation of the proceedings, it is possible that no party decides to charge and, hence, to exercise the criminal action. In these cases, however, the examining magistrate may still consider that there are sufficient elements to open the trial phase. If so, the judge could propose to summon «those known to be directly aggrieved or harmed, who were not a party to the proceedings, so that within a maximum of fifteen days they appear to defend their action if they consider this to be appropriate. If they do not do so within the time limit set, the dismissal requested [...] will be ordered» [Art. 782.2 a) CCP-Spain].

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<sup>32</sup> On the procedural position of this third party and the critics to the limitations of his defense see GASCÓN INCHAUSTI, F., “Las nuevas herramientas procesales para articular la política criminal de decomiso total: la intervención en el proceso penal de terceros afectados por el decomiso y el proceso para el decomiso autónomo de los bienes y productos del delito”, *Revista General de Derecho Procesal*, núm. 38, 2016, pp. 21-24.

<sup>33</sup> On the so-called «fase intermedia» and the decision to continue or terminate the criminal proceedings in the Spanish legal order see GASCÓN INCHAUSTI, F. (2024), pp. 223-232.

To sum up, the victim who is not a party to the proceedings has specific procedural rights aimed at avoiding the termination of the proceedings: (i) challenging the examining magistrate’s decision not to open the trial phase; (ii) being offered the possibility to enter into the proceedings to press charges and request the opening of the trial phase, when no other party decided to charge and request the opening of the trial phase.

## **7 Third Parties in Court Proceedings**

During the trial phase the prosecuting parties and the defense present their statements, make their oral arguments and the relevant evidence is taken.

We have already explained that, under Spanish law, some third parties have a special status that allows them to intervene during criminal investigations. That is the case of the (non-prosecuting) victim of the crime, the third parties affected by judicial investigation measures, or the third parties affected by the freezing and confiscation of instrumentalities and proceeds of crime. Although it is not always clear if their intervention grants them the formal status of parties, they have specific procedural rights to defend themselves.

When proceedings reach the trial phase, these rights may differ in their contents; indeed, different third parties appear, whose legal position may require a specific legal treatment: this is namely the case of witnesses and other subjects involved in the taking of the evidence.

### ***7.1 The Right of Third Parties to Be Heard Fairly***

The right to be heard (Art. 24.1 CE) is attributed to the formal parties of the proceedings and to those third parties that, although not having that formal status, may intervene in it. The most important case in this regard is the third party affected by the freezing and confiscation of instrumentalities and proceeds of crime (*vid. supra*).

When the judge or the court consider that a person may be affected by the confiscation, they will order their intervention in the criminal proceedings [Art. 803 *ter a*) CCP-Spain]. Under Art. 803 *ter c*) the third party «may take part in the criminal proceedings once their intervention is ordered, although this intervention will be limited to such aspects as directly affect their assets, rights or legal position and may not be extended to matters relating to the criminal liability of the accused». That person will be therefore summoned to the court proceedings. This possibility of intervention and this *sui generis status* ensure their right to be fairly heard (Art. 24.1 CE).

### ***7.2 The Right of Third Parties not to Be Questioned***

The Law recognizes some exceptions to the general duty to give testimony. In particular, the following persons can refuse to testify: (i) family members of the accused in direct ascendant or descendant lines, their spouse or person linked to them by a *de facto* relationship similar to marriage, their brothers and sisters and bloodlines up to the second degree (Art. 416.1 CCP-Spain); (ii) the lawyer of the accused concerning facts confided in their professional capacity (Art. 416.2 CCP-Spain); (iii) translators and interpreters of conversations and communications between the person prosecuted or accused and others (Art. 416.3 CCP-Spain); (iv) the clergy and other religions’ ministers on facts that were revealed to them in the exercise of the duties of their ministry (Art. 417.1° CCP-Spain);

(v) public officials, whether civil or military, where they cannot testify without breaching the secrecy that they are under the obligation to keep (Art. 417.2° CCP-Spain); and (vi) the physically or morally disabled (Art. 417.3° CCP-Spain). All these persons have the right to be informed by the court of their exception from the duty to testify.<sup>34</sup>

The exception from the duty to testify finds many justifications and serves for the protection of different fundamental rights. In some cases, protection is ensured to the family member itself because of the moral-legal conflict of interest that arise in his inner self or the ideological and religious freedom of the investigated person.

In addition, any witness — regardless of whether they are entitled to refuse to testify— have the right not to «testify on a question whose answer may, materially or morally and in a direct and significant manner, prejudice either the person or the estate of any of the family members» (Art. 418 CCP-Spain).

The issues arises whether the protection of these relationships of confidence and confidentiality, covered by the exception from the duty to testify, could be expanded to other criminal investigation measures: *i.e.*, if it is possible to access by other means to the information that the witness does not have the duty to reveal. That is explained with a very graphical image: «what the mouth does not have to reveal, cannot be torn out by hand either».<sup>35</sup> A proper analysis of this issue requires the determination of the scope of the protection with the exception from the obligation to testify —the information itself or the relationship of the accused and the third party— and the basis of it.<sup>36</sup>

In almost every case, the exceptions from the duty to testify recognized in the CCP-Spain aim at protecting the confidence relationship itself: *rectius*, the third party's conflict of interest between complying with her duty to cooperate with the justice and protecting a person with whom she has a relationship of trust —and, therefore, not the information itself—.<sup>37</sup> It is also important to distinguish between the *active performance* that is required to testify in court and the *passive position* of the third party that is (merely) subject of a criminal investigation measure —e.g., a search in her home—. Therefore, the exception does not usually affect the possibility of adopting other judicial investigation measures: the impact on the legal position of third parties in these cases should be assessed under the criteria of proportionality (*vid. supra*).<sup>38</sup> There is just a case in which the protection that justifies the exception from the obligation to testify should be (and is) expanded to other criminal measures: the relationship between lawyers and their clients: this privilege —although it admits some exceptions in case of serious crimes— aims at protecting the right of defense itself (Art. 24.1 CE in relationship with Art. 118.4 CCP-Spain).<sup>39</sup>

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<sup>34</sup> BACHMAIER WINTER, L. (2004), pp. 47-50.

<sup>35</sup> BACHMAIER WINTER, L. (2004), p. 53.

<sup>36</sup> From a comparative perspective it is also of interest to consider how this possibility of the third party to refuse to testify is conceived: as a right —as in Germany, with the *Zeugnisverweigerungsrecht*— or as an exception of a duty to declare —as in Spain—.

<sup>37</sup> BACHMAIER WINTER, L. (2004), p. 66.

<sup>38</sup> BACHMAIER WINTER, L. (2004), pp. 56, 72, 75, 80.

<sup>39</sup> In connection with the confidentiality of the relation lawyer-client in Spain *vid.* VILLAMARÍN LÓPEZ, M. L. (2021), pp. 137-172.

### **7.3 The Protection of Non-Parties in Court Activities Involving Formal Participants**

The Crime Victim Statute recognizes specific rights of protection to the victims of the crimes, minors and vulnerable third parties during court proceedings (Art. 19 Ley 4/2015).

In particular, one or more of the following measures could be adopted for the protection of the victim of the crime: (i) measures to avoid visual contact between the victim and the alleged criminal, which could include the taking of evidence with technological devices; (ii) measures to ensure that the victim can be heard without being present in the courtroom; (iii) measures to prevent questions relating to the victim's private life that have no relevance to the allegedly criminal facts being prosecuted, unless the court exceptionally considers that they should be answered to assess the facts or the credibility of the victim's statement; and (iv) the holding of the oral hearing without the presence of the public to protect the intimacy of the victim (Arts. 19, 20, 22 and 25.2 Ley 4/2015). The objective of all these measures is to avoid the so-called “secondary victimization” (Preamble III and VIII Ley 4/2015).

In addition, when the victim is a minor or a vulnerable party with any physical or mental impairment, the following measures could be adopted during the proceedings: (i) the testimony made during the criminal investigation phase will be recorded by audiovisual means and may be reproduced at the trial phase, in order not to take it anew; and (ii) the testimony may be received through experts (Arts. 4, 22 and 26 Ley 4/2015).

In that vein, a legal reform in 2021 gave legal nature to the so-called helper advisor — *facilitador*— regulated in Art. 7 *bis* of the Code of Civil Procedure (*Ley de Enjuiciamiento Civil*, hereinafter LEC) and established a general duty to take all necessary measures to overcome the hurdles triggered by any disability: although formally established in the LEC, they are also applicable to criminal proceedings due the subsidiary nature of the LEC (Art. 4 LEC).<sup>40</sup> In accordance with the LEC, «[i]n the proceedings where persons with disabilities must participate, the necessary adaptations and adjustments will be made to ensure their participation under equal conditions» (Art. 7.1 *bis* LEC). In particular, to ensure the so-called right to understand and to be understood, the following measures could be adopted: (i) all communications with persons with disabilities, whether oral or written, shall be in clear, simple and accessible language; (ii) the person with a disability shall be provided with the necessary assistance or support to be understood, including interpretation in legally recognized sign languages and means of oral communication support for deaf people; (iii) the participation of an expert will be allowed who, as a helper advisor, will carry out the necessary adaptations and adjustments, so that the person with a disability can understand and be understood; and (iv) the person with a disability may be accompanied by a person of his or her choice from the first contact with authorities and officials (Art. 7.2 *bis* LEC).<sup>41</sup>

### **7.4 Can Third Parties Take Part in Court Activities?**

As already explained, both the victim and any other person could take part in court activities becoming a formal party if they choose to exercise the so-called particular or

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<sup>40</sup> Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil [<https://www.boe.es/buscar/act.php?id=BOE-A-2000-323>].

<sup>41</sup> MUYO BUSSAC, P. (2022a), pp. 73-76. Analysing the helper advisor, see, MUYO BUSSAC, P. (2022b), pp. 365-379.

popular accusation. The third parties affected by the confiscation could also take part in court activities under their *sui generis* procedural status.

It should also be added that, as a rule, trials are public (Art. 24.2 CE). Therefore, normally everyone can assist as public, unless the publicity is excluded to protect the intimacy of the victim or due to public order grounds.

## 8 The Protection of Third Parties in Decision-Making Processes

There are some cases in which parties may be directly or indirectly affected by the final judgment and, therefore, must be considered during the decision-making process. That is the case of the so-analyzed third party affected by the confiscation —who may have intervened or not in the proceedings— and other subjects that, although not expressly considered during the investigation, could also be influenced by the final decision. A traditional example of the latter are the employees, creditors or shareholders of the legal person that has been convicted and must endure a monetary penalty or, even worse, a suspension or termination of activities.

The Spanish Criminal Code (“CP”) incorporated the criminal liability of legal persons in 2010 (Arts. 31 *bis et seq.* CP).<sup>42</sup> The following penalties may be imposed on legal persons: (i) fines; (ii) dissolution; (iii) suspension of activities for a maximum period of 5 years; (iv) closure of premises and establishments for up to 5 years; (v) prohibition to carry out in the future the activities through which it has committed, favored or concealed the criminal offense; (vi) barring from obtaining public subsidies and aid, to enter into contracts with the public sector and to enjoy tax or Social Security benefits and incentives; (v) judicial intervention to safeguard the rights of the employees or creditors for the time deemed necessary (Art. 33.7 CP). All these penalties may affect third persons that have a direct relation with the legal person: the shareholders could see a reduction in the value of the company or the limitation of their rights of participation and the employees could be subject to a geographic mobility procedure to another establishment or, directly, be fired.<sup>43</sup> In addition, these measures could be imposed as a penalty in the judgment or as a preventive measure during the criminal proceedings (Art. 33.7 CP).

In this regard, the protection of the third parties affected by the judgment is something that should be considered by the court. Following Art. 66 *bis* CP, when determining the penalty of the legal person, the court shall consider «their economic and social consequences, and especially the effects on employees».<sup>44</sup> The prosecutor and the judge shall consider these circumstances in their respective procedural roles of accusing/defending and judging. The Law does not contain any provision about the possibility of these thirds-parties intervening in the proceedings. On one hand, it could be argued that, on the basis of the referred STC 30/2022 (*vid. supra*) these individuals have a legitimate interest in intervening. On the other hand, it could be said that there is not a fundamental right directly affected or such a direct damage that could really justify the intervention. It is probably more reasonable to assume that these persons are suffering an indirect harm, which may not suffice to sustain their intervention in the proceedings;

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<sup>42</sup> This has been made by the Organic Law 5/2010 [<https://www.boe.es/buscar/doc.php?id=BOE-A-2010-9953>]. About the criminal liability of legal persons see GASCÓN INCHAUSTI, F. (2012); BANACLOCHE PALAO, J., ZARZALEJOS NIETO, J., GÓMEZ-JARA DÍEZ, C. (2011).

<sup>43</sup> GASCÓN INCHAUSTI, F. (2012), pp. 103-106.

<sup>44</sup> GASCÓN INCHAUSTI, F. (2012), pp. 104-105.

compensation from the possible damages suffered should be requested in subsequent civil proceedings, brought against the legal person or its administrator.<sup>45</sup>

In another vein, it should be recalled that jury courts exist in Spain (Art. 125 CE).<sup>46</sup> However, the individuals who are part of them should not be considered third parties that participate in decision-making processes, but rather as true lay judges —*jueces legos*— who are part of the administration of justice.

## 9 Third Parties in Appeal Proceedings

The victim of the crime does not have any special right to appeal the judgment if she has not decided to accuse and, therefore, to become a formal party to the proceedings. However, the ruling is not indifferent to other third parties that may have the right to appeal it, such as the persons who have seen some object of their property confiscated. The judgment ordering the confiscation of their property must be served on them. They have the right to appeal it, although they have decided not to actively participate in the proceedings. These third parties could file any challenge available «although such appeal must be restricted to the rulings directly affecting their assets, rights or legal position, and may not extend to matters related to the criminal liability of the accused» [Art. 803 *ter* b) CCP-Spain]. In practice, as happens within the investigation and trial phase, it is difficult to determine the lines of what «directly affects» them and what not and, therefore, to set the limits of their right of defense.

Insofar as the confiscation depends on the illegal source of the objects, the criminal liability of the accused person is something that directly affects the third party that has seen her property seized.

If the third party identified by the court as affected by the confiscation decided not to intervene in the proceedings, she shall be considered in default—as happens in ordinary civil proceedings—. Despite this, the judgment shall be served on them and they still can file a challenge against it. In addition, the third party has a special extraordinary remedy for the rescission of the *res judicata* of the final judgment in cases in which the default was due to «involuntary» reasons [Art. 803 *ter* c) CCP-Spain in relation to Arts. 496-508 LEC].

## 10 *Res Judicata* and the Effects of Criminal Judgments Upon Third Parties

*Res judicata* —*cosa juzgada material*— refers to those effects produced by judicial decisions when they become final in proceedings other than the one in which they have been issued. There is a negative dimension —*ne bis in idem*— that excludes a second procedure with the same scope and a positive dimension, by which the ruling of the judgment must be considered by a court hearing a subsequent proceeding with a related scope. These effects are deployed within an objective, personal and temporal scope of application.

*Res judicata* only operates *inter partes*. This rule requires an «adaptation» in criminal proceedings insofar as is the accused person who delimits the personal scope of *res judicata* and not the prosecuting parties, that may be different in the subsequent

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<sup>45</sup> GASCÓN INCHAUSTI, F. (2012), pp. 105-106.

<sup>46</sup> The jury and the jury proceedings are regulated in Organic Law 5/1995 del Tribunal del Jurado [<https://www.boe.es/buscar/act.php?id=BOE-A-1995-12095>].

proceedings—which would, nevertheless, be affected by the preclusive effect of *res judicata*—. The *inter partes* effect is a basic rule based on the rights of defense and on the technical procedural principles in which civil and criminal proceedings are underpinned—at least, in the trial phase—. For that reason, a judgment given in criminal proceedings shall not bind third parties.

The connection of the *inter partes* effect of *res judicata* to the right of defense in criminal matters means that it can never be extended to third parties. Consequently, the exceptions to this principle, admitted in civil proceedings—*e.g.*, Art. 222.3 LEC—can never apply in criminal proceedings.<sup>47</sup>

It is also important to bear in mind that *res judicata* describes—or encompasses, if preferred—one of the ranges of *procedural* effects that may arise from a final judgment. Procedural law scholars have traditionally studied the relationship and the distinction between the *inter partes res judicata* effect and the *material* effects of the judgment. Usually, the judgment could be the premise of (civil or criminal) material rules and, therefore, a particular material effect may arise from it. This is what German scholars have called *Tatbestandswirkung*.<sup>48</sup> It is not precluded that this material effect of the criminal judgment could be deployed vis-à-vis third parties in other civil, labor or administrative proceedings—*e.g.*, a lawsuit about the civil liability *ex delicto* of the criminal or his insurance company—.

In a different vein, the CCP-Spain regulates a «stand-alone» procedure for the freezing and confiscation [Arts. 803 *ter e*) to 803 *ter u*) CCP-Spain] (*vid. supra*). This «modality» may be used by the Public Prosecution Office for convenience or opportunity—*e.g.*, the prosecutor does not want this third party intervening in the «main» proceedings— or by necessity—the accused person has died or is a fugitive—.<sup>49</sup> For the purpose of this report, we must highlight the relationship and effects of *res judicata* between the «main» criminal proceedings and the «stand-alone» confiscation proceedings.

There are cases where the confiscation proceedings are initiated against the third party after the criminal conviction of the accused—*i.e.*, a *follow-on* confiscation proceeding—. In this case, although the third party is not bound by the *res judicata* effects of the ruling, the latter will deploy its material effect on the follow-on proceedings. The conviction and, with it, the illegal origin of the assets—sustaining the material rule allowing confiscation (Art. 127 *quarter* CP)—*can be proven* with the previous judgment.<sup>50</sup> It must be noted that this is a *material effect* that can be refuted by any other means by the third party: this «binding» effect is based on the *de facto* nature of the judgment—*i.e.*, as a fact—and not by the procedural effects of *res judicata*. For that reason, normally the reasonable defense of the third party subject to the confiscation proceedings should be focused on the (lack of) knowledge of the illicit origin of the assets.

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<sup>47</sup> GASCÓN INCHAUSTI, F. (2024), pp. 301-305.

<sup>48</sup> LEIPOLD, D. (2018), “§ 322”, Rn. 7-16; GOTTWALD, P. (2020), “§ 322”, Rn. 16-23.

<sup>49</sup> GASCÓN INCHAUSTI, F. (2016), pp. 34-41.

<sup>50</sup> Art. 127 *ter* of the Spanish Criminal Code: «1. The Judge or Court of Law may order the confiscation outlined in the preceding articles even if no sentence has been handed down, when the unlawful financial position has been demonstrated in adversarial proceedings and in any of the following cases: a) That the subject is deceased or suffers from a chronic illness impeding his trial and that there is a risk that the criminal offences may prescribe; b) He is in a situation of default, preventing a trial within a reasonable period of time; or c) No sentence is handed down as the individual is exempt from criminal responsibility or said responsibility has been finalized. 2. The confiscation referred to in this article may only be adopted against individuals who have been formally accused or against defendants for whom there is circumstantial evidence of criminality when the situations outlined in the preceding Section have prevented criminal proceedings from continuing».

Conversely, we shall also address the effects of *res judicata* of the «stand-alone» — and previous— confiscation proceedings on the «main» criminal proceedings. This is a matter regulated by the law. In accordance with Art. 803 *ter p*) CCP-Spain, «[t]he judgment will set out the material effects of *res judicata* in relation to the persons against whom the action was taken [...] the content of the judgment in the separate confiscation proceedings will not be binding on the later trial of the accused [...] In the later criminal proceedings against the accused, if any, the confiscation of assets ruled on with the effect of *res judicata* in the separate confiscation proceedings will not be requested to be or be subject to the trial». The confiscation judgment shall not be binding against the accused of the (future) criminal proceedings. These rules, therefore, confirm and reinforce the *inter partes* positive effect of *res judicata*.

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