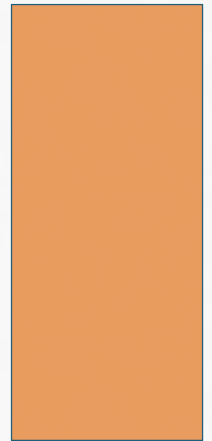


LESSON 2: MEANS OF DISPUTE RESOLUTION

Lecturer Dr Ana Isabel Blanco García
Procedural Law I



THE SOLUTION OF CONFLICTS IN A SYSTEM OF DEMOCRATIC JUSTICE

SELF-PROTECTION

Imposition of a solution by one of the parties

Requires judicial control

Forbidden.
Exceptions: self-defence

SELF-COMPOSITION

Agreed solution.
Possibility of the participation of a third person

Private rights and interests

Mediation, conciliation, transaction...

HETERO-COMPOSITION

Resolution by a third person

Third impartial, with auctoritas

Judge, arbitrator or other authority

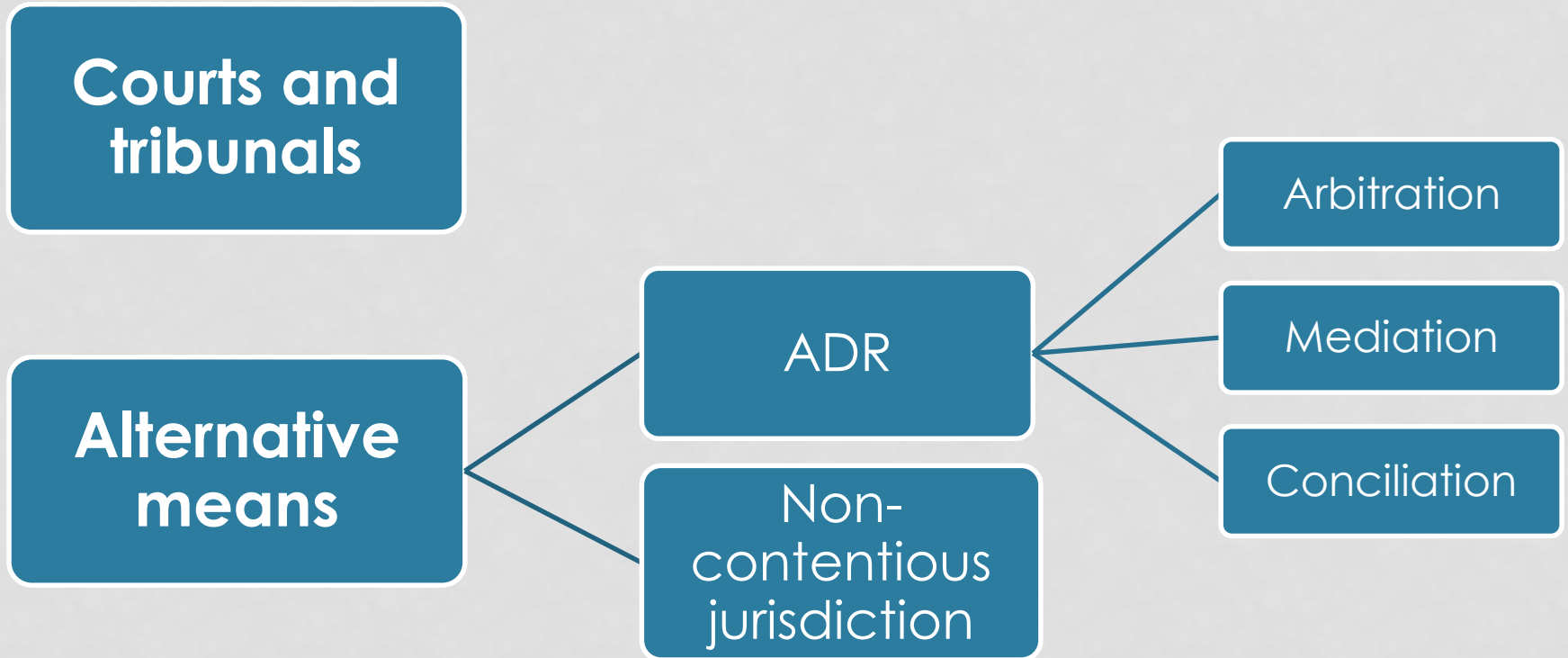
HETERO-COMPOSITION

- Resolution by **a neutral and impartial third party**.
- **Possibilities:** arbitrator, authority (notary public, qualified registrar) or judge.
- **Alternatives to judicial solutions:**
 - Use of alternative means is a consequence of a collapse in the courts and tribunals.
 - These alternative means contribute to freedom in the choice of the means of dispute resolution.

HETERO-COMPOSITION

- The resolution of the third party is **irrevocable**.
- Resolution with effects of res judicata.
- Although the parties opt for an alternative mechanism, the judicial proceedings will always be the last option for resolution (the judiciary is subsidiary).
- In matters that cannot be freely decided (criminal law), judicial proceeding is the only way to resolve a conflict.

INSTITUTIONS OF CONFLICT RESOLUTION



VOLUNTARY JURISDICTION

- **Hetero-compositive** form: intervention of an impartial third party.
- Sometimes, it does not involve a conflict (for example, divorce by consent).
- Act 15/2015, of 2 July, on non-contentious jurisdiction
- Art. 1 LVJ: *“all those proceedings which require the involvement of a court to protect rights and interests in matters of civil or commercial law, where there is no dispute requiring contentious proceedings, are considered non-contentious proceedings.”*

VOLUNTARY JURISDICTION

JURISDICTION:

- Courts of first instance or commercial courts
- Court clerk
- Justice of the peace
- Notary public, diplomatic or consular official
- Mayor
- Delegated councillor
- Courts when fundamental rights or interests of minors, or people that have to be especially protected, are affected. In other cases, other court officials will be empowered.

VOLUNTARY JURISDICTION

- The **judge** will resolve those conflicts which affect the public interest, civil state of the people, family matters, and others conferred to a judge by law.
- Other matters will be resolved by **a court clerk**.
- The LJV regulates the acts in matter of individuals, family, succession, law of obligations, rights in rem, commercial matters, voluntary auctions, and conciliation hearings.

VOLUNTARY JURISDICTION

- **INITIATING PROCEEDINGS:** initiated *ex officio*, at the request of the public prosecution service, or by an application filed by an individual having locus standi, with the details and circumstances identifying the applicant and giving an address for the purposes of notices.
- **DECIDING THE PROCEEDINGS:** order or decree, according to whether the judge or the court clerk has jurisdiction. Also, appeal or appeal for judicial review, respectively.
- The resolution has effects of res judicata while the circumstances do not change.

MECHANISMS OF ADR

- Previously called *alternative dispute resolution*, now called *adequate dispute resolution*
- Translated into Spanish as MARC
- These arise in Anglo-Saxon countries (especially the U.S.) as an out-of-court resolution system, although ADR has become complementary to the trial.
- Widely accepted by the public. Almost all states have legislation, procedural rules, and specific policies on ADR
- **ADVANTAGES:** speed, less costly, more user-friendly.

MECHANISMS OF ADR

MECHANISMS: conciliation, mediation, arbitration, negotiation

+ Mini-trial, early neutral evaluation, settlement conferences, summary jury trial, special masters, ombudsman

- Agreed option. Fairest solution. Voluntary option
- In recent years, ADR has spread throughout public disputes, not only private disputes (i.e. restorative justice)
- Europe supports mediation with Directive 2008/52/CE.

MECHANISMS OF ODR

MECHANISMS: mediation, arbitration, and negotiation

- Online dispute resolution systems.
- Entirely or partly online disputes
- Avoids time-consuming jurisdiction problems, choice of law, enforceability of court judgments.
- Facilitator
- Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR)

CONCILIATION

- **Self-compositive.**
- **Two classes:** “intraprocedural” / “lis pendens conciliation” and “extraprocedural” / “private conciliation” or “pre-trial conciliation”

A) LIS PENDENS CONCILIATION:

- Takes place in an open judicial process
- Court or tribunal jurisdiction.
- Conciliator can dictate a solution

CONCILIATION

B) PRE-TRIAL CONCILIATION:

- Prior to starting the process.
- Court clerk can act as conciliator and recognise the agreement by decree. In some cases it will be the Justice of Peace by means of an order.
- Good procedural faith → validity principle.
- **Matters can be freely decided.** Exclusions art. 139.2 LVJ.
- The agreement reached is an enforceable title.

ARBITRATION

- **Hetero-compositive** form → a third impartial resolution.
- Act 60/2003 of 23 December on arbitration.
- **Arbitration agreement:** previous agreement by which parties decide to submit disputes arising from a contract to arbitration (e.g. clauses in international mercantile agreements).
- Stipulations binding for complainants and respondents entering into arbitration
- Outcome / finding = award (Laudo arbitral)

ARBITRATION

- Only disputes on matters regarded by law to involve free choice.
- **Advantages:** speed, flexibility, less formality, and confidentiality.
- **CLASSES:**
 - a) Arbitration based on law: arbitrators decide the matter applying the law.
 - b) Arbitration based on ex aequo et bono: arbitrators decide in base of the “best of their knowledge and belief”. Only when parties agree.

ARBITRATION

➤ ARBITRATOR:

- The parties are free to agree on a procedure for appointing the arbitrator or arbitrators, providing the principle of equality is honoured.
- Unless otherwise agreed by the parties (*ex aequo et bono*), in arbitration not to be decided *ex aequo et bono* and conducted by a single arbitrator, such person will be required to be a lawyer if acting as such.
- When arbitration is to be conducted by three or more arbitrators, at least one must be a lawyer.

ARBITRATION

➤ PROCEDURE:

- Regulated in law on arbitration.
- Same evidence and precautionary measures as those admitted in a judicial process.
- The arbitrator's decision has res judicata effects and the same enforceable effects such as a judicial sentence.
- No court shall intervene except where so provided

MEDIATION

Self-compositive

Win-win solution

Private informal dispute resolution process

CONCEPT:

- Neutral mediator.
- Mediator does not have the power to impose a resolution on the parties nor propose any solution
- Disputing parties reach an agreement
- Mediator can only facilitate a compromise

REGULATION:

- Act 5/2012 of 6 July on mediation in civil and commercial matters.

MEDIATION

PRINCIPLES:

- **Parties' freedom of decision**

The parties are free to submit the dispute to mediation and end the proceeding.

- **Confidentiality**

The content is confidential, except if required in a criminal cause, or by agreement of the parties to disclose information.

- **Impartiality of the mediator**

Neutral and impartial third party.

Impartiality  independence

MEDIATION

CHARACTERISTICS:

1. Matters regarded by law to involve free choice (except criminal mediation).
2. Equality of opportunities: contributions of each party can be expanded, reduced, confirmed, or argued by the other party.
3. While the mediation is ongoing, there is no possibility to settle the dispute through other means.
4. Binding: since there is clause of submission to mediation, parties are bound to submit the dispute to mediation.

MEDIATION

SCOPE OF APPLICATION:

- Civil, commercial and family matters.
- Family mediation has improved in recent years. Capacity to reach agreements.
- **Exclusions:**
 - a. Criminal law: not available yet
 - b. Administrative law: not available yet
 - c. Labour law: planned conciliation
 - d. Consumer law: available.

MEDIATION

MEDIATOR:

- Arts. 11-15 Mediation Act → legal status.
- **Principles** → neutrality and impartiality.
- Obligation of **confidentiality**.
- Requirement of skilled training. Qualified and experienced mediators
- Mediators are experts in specific field of professional endeavor.
- Liability insurance compulsory.
- Single or group mediators. Individual persons, non-legal persons.
- The choice of mediator is up to the parties.

MEDIATION

PROCEDURE: from art. 16 Mediation Act.

INITIATION:

- By an application filed by an individual or by requesting mediation institution.
- **Civil proceedings:**
 - a. Non lis pendens → suspend the expiry of limitation or prescription periods.
 - b. Lis pendens → the parties, by mutual agreement, may apply for suspension thereof pursuant to the terms set forth in the procedural legislation.

MEDIATION

PROCESSING:

- Minimum three oral sessions:
 - a. Informative (art. 17 LM)/opening session
 - b. Constitutive (art. 19 LM)
 - c. On the merits
- Mediation involving claims for sums not exceeding €600 shall preferably be carried out by electronic means.
- Can be finalised **with agreement or without agreement.**
- Lack of agreement → judicial trial.

MEDIATION

ENDING WITH AGREEMENT:

1. No lis pendens in civil courts

- Agreement is recorded in a private document.
- Mediation agreement shall be submitted by the parties to a notary public to become enforceable.

2. Lis pendens in civil courts

- The parties may request the court to validate it.

CRIMINAL MEDIATION

- Included in the Fundamental Act of Penal Responsibility of Minors of 2000.
- Excluded in the Mediation Act.
- Accepted for adults and there are some pilot projects.
- **Critical** → non-disposal matters.
- **Advantages** → recognition of extenuating circumstances, statement of liability, etc.
- **Restorative justice movement.**

CRIMINAL MEDIATION

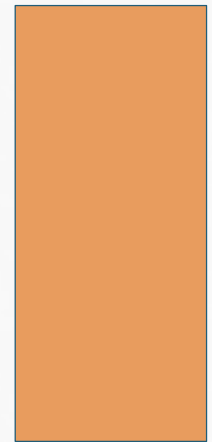
PROPOSALS OF IMPROVEMENT:

1. Delimitation of the objective scope of application.
2. Restriction in case of recidivism.
3. Legal advice to the victim.
4. Compensation to the victim: civil liability.
5. If the criminal breaks the agreement: offences committed in aggravating circumstances.

END

LESSON 3: JURISDICTION

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Procedural Law I



SUMMARY

1. Judiciary power.
2. Potestas.
3. Jurisdiccional authority/potestas.
4. Scope of jurisdiccional authority.
5. Organisation of judiciary power.
6. Constitutional courts.
7. Supranational courts.

JUDICIAL POWER

DIVISION OF POWERS OF MONTESQUIEU:

- French revolution.
- Approach: three independent “powers”, executive, legislative and judicial.
- In practice, judicial power is not really a power, and is subject to executive power.

JUDICIAL POWER

FRENCH BACKGROUND

Initially, judges were chosen by the population (Constitutions 1791, 1793, 1795).

From the Constitution 1799, judges were appointed by the First Consul, Napoleon ⇒ executive power empowers judicial power.

What does this mean?

Justice is part of the administration.

JUDICIAL POWER

SPANISH SITUATION BEFORE 1978:

- **Constitution 1812:** division of powers, but judicial power was moderated → the King appointed judges from proposal made by the Council of State.
- **Constitutions of the 19th century:** proclaimed judges as tenured officers, but each government appointed its own judges.
- **Fundamental Law on the Judiciary (LOPJ) 1870.**

JUDICIAL POWER

In general terms:

- Judicial power only administers justice.
- The administration of justice is a public administration.

What does this mean?

- Judges are civil servants.
- Judges are within the executive power.

AUTHORITY/POTESTAS

Starting point: what does political power mean?

- Capacity to make society obey; to connect the decisions adopted to other people.
- National sovereignty (article 1.2. SC).

Institutionalisation of power:

- Constituent power/“poder constituyente”: the people.
- Constituted power/“poderes constituidos”: powers derived from the fundamental norm (constitution).

AUTHORITY/POTESTAS

CONCEPT OF AUTHORITY

- Derives from sovereignty.
- Confers to the holder a position of superiority or supremacy.
- Supposes a control over behaviour of others.

All public powers have authority.

EXECUTIVE POWER

Article 97 SC:

“The government directs domestic and foreign policy, civil and military administration and the defence of the State. It exercises **executive and statutory authority** in accordance with the constitution and the law.”

LEGISLATIVE POWER

Article 66.2 SC:

“Parliament (Cortes Generales) exercises the **legislative power of the state** and approves its budget, controls the action of the government, and has other competences assigned by the constitution.”

JUDICIAL POWER

Article 117.3 SC:

“The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the courts and tribunals laid down by law, in accordance with the rules of jurisdiction and procedure which may be established therein.”

JURISDICTIONAL AUTHORITY

- Comes from **state sovereignty**.
- Qualified authority by the function developed: the jurisdictional function
- Power to **realise the right** in specific cases by ruling in an irrevocable way and having judgments executed.
- Enforceability function exclusive to **judges and magistrates**.

SCOPE OF JURISDICTION

1° STAGE (Art. 242 Constitution 1812, Art. 2 LOPJ 1870)

- Disputes between particulars (civil process)
- Imposition of penalties (criminal process)

2° STAGE (Constitution 1978 and LOPJ 1985)

- Protection of rights (Art.24.1 SC and Art.7.3 LOPJ)
- State monopoly of imposition of penalties (Art.25 CE)
- Protection of fundamental rights and freedoms (Art.53.2 SC and Art.7.1-2 LOPJ)
- Control of the administration (Art.106.1 SC and Art.8 LOPJ)
- Control of the constitutionality of legislation (Art.161 SC and Art.2 Fundamental Act 2/1979)

DOUBLE CONSTITUTIONAL SIGNIFICANCE OF JUDICIAL POWER

1. POLITICAL JUDICIAL POWER

Bodies with jurisdiccional authority in general.

2. JUDICIAL POWER ORGANISATION

Bodies with specific jurisdiccional authority (within judicial political power).

POLITICAL JUDICIAL POWER

Integrated by bodies with jurisdictional authority, individually considered.

- Constitutional Court
- Court of Accounts
- Supreme Court
- High Court of Justice
- Courts and tribunals
- Customary courts

JUDICIAL POWER ORGANISATION (TIT. VI CE)

- Organisation of judges and magistrates who have jurisdictional authority, regulated in the LOPJ 1985.
- The organisation does not itself have jurisdiction.
- It is a state organisation.

How are judges and magistrates organised?

In a single body, with a common legal statute, governed by the General Council of the Judiciary, art. 122 CE.

“The Fundamental Act of the Judicial Power shall make provision for the setting up, operation and internal administration of courts and tribunals as well as for the legal status of professional judges and magistrates, who shall form a single body, and of the staff serving in the administration of justice.”

CONSTITUTIONAL SPECIAL COURTS

- a) Constitutional Court
- b) Court of Accounts
- c) Military courts
- d) Customary courts
- e) Jury courts

CONSTITUTIONAL COURT

Arts. 159 to 165 SC developed by Fundamental Act 2/1979, of 3 October.

▶ **Functions:**

- a. Control constitutionality of laws.
- b. Protection of fundamental rights.

▶ **Composition:** 12 members appointed by the King and nominated as follows:

- 4 by Congress (majority of 3/5).
- 4 by Senate (majority of 3/5).
- 2 by the Government and,
- 2 by the CGPJ (majority of 3/5).

CONSTITUTIONAL COURT

- ▶ **Membership conditions:** Spanish nationality, to have been appointed magistrate and prosecutor, university professor, public official, or lawyer, all of whom must have a recognised standing with at least 15 years practice in their profession.
- ▶ **Term:** 9 years, 1/3 of the magistrates are renewed every 3 years, without the possibility of being re-elected.

CONSTITUTIONAL COURT

► **Incompatibilities:**

Any position of a representative nature, any political or administrative office, a management position in a political party or a trade union, as well as any employment in their service, active service as a judge or prosecutor, and any professional or business activity whatsoever.

CONSTITUTIONAL COURT

- ▶ **Presidency/chair:** proposed by parliament and appointed by the King for a term of three years.
- ▶ **Vicepresidency:** The same system of nomination of the president.
- ▶ **Guarantees:** independence of the magistrates (art. 159 CE).
- ▶ **Internal organisation:**
 - In plenary session (Pleno): all the members are present.
 - Divisions: president and 5 magistrates (total 6).
 - Sections: president and 2 magistrates (total 3).

CONSTITUTIONAL COURT

Jurisdiction:

1. Control of constitutionality of acts and statutes having the force of an act.
2. Individual appeals for protection (recursos de amparo) against violation of rights and freedoms.
3. Conflicts of jurisdiction between the state and the self-governing regions or between the self-governing regions themselves.
4. Appeals by the government against provisions and resolutions adopted by the bodies of the self-governing regions.
5. Other matters assigned to it by the constitution or by fundamental acts
6. Resolution "incidenter tantum" of incidental questions.

COURT OF ACCOUNTS/COURT OF AUDITORS/AUDITING COURT

Arts. 136 CE; Fundamental Act 2/1982; Act 7/1988.

▶ **Functions:**

- a. Auditing the state's accounts and financial management.
- b. Auditing state accounts and those of the public sector.

▶ **Composition:** 12 advisers (6 designated by Congress for 9 years, and 6 by the Senate, by majority of 3/5).

▶ **Presidency:** appointed by the King, from nominations by the Constitutional Court, for a term of three years.

COURT OF ACCOUNTS

▶ **Conditions:**

Be auditor of the court, certified auditor/chartered accountant, magistrate and public prosecutor, university lecturer, public civil officers of bodies that demand a university degree, lawyers, economists and mercantile lecturers, with recognised competence and with more than 15 years of professional experience.

▶ **Guarantees:**

Similar legal statute as judges and magistrates (independent and tenured officers).

▶ **Internal organisation:**

- Plenary session/plenum.
- Prosecution sections.
- Audit counsellors.

MILITARY COURTS

Art. 117.5 SC; Arts. 3.2 and 9.2 LOPJ; Fundamental Act 4/1987; Act 6/1988, of 5 April; Law./1988, of 21 of April; Fundamental Act 4/1981, of 1 June; Fundamental Act 13/1985, of 9 December; Fundamental Act 2/1989, of 13 April.

Art. 117.5 SC: The principle of jurisdictional unity is the basis of the organisation and operation of the courts. The law shall make provision for the exercise of military jurisdiction strictly within military framework, and in cases of martial law, in accordance with the principles of the constitution.

MILITARY COURTS

- ▶ **Jurisdiction:** military law and contentious matter-administrative.

- ▶ **Organs:**
 - a. Division: president and 7 magistrates.
 - b. Central military court: with 2 robed central military courts “Tribunales togados militares”.
 - c. Territorial military courts.
 - d. Robed territorial military courts “Tribunales territoriales togados”.

CUSTOMARY COURTS

Art. 19 LOPJ:

- The “Tribunal de las Aguas de la Vega de Valencia” [**Court for Irrigation Disputes of the Region of Valencia**] is a court of custom and common law.
- The “Consejo de Hombres Buenos de Murcia” [**The Lay Counsellors Council of the Region of Murcia**] is a court of custom and common law.

A) COURT FOR IRRIGATION DISPUTES OF THE REGION OF VALENCIA (ART. 125 SC, 19.3 LOPJ, D. 5 APRIL OF 1932)

- ▶ **Composition:** 8 officials and judges from farm irrigation channels (acequias) and communities of the “La Vega de Valencia”: Quart, Benàger-Faitanar, Tormos, Mislata, Mestalla, Favara, Rascanya, Rovella and Xirivella.
- ▶ **Nomination:** by democratic election in each irrigation community (3 years, with possibility of re-election).
- ▶ **Presidency and vicepresidency:** by vote (one from the right bank and another from the left bank).
- ▶ **Functions:** officials (syndics) and jurisdiccionales (judges). This court settles conflicts between irrigators orally, quickly, cheaply, publicly, and impartially.
- ▶ **Farmer-judges** are honourable persons, experts in uses and customs, and fair in their proceedings

B) THE LAY COUNSELLORS COUNCIL OF THE REGION OF MURCIA (ART. 125 CE, 19.4 LOPJ, OL 13/1999)

- **Jurisdiction:** disputes between irrigators and for certain offenses against the ordinances
- **Internal organisation:** five full members and five lawyers.
- **Presidency:** The panel is chaired by the mayor or his delegate. S/he has a decisive vote in case of a tie and is responsible for carrying out the resolutions.
- **Proceedings:** the council holds its hearings in public every Thursday in the salon of the city hall of Murcia, from nine until midnight.

<https://ich.unesco.org/en/RL/irrigators-tribunals-of-the-spanish-mediterranean-coast-the-council-of-wise-men-of-the-plain-of-murcia-and-the-water-tribunal-of-the-plain-of-valencia-00171>

JURY COURT

Art. 125 CE; Arts. 19.2 and 83 LOPJ; OL 5/1995

Art. 125 CE: “Citizens may engage in popular action and take part in the administration of justice through the institution of the jury, in the manner and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.”

Composition:

- Nine jurors
- One trial judge belonging to the provincial court.
- If, due to the personal status of the accused, the jury trial must take place in the Supreme Court or a High Court of Justice, the trial judge shall be a judge of the Criminal Chamber of the Supreme Court or of the Civil and Criminal Chamber of the High Court of Justice, respectively.
- Two alternate jurors.

JURY COURT

1. Felonies against the person:
2. Felonies committed by civil servants in the exercise of their posts;
3. Felonies against honour;
4. Felonies against freedom and security;
5. Felonies of arson.
 - a) Unlawful killing (Articles 138 to 140);
 - b) Intimidation (Article 169.1);
 - c) Failure in duty to assist (Articles 195 and 196);
 - d) Trespassing in dwellings (Articles 202 and 204);
 - e) Forest fires (Articles 352 to 354);
 - f) Disloyalty in the custody of documents (Articles 413 to 415);
 - g) Corruption (Article 419 to 426);
 - h) Influence peddling (Articles 428 to 430);
 - i) Embezzlement (Articles 432 to 434);
 - j) Fraud and illegal taxation (Articles 436 to 438);
 - k) Activities prohibited for civil servants (Articles 439 and 440);
 - l) Disloyalty in the custody of prisoners (Article 471).

SUPRANATIONAL COURTS

- 1) European Court of Human Rights (ECHR) /
Tribunal Europeo de Derechos Humanos**
- 2) Court of Justice of the European Union (CJEU) /
Tribunal de Justicia de la Unión Europea**
- 3) International Criminal Court / Corte Penal
Internacional**

EUROPEAN COURT OF HUMAN RIGHTS

CEDH 4 November 1950. Reformed the TEDH 26 June 1998, Prot. 11.

► **Functions:**

- ▲ **Complaints (“applications”)** submitted by individuals and states concerning violations of the European Convention on Human Rights, which principally concerns civil and political rights.
- ▲ Any contracting state to the European Convention on Human Rights can sue another contracting state in the court for alleged breaches of the Convention, although in practice this is very rare.

Conditio sine qua non: Previous exhaustion of all the procedural domestic remedies.

EUROPEAN COURT OF HUMAN RIGHTS

- ▶ **Number:** a judge from each of the states of the CEDH.
- ▶ **Election:** by parliamentary assembly of the Council of Europe; for 9 years, renewing each 3 years by halves. Judges cannot be re-selected.
- ▶ **Structure:**
 - a. **Single judge:** only rules on the admissibility of applications that are clearly inadmissible based on the material submitted by the applicant.
 - b. **Committee:** composed of 3 judges, committees rule on the admissibility of cases as well as the merits when the case concerns an issue covered by well-developed case law (decision must be unanimous).
 - c. **Chamber:** 7 judges, chambers primarily rule on admissibility and merits for cases that raise issues that have not been ruled on repeatedly (a decision may be made by a majority). Each chamber includes the section president and the “national judge” (the judge with the nationality of the state against which the application is lodged).
 - d. **Grand Chamber:** 17 judges, the Grand Chamber hears a small and select number of cases that have been either referred to it (on appeal from a chamber decision) or relinquished by a chamber, usually when the case involves an important or novel question. Applications never go directly to a Grand Chamber. The Grand Chamber always includes the president and vice-president of the court, the five section presidents, and the national judge.

COURT OF JUSTICE OF THE EUROPEAN UNION

Established in: 1952

Location: Luxembourg

COMPOSITION:

- General court
- Court of Justice

GENERAL COURT

- **Composition:** from 2016 there are 47 judges. From 2019 there will be 56 (2 from each member state).
- **President:** elected by the judges from the General Court.
- **Jurisdiction:**
 - ✓ Actions brought by **natural or legal persons against acts of the institutions, bodies, offices or agencies of the European Union** and against regulatory acts (which concern them directly and which do not entail implementing measures) or against a failure to act on the part of those institutions, bodies, offices or agencies;
 - ✓ Actions brought by the **member states against the Commission**;
 - ✓ Actions brought by **member states against the Council** relating to acts adopted in the field of state aid, trade protection measures (dumping), and acts by which it exercises implementing powers;
 - ✓ Actions seeking **compensation for damage** caused by the institutions or the bodies, offices or agencies of the European Union or their staff; actions based on contracts made by the European Union which expressly give jurisdiction to the General Court;
 - ✓ Actions relating to **intellectual property** brought against the European Union Intellectual Property Office and against the Community Plant Variety Office;
 - ✓ Disputes **between the institutions of the European Union and their staff** concerning employment relations and the social security system.

COURT OF JUSTICE

- ▶ **Composition:** 28 judges and 11 advocates general. The judges and advocates general are appointed by governments (recognised experience, guarantees of independence).

They are appointed for a term of office of 6 years, which is renewable.

The judges of the Court of Justice elect from amongst themselves a president and a vice-president for a renewable term of 3 years. The president directs the work of the court and presides at hearings and deliberations of the full court or the Grand Chamber. The vice-president assists the president in the exercise of his duties and takes his place when necessary.

- ▶ **Structure:**

a) Full Court: in the particular cases prescribed by the statute of the court (including proceedings to dismiss the European Ombudsman or a Member of the European Commission who has failed to fulfil his or her obligations) and where the Court considers that a case is of exceptional importance.

b) Grand Chamber: 15 judges, when a member state or an institution which is a party to the proceedings so requests, and in particularly complex or important cases.

c) Chambers: 3-5 judge. The presidents of the chambers of 5 judges are elected for three years, and those of the chambers of 3 judges for one year.

d) Advocates General

e) Registrar

COURT OF JUSTICE

CLASSES OF PROCEDURES:

1. **Preliminary rulings** from national courts in the matters specified by the statute.
2. **Actions for failure to fulfil obligations** brought by the Commission or by the member state to determine whether a member state has fulfilled its obligations under European Union law.
3. **Actions for annulment** of a measure (in particular a regulation, directive or decision) adopted by an institution, body, office, or agency of the European Union. (MS against EC or Council)
4. **Actions for failure to act** of institution, body, office or agency of the European Union.
5. **Appeals** against judgments and orders of the General Court.

INTERNATIONAL CRIMINAL COURT

- **Statute of Rome of 17 July 1998.**
- **Jurisdiction:**
 1. genocide, crimes against humanity, or war crimes
 2. crime of aggression - the use of armed force by a state against the sovereignty, integrity, or independence of another state.
 3. crimes committed by a state party national, or in the territory of a state party, or in a state that has accepted the jurisdiction of the court;
 4. crimes referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter.

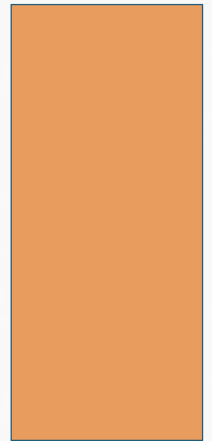
INTERNATIONAL CRIMINAL COURT

- **Internal organisation:** Judges are elected by the Parliamentary Assembly of the Council of Europe from lists of three candidates proposed by each state. They are elected for a non-renewable term of nine years.
- **Structure:** The Rome Statute system.
 - a) Presidency:** external relations with states, coordinates judicial matters such as assigning judges, situations and cases to divisions, and oversees the registry's administrative work
 - b) Judicial divisions:** 18 judges in 3 divisions – pre-trial, trial and appeals – conduct judicial proceedings
 - c) OTP (Office of the Prosecutor):** preliminary examinations, investigations, and prosecutions
 - d) Registry:** non-judicial activities, such as security, interpretation, outreach, support for defence and victims' lawyers.

END

LESSON 4: CONSTITUTIONAL PRINCIPLES APPLIED TO THE JUDICIARY

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Procedural Law I



SUMMARY

1. List → basic principles
2. Unity
3. Judicial power and self-governing regions
4. Exclusivity
5. Legal judge or judge predetermined by law

LIST

Basic principles of judicial power:

1. **Unity:** art. 117.5 SC and 3.1 LOPJ.
2. **Exclusivity:** art. 117.3 SC and 2.1 LOPJ.
3. **Legal judge or judge predetermined by law:** art. 24.2 and 117.6 SC.

UNITY

Art. 117.5 SC → “The principle of jurisdictional unity is the basis of the organisation and operation of the courts. The law shall regulate the exercise of military jurisdiction strictly within military limits and in cases of state of siege (martial law), in accordance with the principles of the constitution.”

Art. 3.1 LOPJ → “1. There is a sole jurisdiction exercised by the courts and tribunals foreseen in this act, notwithstanding any other judicial faculties recognised by the constitution and vested in other bodies.”

UNITY

Starting point → The jurisdiction is an authority that arises from the national sovereignty and therefore it is unique.

Judicial power is assigned to the ordinary jurisdiction. However, special courts have been created in relation to different subject matters: violence against women; commercial courts; and courts with special duties regarding criminal sentencing; as well as juvenile courts.

In addition, the SC provides for certain courts that enjoy full independence and impartiality and are fully subject to the rule of law. These are the Constitutional Court, juries, the Court of Accounts, military courts and customary court.

UNITY

Need for theoretical unity:

- One single jurisdictiony → different jurisdictional bodies.
- Full and indivisible jurisdiction → distribution of competences.
- Competence is the field where jurisdiction is applied.

***Competence=Competencia**

***Jurisdiction=Jurisdicción**



UNITY

Double constitutional meaning

A. Classes of courts according to the competences (jurisdictional divisions)

1. General or ordinary competence: civil and criminal divisions. Matters of a civil nature, but also other matters not allocated to other jurisdictional divisions: commercial matters. ***Vis attractiva***
2. Specialist competence: contentious-administrative and labour divisions. Matters of a public nature or specific persons.
3. Special competence: Violence against woman, etc.

➤ **Courts of exception are forbidden (art. 117.6 SC).**

UNITY

B. Classes of courts by organisation

1. Ordinary:

- Regulated in the Judiciary Act (LOPJ).
- Integrated by judges and magistrates:
 - i. Single staff regulation or single statute.
 - ii. Art. 122.1 SC: Fundamental Act → LOPJ
 - iii. Staffed by judicial specialists
 - iv. Judicial dedication (Cuerpo único de carrera judicial).
 - v. Management by the CGPJ. (Art. 122.2 SC)

Article 122

1. The Fundamental Act of the Judiciary shall determine the setting up, operation and control of the courts and tribunals as well as the legal status of professional judges and magistrates, who shall form a single body, and of the staff serving in the administration of justice.
2. The General Council of the Judiciary is its governing body. A fundamental act shall set up its statutes and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotions, inspection and the disciplinary system.

UNITY

2. Special:

- Mentioned in the SC and in art. 3.1 LOPJ.
- Constitutional court, military courts, court of audits, etc.

3.1 LOPJ: There is a sole jurisdiction exercised by the courts and tribunals foreseen in this act, notwithstanding any other judicial faculties recognised by the constitution and vested in other bodies.

- Exceptional courts are prohibited.

JUDICIAL POWER AND SELF-GOVERNING REGIONS

Art. 149.1.v SC → The state holds exclusive competence over the administration of justice.

Nuances:

- “Inaccessible core of the judiciary”: jurisdictional function and organisation → state.
- Administration of the administration of justice: tangible and intangible assets and staff resources → self-governing regions.

JUDICIAL POWER AND SELF-GOVERNING REGIONS

Regional competences:

A. Human resources:

1. Judges and magistrates excluded since they are part of the “inaccessible core”. Also court clerks.
2. Personnel included in the Administration of Justice (art. 470 LOPJ): members of Association of Forensic Scientists; doctors within the National Toxicology and Forensic Science Institute; Procedural and Administrative Management Association members; specialised technical personnel within the National Toxicology and Forensic Science Institute; technical personnel of the Procedural and Administrative Management Association; judicial assistants and laboratory assistants who are members of the National Toxicology and Forensic Science Institute.
3. Labour personnel (art. 473.2 LOPJ). Maintenance and preservation of buildings, equipment or installations, and similar services

B. Material assets

JUDICIAL POWER AND SELF-GOVERNING REGIONS

High Courts of Justice

Art. 152.1 SC: “(...) A High Court of Justice, without prejudice to the jurisdiction exercised by the Supreme Court, shall head the judiciary within the territorial area of self-governing regions

- **Statutes of autonomy** → creation.
- **LOPJ** → Generalises to all the AACC the existence of HCJ (TSJ).

JUDICIAL POWER AND SELF-GOVERNING REGIONS

Judicial demarcations:

Art. 152.1 SC: “The Statutes of the self-governing regions shall establish the circumstances and manner in which they will participate in the organisation of the judicial demarcations of the territory, all of which must be in conformity with the provisions of the fundamental act on judicial power and compatible with its unity and independence.”

Art. 35.2 LOPJ: the self-governing regions will participate in the determination of judicial boundaries within their respective territories, forwarding to the government, at its behest, a proposal outlining the administrative areas.

SC Judgment 56/1990 → declares constitutionality art. 35 LOPJ.

JUDICIAL POWER AND SELF-GOVERNING REGIONS

Exhaustion of procedural instances:

Art. 152.1 SC: “Without prejudice to that in article 123, the successive procedural instances, in his case, will take place in front of judicial organs in the territory of the self-governing region in which was located the competent organisation in first instance”.

- **Statutes of Autonomy** → exhaustion before the HCJ (TSJ).
- **LOPJ** → Exhaustion before a judicial body territorially placed in the self-governing region, not necessarily the HCJ.

EXCLUSIVITY

Art. 117.3 SC → “The exercise of judicial authority in any kind of action, both in passing judgment and having judgments executed, lies exclusively within the competence of the courts and tribunals established by law, in accordance with the rules of jurisdiction and procedure which may be established therein.”

Art. 117.4 SC → “The courts and tribunals shall exercise only the powers indicated in the foregoing clause and those which are expressly allocated to them by law as a guarantee of some right.”

Art. 2.1 LOPJ → “The exercise of judicial functions, adjudging and enforcing the judgments delivered is vested exclusively in the courts and tribunals foreseen by law and in international treaties.”

EXCLUSIVITY

Positive meaning → Potestas is exclusive to judges and courts.

Negative meaning → Judges and courts cannot exercise powers other than those included under their potestas or those previously granted to them by law.

EXCLUSIVITY

STATE MONOPOLY

A. International field:

- **Art. 93 SC** → By means of fundamental act, authorisation may be granted for concluding treaties by which powers derived from the constitution shall be vested in an international organisation or institution.
- **Art. 2.1 LOPJ** → The exercise of judicial functions, adjudging and enforcing the judgments delivered is vested exclusively in the courts and tribunals foreseen by law and in international treaties.

EXCLUSIVITY

JUDICIAL MONOPOLY of the state:

- The jurisdiction corresponds **exclusively to judges and courts** regulated in the LOPJ.
- **Arts. 122.1 SC and arts. 2.1, 3.1 LOPJ.**
- The legislative and executive powers do not have jurisdictional authority (with nuances: execution of administrative sanctions).

EXCLUSIVITY

B. National field:

- The principle of unity is applied, pursuant to which internal jurisdiction divisions do not exist.
- **The self-governing regions do not have sovereignty nor jurisdiction**, only competences regarding the administration/management of the administration of justice.

LEGAL OR PREDETERMINED JUDGE

Art. 24.2 SC: “all persons have the right of access to the ordinary judge predetermined by law”

Art. 117.6 SC: “Courts of exception are prohibited”



POSITIVE and NEGATIVE perspective of the principle

LEGAL OR PREDETERMINED JUDGE

POSITIVE MEANING

A. As regards jurisdictional bodies:

1. Pre-existence of the judge or court: exclusively by fundamental law, prohibition of the legislative delegation and decree-law.
2. Extent of the power established: generic, objective, functional and territorial jurisdiction.
3. Objective rules of assignment of the cases: no formal law.
4. Designation of judges and magistrates: the LOPJ regulates the composition of divisions and sections, nomination, transfer, and promotion of them.
5. Assignment of lectures: rules of assignment of lectures to the magistrates, approved annually by government chambers.

LEGAL OR PREDETERMINED JUDGE

POSITIVE MEANING

B. As a fundamental right:

- Right of all person to be judged by judges and magistrates already predetermined by law.
- Guaranteed by individual appeals for protection.
- The general rule jurisdiction cannot be altered, except by objective and reasonable reasons.

LEGAL OR PREDETERMINED JUDGE

“ORDINARY JUDGE”

- Independent and impartial judge.
 - Established with the constitutional and legal guarantees.
 - Acts within the scope of the pre-existed competence and jurisdiction.
- ❖ **It does not involve restriction to ordinary courts**, as this would mean the exclusion of the special courts recognised by the constitution.

LEGAL OR PREDETERMINED JUDGE

NEGATIVE MEANING

- **Prohibition of exceptional courts** → those created *ex post facto* to judge a particular case and which contravene the rules of competence and jurisdiction.
- **Other prohibitions** → fundamental law restriction
- The violation of the right that establishes the judicial competence implies a violation of judicial independence

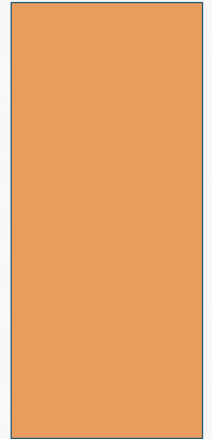


Prohibition of ad
hoc courts

END

LESSON 5: JURISDICTIONAL PERSONNEL

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Procedural Law I



SUMMARY

1. Judges and magistrates
2. Legal statute of the jurisdictional personnel
3. Impartiality
4. Independence and submission to the law
5. Tenured position
6. Responsibility and liability

JUDGES AND MAGISTRATES

TERMINOLOGICAL PRECISIONS:

Art. 299 LOPJ → the judicial career system consists of three ranks:

- Supreme court judges
- Judges
- Magistrates.

➤ **Judge** → singular title.

➤ **Magistrate** → member of a collegiate body.

***Magistrate-judge** → singular title, but has category of magistrate by seniority (minimum 3 years).

STATUTE OF JURISDICTIONAL PERSONNEL

Judicial career → All magistrates who practice a jurisdictional function are part of the judicial system.

Art. 122.1 SC → “The Fundamental Act of the Judiciary shall determine the setting up, operation, and control of the courts and tribunals as well as the **legal status of professional judges and magistrates**, who shall form a single professional body, and of the staff serving in the administration of justice.”

STATUTE OF JURISDICTIONAL PERSONNEL

ACCESS TO THE JUDICIAL CAREER

a) **Competitive exams:** art. 301 et seq. LOPJ.

- Exams + theoretical and practical course at law school.
- Requirements: Spanish nationality, more than 18 years of age, law graduate.
- Same exam for judges and public prosecutor.
- Not incurring in cause of inability (art. 303 LOPJ).

Physical or mentally handicapped individuals performing judicial duties, persons convicted for malicious offences in so far as they have not been rehabilitated; individuals charged or indicted for malicious offences until they have been absolved or the proceedings dismissed, and those persons who do not enjoy full legal rights may not fully exercise all their legal rights.

STATUTE OF THE JURISDICTIONAL PERSONNEL

b) Merit-based competition (4° turn): art. 311.1 LOPJ

- For every four vacancies that arise within the category of magistrate, **two** will be filled by promoting those **judges who are ranked first within their category**.
- The **third** vacant post will be filled by a **judge selected via competitive examinations** for the civil and criminal judicial spheres, and for specialisations within the administrative, labour-related and commercial spheres.
- The **fourth** vacant post will be filled via a **selection process** entailing eminent **jurists** with more than ten years of professional experience who have successfully completed the training course referred to in paragraph 5 of article 301. In addition, a third of such vacant posts will be reserved for first or second-category members of the Association of Court Registrars

STATUTE OF JURISDICTIONAL PERSONNEL

c) Designation by the CGPJ:

- Civil and criminal chambers of the High Court of Justice: one of every three vacancies will be filled by an eminent jurist with more than ten years of professional experience in a self-governing region, appointed on the proposal of the General Council of the Judiciary (art. 330.4 LOPJ). The remaining vacancies will be filled by magistrates proposed by the General Council of the Judiciary,
- Divisions Supreme Court: 1 of each 5 vacancies appointed by the CGPJ from jurists with more than 15 years of experience and recognised competence (arts. 343, 345 LOPJ).
- The Supreme Court is constituted by its president, deputy president, presidents of its five chambers, and 84 senior judges. The president of the Supreme Court is elected by the General Council for the Judiciary, and once elected s/he also becomes president of the General Council for the Judiciary.

STATUTE OF JURISDICTIONAL PERSONNEL

PROMOTION OF CATEGORY

Judge to magistrate:

- Seniority: For every four vacancies that arise within the category of magistrate, two will be filled by promoting those judges who are ranked first within their category.
- Selection via competitive examinations: for the civil and criminal judicial spheres, and for specialisation within the administrative, labour-related and commercial spheres.

Magistrate to magistrate Supreme Court

- Seniority: 2 magistrates
- Selective evidence: 2 magistrates
- Vacancies: 4 by members of the judicial system

STATUTE OF JURISDICTIONAL PERSONNEL

PROVISION OF SPECIFIC POST

- **Jurisdictional places:** resolved by merit-based competition and assigned according to seniority.
- **Government places:** presidencies of National High Court, High Court of Justice, and Provincial Audience are appointed to the CGPJ according to rules of the LOPJ. Nomination for five years. President of the Supreme Court appointed from among magistrates of the court.

IMPARTIALITY

ESSENCE OF THE PROCESS:

Two confronted parties and an impartial third person

- Impartiality refers to a specific judge in a specific case.
- Partiality is subjective. Judges and magistrates have the duty to disclose all the information that could cause partiality.
- The judge has to decide without any direct or indirect interest in the outcome of the judgment, or without a tendency to favor the parties.
- Judges must be free to exercise jurisdiction without interference from litigants, the state, media, or other entities.

IMPARTIALITY

Art. 219 LOPJ: rounds for abstention or recusation:

- Marriage ties or similar de facto situation, kinship by consanguinity, or affinity to the second degree with any of the parties, or the Prosecutor's Office representative or the court lawyer, as well as the judges or magistrates involved in the suit or legal proceedings.
- If the judge has held wardship or guardianship duties with regard to any of the parties, or has been a ward or under the care of any of them.
- If a complaint or formal accusation has been made by any of the parties as the material author of an offence or an infraction, provided that such complaint or accusation has given rise to criminal proceedings and provided further that their outcome was not an absolutory judgment or the dismissal of the proceedings.
- If the judge has been sanctioned in the course of disciplinary measures requested or filed by any of the parties.
- If s/he has acted as legal counsel or representative of any of the parties, or has issued an expert report in the proceedings, or has acted in same as prosecutor, delivery expert testimony or as a witness.
- If the judge has been the complainant or accuser of any of the parties.
- If the judge has any pending proceedings with any of them.
- Intimate friendship or manifest ill will against any of the parties.

IMPARTIALITY

Art. 219 LOPJ: rounds for abstention or recusation (cont.)

- If s/he has a direct or indirect interest in the suit or in the proceedings.
- If s/he has taken part in the inquiry stage of the criminal proceedings or has issued a judgment in a former instance of the suit or legal proceedings.
- If any of the parties has been a subordinate of the judge who is to reach a decision on the matter.
- Holding public office, or holding any office or employment whereupon the judge or magistrate has been directly or indirectly involved in the subject matter of the present suit or has taken part in other proceedings related to the latter.
- In those proceedings in which the public administration is party to, if the judge or magistrate is in a similar position with regard to the public officer who issued the decision or reported on the same which gave rise to the proceedings as contemplated in the disqualifying circumstances 9, 12, 13 and 15 of this article.
- If the judge or magistrate has held public office, and in the course of the same, has been acquainted with the subject matter of the suit to the extent that it would be detrimental to an impartial judgment.

IMPARTIALITY

GUARANTEES → abstention and recusal

Abstention/self-recusal:

- The magistrate or judge that incur in any of the partiality causes has to recuse himself (art. 217 LOPJ).

“A magistrate or judge who is under any legal disqualifying circumstance should abstain from hearing the suit without waiting for a formal recusation.”

- Procedure: filed in writing with the grounds of the abstention to the ad quem court (art. 221 LOPJ).

IMPARTIALITY

II. Recusation/recusal:

- Any party's right to disqualify a judge from deciding the case
- Legitimacy:
 - a) Civil, accounting, administrative, and labour matters: the parties and the public prosecutor.
 - b) Criminal matters: the state prosecutor, the public prosecutor, the private prosecutor or complainant, the civil plaintiff, the indicted or accused, the offender, wrongdoer or tortfeasor.

IMPARTIALITY

- **Procedure of recusal:**

1. Initiation: filed in writing by the parties (including the public prosecutor) indicating the legal grounds and attaching sufficient evidence as soon as the circumstances leading to it are known.
2. Processing: notification to the other parties in the proceedings. Term of three days to indicate if they agree or disagree. If they disagree: motion of recusation – discovery of evidence (10 days)
3. Outcome: by order that cannot be appealed

INDEPENDENCE AND SUBMISSION TO THE LAW

Art. 117.1 SC: “Justice emanates from the people and is administered on behalf of the King by judges and magistrates of the judiciary who shall be **independent**, irremovable, and liable and subject only to the rule of law.”

Art. 124.1 SC: “The Office of the Public Prosecutor, without prejudice to the functions entrusted to other bodies, has as its mission that of protecting the **independence of the courts and securing through them the satisfaction of social interest.**”

Art. 127.2 SC: “The law shall establish the system of incompatibilities for members of the judiciary, which must ensure their total **independence.**”

INDEPENDENCE AND SUBMISSION TO THE LAW

Art. 1 LOPJ: “Justice is vested in the citizens and administered in the name of the King by the magistrates and judges who comprise the judiciary, **independent**, unmovable, liable, and subject solely to the constitution and the laws of the land.”

Art. 12.1 LOPJ: “In the exercise of their jurisdictional duties, magistrates and judges are **independent with regard to any and all other judicial and governance bodies of the judiciary.**”

Art. 13 LOPJ: “**All citizens are obliged to uphold the independence of magistrates and judges.**”

Art. 14 LOPJ: “1. Magistrates or judges who see their independence hindered or threatened will report it to the General Council of the Judiciary. 2. The State Prosecutor, either ex officio or at the request of the persons mentioned above, will initiate the corresponding actions to ensure that judicial independence is preserved.”

INDEPENDENCE AND SUBMISSION TO THE LAW

INDEPENDENCE → submission to the law

Law = SC and rest of *judicial* legislation.

- Submission to the SC: possibility to file a question of unconstitutionality to the constitutional court.
- Subject to regulations of the government, but with faculty to control the legality.
- Independence guarantees the submission of the judges and magistrates to the law (and only the law).

INDEPENDENCE AND SUBMISSION TO THE LAW

No submission to upper courts:

- A judge **does not have to follow any upper body's instructions** when applying the law.
- LOPJ protects independence concerning other judicial organisations. Prohibition of instructions on interpretation or application of juridical legislation.
- "Magistrates and judges are independent with regard to any and all other judicial and governance bodies of the judiciary."

No submission to any entity

- All citizens are obliged to uphold the independence of magistrates and judges. (art. 13 LOPJ)
- No submission to executive and legislative powers, media, political parties, unions, etc.

INDEPENDENCE AND SUBMISSION TO THE LAW

Formal + material guarantees

1. FORMAL GUARANTEE

Art. 122.1 SC establishes the **Fundamental Act on the Judiciary** on setting up, operation, and control of the courts and tribunals, as well as the legal status of professional judges and magistrates,

- Not by regulation because it would involve interference from the executive power in the independence of judges and magistrates.

INDEPENDENCE AND SUBMISSION TO THE LAW

2. MATERIAL GUARANTEES

1. **Conditions for the exercise of jurisdictional function:**
requirements to access competitive exams and merit-based access → more than 18 years old, Spanish nationality, and degree in law, together with other specific requirements in each case.
2. **Exclusion:**
 - Have been judicially determined to be mentally incompetent.
 - Not being in full exercise of their civil rights.
 - Convicts, processed for intentional crimes.

INDEPENDENCE AND SUBMISSION TO THE LAW

3. **Incompatibilities**: arts. 389 et seq. LOPJ

- Public positions and other private activities.
- Kinship or affinity inside the same organisation.
- Risk of undermining impartiality.

4. **Prohibitions**: art. 395 LOPJ

- May not belong to political parties or trade unions or work in any manner for them
- Congratulate or reprove powers, authorities, civil servants, or local entities in any of their acts in capacity as members of the judiciary, nor attend in such capacity any public meetings or acts which are not of a judicial nature
- Become involved in legislative elections in any manner other than for voting as any other citizen.

INDEPENDENCE AND SUBMISSION TO THE LAW

DUTIES:

- Effective legal protection
- Fulfil organisational norms (time, place, etc.).

RIGHTS:

Salary, promotion, permissions and licences, professional association, judicial immunity.

TENURED POSITION

Art. 117 SC:

1. Justice emanates from the people and is administered on behalf of the King by judges and magistrates of the judiciary who shall be independent, irremovable, and liable and subject only to the rule of law.

2. Judges and magistrates may only be dismissed, suspended, transferred, or retired on the grounds, and subject to the guarantees provided by law.

Personnel without tenured position: Alternate magistrates, surrogate judges, and justices of the peace: period of 4 renewable years.

TENURED POSITION

- The tenured position can be **absolute** (specific destination) or **relative** (judicial career appointment), as well as **boundless** (until mandatory retirement) or **temporary** (nomination for a specific term).
- **The tenured position of the judges and magistrates of the judicial career is absolute and boundless**

Article 378 LOPJ:

- “1. Magistrates and judges are considered tenured officers while they perform judicial duties.
2. Those officers who have been appointed for a certain period of time will be considered tenured officers only for that period.
3. In the event of resignation, leave of absence, transfer and promotion the specific provisions foreseen in this Act will apply.”

TENURED POSITION

GUARANTEES

- A. Generals:** the CGPJ cannot give direct instructions to the judges on the interpretation of the legislation in the exercise of this function (art. 12 LOPJ).
- B. Individuals:**
- Separation/removal: art. 379 LOPJ.
 - Suspension: art. 383 LOPJ.
 - Transfer: always voluntary.
 - Retirement: for age or permanent disability. Arts. 385-386 LOPJ.

RESPONSIBILITY

Arts. 117.1 SC and 1 LOPJ → Responsibility of the judges and magistrates in the exercise of the jurisdiction.

Types of liability: (art. 16 LOPJ)

“1. Magistrates and judges will be held civilly and criminally liable in the manner and subject to the procedure foreseen in law and any disciplinary measures applied to them will comply with this Act.”

A. Disciplinary:

- i. Performances without implication of the jurisdictional authority (incompatibilities, absence from place of work).
- ii. With implication of the jurisdictional authority in general, not with regard to a specific process (delay in ruling an outcome).

B. Jurisdictional: In the exercise of the jurisdictional function.

RESPONSIBILITY

Civil liability: damages caused due to wilful misconduct (“dolo”) or negligence during the course of their duties.

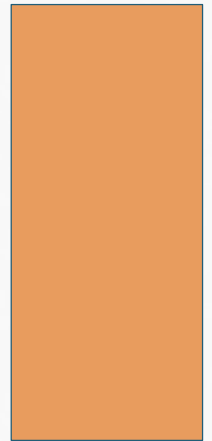
Criminal liability: if they have committed major or minor criminal offences during the course of their duties (Article 405 of the LOPJ).

Disciplinary liability: in the cases and with the guarantees provided by the LOPJ (Article 414 of the LOPJ), e.g. if they join a political party, or trade union, or hold any employment or office during their service (Article 417.1 of the LOPJ); in the event of lack of respect towards hierarchically superior jurisdictional bodies in their presence, by means of a writ addressed to them publicly (Article 418.1 of the LOPJ).

END

LESSON 6: JURISDICTIONAL FUNCTION (POTESTAS)

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Procedural Law I



SUMMARY

1. Previous questions
2. Function of the jurisdiction
3. Pretence and resistance
4. Irrevocability
5. Subjective selflessness
6. Jurisdictional implementation of the law
7. Conflicts of jurisdiction

PREVIOUS QUESTIONS

➤ In **all type of processes.**

Art. 117 SC → Courts and tribunals.

FUNCTION OF JURISDICTION

A. Subjective theories

- Reintegration of the **private subjective rights**, in case of threat or violation.
- Discovery and statement of legality between the parties and execution and effectiveness.
- **Civil process for the service of individuals.**
- Insufficient vision, focused on economic rights exclusively.

FUNCTION OF THE JURISDICTION

B. Objective theories

- The jurisdiction looks for the performance of the objective right by means of the application of norms to specific cases.
- The state ensures that rights are guaranteed → **legal protection of rights.**
- The process is not an instrument of the citizens for the legal protection of their subjective rights, but an instrument of the state to **ensure that the objective right is fulfilled.**

FUNCTION OF THE JURISDICTION

C. Guarantee theory “Teoría garantista”

- **The judge ensures rights recognised in law**, regardless of the legal branch.
- The civil process guarantees private subjective rights, whereas criminal process will look after fundamental rights such as freedom.
- The jurisdictional function is based on **the rule of law (imperio de la Ley)**

FUNCTION OF THE JURISDICTION

Consequences

1. The jurisdictional function operates when somebody applies for it and another opposes: **claim and defence**.
2. The jurisdiction acts of **irrevocable way**: concept of **res judicata**.
3. Jurisdiction always acts with **subjective selflessness**: objective impartiality.

CLAIM

Concept → Request or claim made to a jurisdictional body, against another person.

Characteristics

- a) Statement of will:** the object of the process, the other requests within the process are instrumental (witnesses, evidence, etc.).
- b) Request reasoned/motivated:** not only with legal arguments, but also with facts.

CLAIM

- c) **It is not a formality nor procedural act:** it can manifest at any time and from diverse acts.
- d) **It is not a right:** what exists is a right to the action and through this action the claim is manifested.
- e) **It demands a performance from the jurisdictional body:** declarative, executed, and precautionary
- f) **Against another person:** this person has to be determinated or be determinable.

DEFENCE

Concept → request addressed to the JO as reaction to the claim formulated.

Characteristics

- It is not a formality nor a procedural act.
- Contrary request: both parties are opposed.
- Reasonability is not needed, it is enough to just deny the contrary allegations, but in some cases, fact motivation is needed.
- It serves to determine and specify the object of the process.

IRREVOCABILITY

- The application of the law in the jurisdictional function cannot be controlled by another instance → the law is applied in an irrevocable way → **RES JUDICATA**
- The res judicata effect forces the judges to **not hear again a case already decided.**
- Resolutions of administrative bodies do not have res judicata effects.
- Jurisdiction can control administrative acts.

SUBJECTIVE SELFLESSNESS OR SUBJECTIVE LACK OF CONCERN

- **Interest – affairs of others**
- This “ajenidad” or “disinterest” is designated “**subjective selflessness**”.
- **Self-protection vs. hetero-protection** → Administration judges its own affairs, whereas jurisdiction applies the law in the affairs of others.
- Jurisdiction splits the prohibition of self-protection between individuals, so the state assumes the hetero-protection of subjective rights.

JURISDICTIONAL IMPLEMENTATION OF THE LAW

- The jurisdictional function has to **individualise the legal norm for the specific case**. To some extent, **it creates law** through the jurisprudence (case law).
- **Demonstrations:**
 1. The law can empower judges **create applicable norm to the case** (resolution in equity). This is an exception.
 2. The laws can be **indeterminate:**
 - I. Regarding the rule that composes the norm.
 - II. Regarding the legal consequences.

JURISDICTIONAL IMPLEMENTATION OF THE LAW

3. **Legal silence** force the judges to resolve according to general principles.
4. Although the norm can be complete, the judge has to **apply it to specific cases and explain and justify this application.**

CONFLICTS OF JURISDICTION

Art. 38 LOPJ: conflicts of jurisdiction between the courts and the administration.

OL 2/1987, of 18 May on Jurisdictional Conflicts.

CONFLICTS OF JURISDICTION

- Classes of conflicts:

- a) **Positive** → more than one body assesses itself competent. All the courts (art. 2 LOCJ) and some administrative bodies (art. 3 and 4 LOCJ) can apply to resolve the conflict.
- b) **Negative** → the bodies deny competence to hear the case. The individual can apply directly for the solution of the conflict by addressing the Court of Conflicts of Jurisdiction.

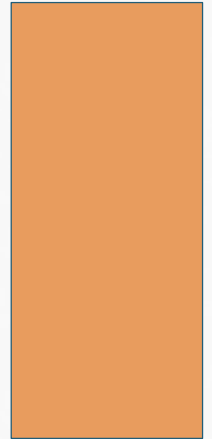
CONFLICTS OF JURISDICTION

- **Court of Conflicts of Jurisdiction**: collegiate body that resolves conflicts of jurisdiction.
 - ❖ **Composition**: president of the TS, 2 magistrates of the accounting-administration section, and 3 permanent advisers of the state. The president holds the casting vote in the event of a tie.
 - ❖ **Procedure**: the judges hear the public prosecutor and the administrative body and then dictate a sentence declaring which body has jurisdiction. No ordinary legal appeal may be filed.

END

LESSON 7: GOVERNMENT OF JUDICIAL POWER

Lecturer Dr Ana Isabel Blanco García
Procedural Law I



SUMMARY

1. Previous questions
2. General Council of the Judicial Power
3. Government courts
4. Presidents of the courts and audiences
5. Presidents of the courts of justice
6. Chief judge
7. Boards of judges
8. The inspection of the courts

PREVIOUS QUESTIONS

System of autonomous government:

- Guarantee of the independence and impartiality of judicial organisations.
- **Aim** → avoid interference from executive power.
- **Controversial aspects**
 - a. The Ministry of Justice is competent to deliver the statute of non-judicial personnel.
 - b. Political nomination of member of the CGPJ.
 - c. Judicial politics in hands of the government.

GENERAL JUDICIAL COUNCIL

Art. 122.2 SC

“The General Council of the Judiciary is its governing body. A fundamental act shall set up its statutes and the system of incompatibilities applicable to its members and their functions, especially in connection with appointments, promotions, inspection, and the disciplinary system.”

GENERAL JUDICIAL COUNCIL

A. Decision-making powers (competencias decisorias): art. 560 LOPJ

- Statute of judges and magistrates, including selection and training.
- Disciplinary regime.
- Proposition of some posts: president CGPJ; 2 magistrates TC; vice-president TS.
- Inspection of courts and tribunals.
- Internal statutory authority within the council itself.
- External statutory authority: judicial promotion system, law school, judicial associations, etc.

GENERAL JUDICIAL COUNCIL

B. Report or audience:

- Draft bills on law and general dispositions about the following matters will be submitted to the General Judiciary Council (art. 561 LOPJ).

Modifications to the Fundamental Act on the Judiciary.

Determination and modification of judicial boundaries, as well as their capital status.

The establishment and modification of the official post listings for judges, magistrates, court registrars, and court employees.

Fundamental Statute for Judges and Magistrates.

Fundamental Statute for Court Registrars and all other court employees.

Procedural regulations that affect legal and constitutional aspects of legal protection before the ordinary courts that relate to the exercise of fundamental rights.

Regulations that affect the constitution, organisation, operation and governance of courts

Criminal laws and regulations relating to the prison system.

Any other matter that the Government, Parliament or, where appropriate, the legislative assemblies of the self-governing regions deem relevant.

- Annual report on the operation of justice.
- Annual report on activities of the council.
- Audience for the nomination by the government of the state public prosecutor.

GENERAL JUDICIAL COUNCIL

COMPOSITION

President + 20 board members

The President of the TS.

I. Members:

- Appointed by the King via Royal Decree
- Period of 5 years
- Proposed to general courts: 10 each chamber
 - 6 (12) between judge-magistrates:
 - 4 (8) between jurists of recognised prestige and 15 years professional experience

GENERAL JUDICIAL COUNCIL

ORGANISATION

- Presidency (chairman)
- Plenary
- Commission:
 - a. Permanent
 - b. Disciplinary committee and ombudsman for disciplinary action
 - c. Economic affairs
 - d. Equality
- Other technical organisations: General secretariat + inspection service + law school

GENERAL JUDICIAL COUNCIL

A. PRESIDENT:

- **Designation:**

Appointed by the King by royal decree endorsed by the prime minister. Support of a majority of three fifths of the members in the roll-call vote of the plenary session. Magistrate of the TS or lawyer of recognised competence with more than 25 years of experience in the profession (art. 586 LOPJ).

- **Functions:** representation of the CGPJ, presidency of the TS, full presidency CGPJ, casting vote, authorise agreements, etc. (art. 598 LOPJ).

GENERAL JUDICIAL COUNCIL

B. PLENARY:

- **Composition:** members (>12) + president (art. 600 LOPJ)
- **Functions:** proposed nomination of discretionary charges of the judicial power (TS, TC, AN, TSJ, AP), statutory authority, designation members of commissions, etc. (art. 599 LOPJ).
- Adoption of agreements by a simple majority (casting vote of the president).

GENERAL JUDICIAL COUNCIL

C. PERMANENT COMMISSION:

- **Composition:** President + 7 members (4 judicial career system and 3 jurists or lawyers).
- **Functions:** prepare full sessions, urgent agreements, non-discretionary nominations; mandatory retirement by age, granting licences, etc. (art. 602 LOPJ).

GENERAL JUDICIAL COUNCIL

D. DISCIPLINARY COMMITTEE AND OMBUDSMAN FOR DISCIPLINARY ACTION:

- **Composition:** 7 members (4 judicial system and 3 jurists or lawyers).
- **Functions:** instruction of disciplinary files, imposition of penalties on judges and magistrates as a consequence of crimes (except in cases of removal from office).

(Art. 604 LOPJ)

GENERAL JUDICIAL COUNCIL

E. ECONOMIC AFFAIRS COMMITTEE:

- **Composition:** 3 members.
- **Functions:** economic studies, draft of budget of the CGPJ, control of financial and accounting activity, and other budgetary questions (art. 609 LOPJ).

GENERAL JUDICIAL COUNCIL

F. EQUALITY COMMITTEE:

- **Composition:** 3 members.
- **Functions:** advise the plenary session on the necessary or desirable measures to actively implement the principle of gender equality in the exercising of the powers of the General Judiciary Council (art. 610 LOPJ).

BOARDS OF GOVERNANCE

- **Government bodies of the CGPJ in the courts.**
- They are not jurisdictional, but governmental bodies.
- Act 1/2000, of 26 July.
- **Governing Chamber:**
 - a. Supreme Court
 - b. National High Court
 - c. High Court Of Justice

BOARDS OF GOVERNANCE

COMPOSITION: (art. 149 LOPJ)

- **Supreme- National High Court**

- President of the Court
- President of Courts of Justice
- Magistrates.

- **High Courts of Justice**

- President of the court, presidents of justice, AP presidents of the self-governing regions, judges, and magistrates.

BOARDS OF GOVERNANCE

FUNCTIONS:

- **Art. 152 LOPJ:** governing rules or competences (rules for distribution of cases, necessary measures in event of disputes among judges, disciplinary, inspection functions, etc).
- Governing Chamber High Court of Justice: other another complementary chamber in art. 152.2 LOPJ (appointment of justices of the peace, rules on allocation of cases between the court divisions and among the sections of the provincial courts, and courts of the same jurisdictional order that have their seat in the corresponding self-governing region).

THE PRESIDENTS OF THE COURTS AND AUDIENCES

Presidents SC-NHC-HCJ:

- **Nomination:** CGPJ, period 5 years.
- **Functions: (art. 160 LOPJ)**
 - Distribution of subjects
 - Measures of urgency
 - Authorise agreements
 - Direct inspection
 - Communication of vacancies
 - Impose penalties or warnings
 - ...

THE PRESIDENTS OF THE COURTS AND AUDIENCES

Presidents of Provincial Audiences:

- **Nomination:** CGPJ, period 5 years.
- **Functions: (art. 164 LOPJ)**

Chief justices of the provincial courts will adopt adequate measures to ensure their operation and will exercise all other functions vested in them by this Act notwithstanding the faculties of the governing bodies of the High Court of Justice

This is because they do not have governing chambers and the HCJ extends its jurisdiction over the territory of the self-governing region.

CHIEF JUSTICES OF DIVISIONS AND JUDGES

A. Divisions of Justice:

- High court, national high court, and high courts of justice: divisions of justice are their jurisdictional bodies.
- President of division participates in the jurisdictional function.

Control and right to inspect all matters within their competencies and any resolutions that favour an adequate progress of the administration of justice - and informing the respective courts and tribunals of deficiencies or infractions observed (art. 165 LOPJ).

B. Judges:

- Same attributions as the presidents (art. 165 LOPJ).

CHIEF JUDGES (JUECES DECANO)

CHIEF JUDGE (art. 166 et seq. LOPJ)

- In districts in which there are more than ten courts.
- Administrative functions.
- **Designation:** 4 years, majority 3/5
 - a. 10 courts or more: general board judges
 - b. Less than 10 courts: chief judge not elected but individual with highest rank within the judicial career ladder is selected (most senior judges or magistrates in the judicial hierarchy)
- **Functions:** supervision of the delivery of subjects, control of the judicial police, ensuring correct implementation of substitutions and annual plans for substitution, adoption of the necessary measures, and promotion of the assignment of the corresponding responsibilities, etc.

JUDGES' ASSEMBLIES

Arts. 169 and 170 LOPJ

- **General judge assemblies:**
 - a. All the judges of a single territorial division.
 - b. Discuss issues which are of common interest concerning judiciary activity
- **Sectorial judge assemblies:**
 - a. Judges of the sector
 - b. Propose rules for the distribution of cases, unify criteria, make practice statements, and discuss common issues.
- **Provincial judges or regional assemblies:**
 - a. Judges of the same province or self-governing region.

INSPECTION COURTS

Art. 176 LOPJ → operation and fulfillment of duties, but never on judicial interpretation.

- **Composition:** arts. 171-177 LOPJ.
- **Classes of inspection:**
 - a. Superior discretions → CGPJ, on any judicial body.
 - b. Ordinary → presidents of SC or chief justice of NHC, HCJ.

END

RULES OF JURISDICTION

Art. 4, 9, 21.23 LOPJ

I. CIVIL PROCESS

1. Objective jurisdiction/competence

- **General criterion:** Court of First Instance (JPI) (Art. 45 LEC)
- **Special criteria:**
 - ✓ *By reason of the matter:*
 - Commercial Court (Juzgado de lo Mercantil) (Art. 86.ter.2 LOPJ)
 - Courts for Violence against Women (JVM) (Art. 87.ter.2 LOPJ)
 - Extension of competence by art. 98 LOPJ (Art. 46 LEC)
 - ✓ *By reason of the person:* “aforados” (politicians)
 - Supreme Court (TS) (Arts. 56.2º and 3º LOPJ)
 - High Court of Justice (TSJ) (Arts. 73.1º and 2º LOPJ)
 - ✓ *By reason of the quantity:* < €90 → Justices of the Peace or Magistrates Court (Juzgados de Paz) (Art. 47 LEC)

2. Territorial jurisdiction/competence

Dispositive nature of the rules on territorial jurisdiction. (Art. 54 LEC)

- **Parties agreement (Fueros Convencionales):**
 - ✓ *Explicit submission/express legal jurisdiction* (Arts. 55 and 57 LEC)
 - ✓ *Tacit submission/implied jurisdiction* (Art. 56 LEC)
- **Special jurisdiction (Fueros Imperativos):** Art. 52 LEC
- **General jurisdiction (Fuero Legal general):** Court of the place of their address:
 - ✓ *Individuals:* Art. 50.1 LEC
 - ✓ *Companies or entities without legal personality:* Art. 51.1 LEC

3. Functional jurisdiction/competence

- **Appeals:**
 - ✓ *Appeal:* Art. 455.2º LEC and arts. 82.3 and 85 LOPJ
 - Justices of the Peace or Magistrates Court (Juzgados de Paz) → CFI (JPI)
 - CFI (JPI) / CVW (JVM) → Provincial Courts (AP)
 - ✓ *Appeal of complaint:* AP / TSJ / TS (Art. 494 LEC)

- ✓ *Extraordinary appeal for an infringement of procedure*: Supreme Court (TS) (DF 16^a LEC)
- ✓ *Appeal in cassation*: First Chamber of the Supreme Court / Civil and Criminal Chamber of the High Court of Justice (Art. 478 LEC)
- ***Review of final judgements***: Civil Chamber of the High Court / Civil and Criminal Chambers of the High Courts of Justice (Art. 509 LEC)
- ***Recusation motions***: Arts. 224 and 228 LOPJ
- ***Negative conflict of territorial jurisdiction***: immediately superior ordinary court (Art. 60.3 LEC)
- ***Joinder of processes***: Court dealing with the oldest proceedings (Art. 79 LEC)
- ***Functional jurisdiction by connectivity (incidents, covenants...)***: Art. 61 LEC and 406 LEC
- ***Enforcements decisions***: Court that heard the case in first instance (Art. 545.1 LEC)

II. CRIMINAL PROCESS

1. Objective competition

- ***Defendant (person accused)***:
 - ✓ “*Aforados*”:
 - Supreme Court (TS) (Art. 57.1.2^o LOPJ)
 - High Court of Justice (TSJ) (Art. 73.3.b) LOPJ
 - ✓ “*Minors*”:
 - Juvenile Courts (Tribunal de Menores) (Art. 96 LOPJ)
- ***Specific matters***:
 - ✓ Crimes art. 65 LOPJ or terrorism art. 23.4 LOPJ:
 - Nacional High Court (AN)
 - ✓ *Jury court* (Tribunal del Jurado) (Art. 1.2 LOTJ)
- ***Seriousness of the penalty***:
 - ✓ *Minor offences*: Examining Magistrate/Judge Violence against Women (JVM) (Art. 14.1 LECrim)
 - ✓ *Offences*:
 - Penalties < 5 years: Criminal Court Judge/ Domestic Violence Judge (Art. 14.3 LECrim)

- Penalties > 5 years: Provincial Court / Domestic Violence Court (Art. 14.4 LECrim)

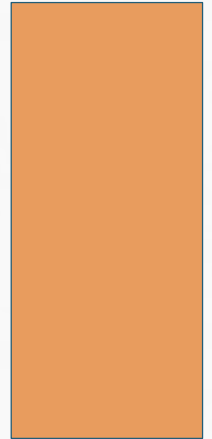
2. Territorial jurisdiction/competence

- **Main Forum:** *Forum commissi delicti* = the place where the offence was committed (Art. 14.2 to 4 LECrim)
Exception: CVW (JVM) victim's place of residence (Art. 15 bis LECrim)
- **Subsidiary Forums:** Art. 15 LECrim
 - ✓ Place where material evidence of the offence was discovered.
 - ✓ Place where the accused was detained.
 - ✓ Place of residence of the accused.
 - ✓ Anyone who may have had notice of the offence.
- **Related offences** (Purposes Art. 17 LECrim): art. 18 LECrim
 - ✓ Where the offence for which a higher penalty is set was committed.
 - ✓ The first to commence the case in the event that the same penalty is set for the offences.
 - ✓ The court appointed by the Criminal Court or the Supreme Court, in their respective cases, where the cases began at the same time or there is no record of which one started first.

3. Functional jurisdiction/competition: Arts. 65, 82.1 and 89 bis LOPJ

LESSON 9: AUXILIARY PERSONNEL AND COLLABORATORS

Lecturer Dr Ana Isabel Blanco García
Procedural Law I



SUMMARY

1. Court clerks
2. Court officials
3. Judicial police
4. Public prosecutor
5. State lawyers
6. Lawyers
7. Court lawyers

NON-JURISDICTIONAL PERSONNEL

1. AUXILIARY PERSONNEL

- a) Court clerks (Letrados de la Administración de Justicia)
- b) Court officials
- c) Judicial police

2. COLLABORATOR STAFF

- a) Public prosecutor
- b) State lawyers
- c) Court lawyers

COURT CLERKS

COURT PERSONNEL REGIME

(Arts. 440 to 469 LOPJ and RD 1608/2005, of 30 December)

- a) **Access to the career:** 30% internal promotion (court officials in procedural and administrative management) and 70% open access opposition (ordinary), or merit-based exam competition (exceptional). A theoretical and practical course in the Centre of Legal Studies of the Administration of Justice is required.
- b) **Conditions, exclusions, incompatibilities, and prohibitions. Abstention and recusal.**
- c) **Rights and duties.**
- d) **Disciplinary responsibility:** process at the request of the Ministry of Justice, the government secretary, and the provincial coordinators.

COURT CLERKS

FUNCTIONS:

- **Bear witness to:** (art. 453 LOPJ) leaves evidence or justification of the procedural acts, testimonies of judicial performances, or legal powers.
- **Documentation:** (art. 454 LOPJ) record duties vested in them and in the opening of proceedings and files recording the decisions given by the magistrates and judges, or themselves when so authorised by law.
- **Provide reports:** inform the judiciary about the acts of the parties and the records made by the secretary out of the judicial presence.

COURT CLERKS

- **Procedural management:** admitting a lawsuit, calling proceedings to a close, or providing grounds for a decision, when necessary or advisable, will be referred to as an order. Executive organisational resolutions will be referred to as determinations.
- **Bureaucratic or judicial office**

COURT OFFICIALS OF THE ADMINISTRATION OF JUSTICE

GENERAL BODIES

1. Office for Procedural and Administrative Management

- **Qualification:** university degree.
- **Functions:** art. 476 LOPJ. In general, collaborate in higher level procedural activity:
 - a. Managing the processing of proceedings
 - b. Oversee and sign the appearances made by parties within proceedings that are being heard in the judicial body
 - c. Document the seizures, dispossessions, and other acts requiring documentation
 - d. Issue notes intended to incorporate data or elements into the proceedings that do not constitute evidence
 - e. Perform the duties of registering, receiving, and distributing documents, etc.

COURT OFFICIALS OF THE ADMINISTRATION OF JUSTICE

GENERAL BODIES

2. Procedural and Administrative Handling Office

- **Qualification:** Degree or equivalent
- **Functions:** Art. 477 LOPJ. In general, support procedural management.
 - a. General handling of proceedings by means of mechanical or information technology, office packages preparing all documents, certificates, entries, notices, and other forms. Register and classify correspondence.
 - b. Filing and classification of correspondence.
 - c. Prepare the documentary support of proceedings and files under the supervision of a senior officer.
 - d. Draft the notice forms for any required communications, etc.

COURT OFFICIALS OF THE ADMINISTRATION OF JUSTICE

GENERAL BODIES

3. Judicial Assistance Office

- **Condition:** Secondary grade or equivalent.
- **Functions:** art. 478 LOPJ. In general, support the judicial organisation
 - a. Prepare notices, summons, and requests in the manner established in procedural laws
 - b. Carry out enforcements, evictions, and other similar acts
 - c. Act as judicial police
 - d. Perform duties of filing court records and proceedings under the supervision of the court registrar

COURT OFFICIALS OF THE ADMINISTRATION OF JUSTICE

SPECIAL BODIES

1. Institutes of Legal Medicine and Forensic Science

Technical bodies, reporting to the Ministry of Justice that assist the judicial administration within the sphere of their scientific and technical discipline. (art. 479 LOPJ).

- **Condition:** Medical degree.
- **Destinations:** National Toxicology and Forensic Science Institute (art. 480 LOPJ).
- **Functions:**
 - a. Technical assistance for courts and state prosecutor's offices.
 - b. Care and medical monitoring of detainees who are injured or ill in the custody of the courts or state prosecutor's offices

COURT OFFICIALS OF THE ADMINISTRATION OF JUSTICE

SPECIAL BODIES

2. National Institute of Toxicology and Forensic Sciences civil servants: University degree in experimental sciences and health.
3. Technical Specialists in Toxicology and Forensic Sciences
4. Laboratory assistants of the National Institute of Toxicology and Forensic Sciences Association

JUDICIAL POLICE

Art. 282 to 289 LECrim; 547 to 550 LOPJ; OL 2/1986

Art. 547 LOPJ: assistance for courts and tribunals and the state prosecutor in the investigation of offences and the discovery and arrest of offenders. All security forces and organisations are obliged to perform this function when they have been so requested regardless of whether they are under the supervision of the central government or the self-governing regions or local councils, within the sphere of their respective competencies.

Reporting to: judges and public prosecutor (art. 126 CE) **Functions:** art. 549 LOPJ

- a. Investigation of offenders and circumstances surrounding a crime and arrests while informing the judicial and tax authorities.
- b. Assistance for judicial and tax authorities.
- c. Material execution of actions that require the use of force and which have been ordered by the judicial or tax authorities.
- d. Ensure compliance with orders and resolutions given by the judicial or tax authorities.

PUBLIC PROSECUTOR

Art. 124 SC, 541 LOPJ, EOMF

Organisation:

- Attorney General of the State
- Public Prosecutor Council
- Board of Chambers' Public Prosecutors
- Board of Senior Lawyers of the Self-governing Regions
- Public Prosecutor of the Supreme Court
- Public Prosecutor Office of the Constitutional Court
- Public Prosecutor Office of the National Court
- Special Public Prosecutor Offices
- Public Prosecutor Office of the Accounting Court
- Military Legal Prosecutor
- Public Prosecutor Offices of the Self-governing Regions
- Provincial Public Prosecutor Offices
- Public Prosecutor Offices

PUBLIC PROSECUTOR

- **Functions:**

Support the action of justice (art. 541 LOPJ) →

- Defence of legality;
- Defence of the rights of citizens;
- Defence of public interest protected by law;
- Guarantee independence of courts;
- Ensuring that citizenship interests are satisfied.

- **Principles:**

a. Unity and dependence – external and internal.

b. Action: legality and impartiality.

STATE LAWYERS

- Act 997/2003, 24 June and Act 52/1997, 27 November, regarding state legal assistance and public institutions.
- **Art. 551 LOPJ:** The representation and defence of the state and its autonomous organisations, and the constitutional bodies with internal regulations that do not set forth a specific system
- Representation and defence of Parliament, of the House of Representatives, of the Senate, of the Central Electoral Committee, and of any bodies or institutions linked to these
- Representation and defence of self-governing regions and local entities, and the lawyers who work in the legal department of those public administrations

LAWYERS

Arts. 542 to 546 LOPJ - RD 658/2001, 22 June of the AGE.

- **Defence of extraneous legal interests** → before the courts and offering extrajudicial advice.
- **Free and independent occupation** → client confidentiality.
- **Legal statute:** freedom of acceptance of subject, professional secrecy; freedom of expression; principle of good faith; fees.
- **Corporate organisation:** Spanish Bar Association

“those who, having joined a Spanish Bar of Attorneys as practising attorneys, are professionally dedicated to the advice, and defence of third parties’ public or private legal interests”

COURT ATTORNEYS

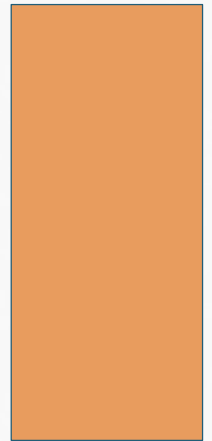
RD 1281/2002 of 5 December, that approves the General Statute of the Court Lawyers.

- **Function** → procedural/technical representation of the parties.
- Since parties cannot appear in court without representation, court lawyers offer legal service in courts and tribunals.
- **Access:** Bar Association.
- **Juridical statute:**
 - Incompatibilities.
 - Fees.
 - Civil liability when mens rea or negligence damages interests

END

LESSON 11: ACTION AND LEGAL PROTECTION

Lecturer Dr Ana Isabel Blanco García
Procedural Law I



INDIVIDUAL RIGHTS

Rights related with the process:

A. Right of all natural and legal persons

Everybody has the right to take action, or the right to jurisdiction. Effective legal protection.

B. Rights of parties to start a lawsuit

Group of rights, possibilities, and obligations in the process.

ACTION AND JURISDICTIONAL PROTECTION

Theories of action:

1. **Action as the right to obtain specific legal protection** → right to a favourable judgment.
2. **Action as the right to obtain an abstract legal protection** → right to a judgment that ends the procedure, regardless of its positive or negative sense. It is a right to bring the action, to have a process, and a judicial decision that resolves the conflict.



Procedural action is a right given to the citizen to protect his/her rights when (s)he considers they have been violated, by applying for a (judicial) resolution.

EFFECTIVE LEGAL (JUDICIAL) PROTECTION

Article 24.1 SC

*“Every person has the right to obtain the **effective protection of the judges and the courts** in the exercise of his or her legitimate rights and interests, and in no case may s/he go undefended.”*

EFFECTIVE LEGAL (JUDICIAL) PROTECTION

KEYPOINTS OF THE RIGHT:

“Every person” (art. 24 SC)

- Natural or legal.
- Spaniards or foreigners (art. 20 ACT 4/2000, of 11 January).
- Public or private nature.

ESSENTIAL CONTENT ON RIGHTS

1.- ACCESS TO JUSTICE:

- Possibility to **access the courts so that they pronounce on the claim** that formulates a key point of a right.
- Access to justice does not depend on administrative controls.
- The legal causes for non-acceptance have to be interpreted in a favourable sense (principle *pro actione*).



1. Right to plead
2. Right to start a proceeding
3. Right to have a decision on merits
4. Right to the enforcement of the judgment
5. Right to appeal using legally established appeal

ESSENTIAL CONTENT ON RIGHTS

2.- BACKGROUND RESOLUTION:

- **Resolution on the merits/grounds based on law, favourable or not, to the claims.**
- The Constitutional Court will be able to review if the terms and procedural requirements have been respected.
- The failure to rule can have constitutional importance.
- Congruence + Exhaustivity + Motivation

ESSENTIAL CONTENT ON RIGHTS

3.- MOTIVATION OF THE RESOLUTION:

- Art. 120.3 SC: “**Judgments shall always contain the grounds therefore**”.
- Precisions:
 1. Effective legal protection comprises the right to obtain a resolution that includes **sufficient motivation and is founded**. This right does not imply a detailed description of the intellectual process (judgment) which has led to a decision. It is a guarantee of legal certainty and against arbitrariness.
 2. The Constitutional Court analyses whether a resolution has fulfilled the requirements of art. 24.1 SC.
- Art. 218.1 CPA: “The judgements must be **clear, precise, and coherent** with the claims and with the other pleas of the parties, as deduced in due time during the proceedings.”

ESSENTIAL CONTENT ON RIGHTS

3.- MOTIVATION OF THE RESOLUTION:

- **Exhaustivity:** the resolution (judgment) must be exhaustive and decide on all the issues raised by the parties, when these have been properly presented to the court.

Lack of exhaustivity violates the right to due process and legal protection.

- **Congruence (consistency):** a judgment must be congruent with the claims and other petitions of the parties = exhaustive + not incongruous

Lack of congruence when the sentence concerns those who are not party in the proceeding; when it does not correspond to the petition, or it grants a judgment different from the one being sought, or modifies the qualitative or quantitative limits stipulated by the plaintiff.

Extrapetita vs ultrapetita

ESSENTIAL CONTENT ON RIGHTS

4.- PROHIBITION OF NO DEFENCE:

- Art. 24.1 SC: “Every person has the right to obtain the effective protection of the judges and the courts in the exercise of his or her legitimate rights and interests, **and in no case may he go undefended.**”
- **When is no defence produced?**

When the party is prevented from exercising his/her right of defence, producing real and effective damage.

ESSENTIAL CONTENT ON RIGHTS

- **Means of defence** → violations of the art. 24.2 SC;
- Ordinary judge predetermined by law
- Defence and assistance of a lawyer
- Be informed of the charges brought against them
- Public trial without undue delays and with full guarantees
- Use of evidence appropriate to their defence
- Not make self-incriminating statements
- Not declare themselves guilty
- To be presumed innocent.

ESSENTIAL CONTENT ON RIGHTS

5.- FINALITY, INVARIABILITY & RES JUDICATA:

- **Finality** of the sentences means there is no possibility of appeal. (Art. 207 CPA)
- **Invariability** means that the OJ cannot modify his resolutions → legal certainty.
- Art. 214-215 CPA “The courts cannot alter the decisions issued by them once they have been signed, although they are given permission to clarify any obscure concept and to rectify any material error contained therein.”
- **Res judicata:**
 - a. Finality or formal: to order the process. The resolution becomes final. It does not affect the legal protection. (207 CPA)
 - b. Material: pronouncement on the grounds. Linked to legal protection. The matter cannot be re-litigated. (222 CPA)

ESSENTIAL CONTENT ON RIGHTS

6.- ENFORCEMENT OF JUDGMENT:

- **Right to enforce the judgment** when the sentenced party has not fulfilled the duty as established in the sentence.
- Civil sentences enforced after the application of the parties and it may be necessary to adopt precautionary measures.
- **Art. 118 SC:** “It is compulsory to execute the sentences and other final judgments of judges and courts, as well as to collaborate with them as they may require during the course of trials and execution of judgments.”
- **Art. 18.2 LOPJ:** “Judgments will be enforced in their own terms”.

ESSENTIAL CONTENT ON RIGHTS

7.- RIGHT TO APPEAL:

- **Right to appeal by using the legally established appeal procedures.**
- The legislator has to establish the appeal system and their requirements of acceptance → the Constitutional Court affirms that the right to appeal is limited to those cases in which the law recognises that possibility.
- Constitutional protection linked with effective legal protection.

PARTICULARITIES IN THE CRIMINAL PROCESS

A.- “IUS UT PROCEDATUR”:

- The criminal action is a right **to proceed**
 - a. Right to initiate the process and to identify facts,
 - b. according to the due process
 - c. and to obtain a judgment on the grounds.

PARTICULARITIES IN CRIMINAL PROCESS

B.- RIGHT TO APPEAL A CRIMINAL JUDGMENT:

- **Art. 14.5 International Covenant on Civil and Political Rights (1966):** “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”.

The article demands just one appeal, not several as in civil matters.

- **Art. 2.1 Protocol no. 7 ECHR:** “Everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.”

PARTICULARITIES IN THE CRIMINAL PROCESS

C.- RIGHT TO REVIEW CRIMINAL JUDGMENTS

- Exclusive right of the convicted.
- Included in the field of the right to a due process (art. 24. CE)
- After 2015 LECrim amendment → **second full instance**.
- Art. 73 LOPJ: The Civil and Criminal Division of the High Court of Justice has jurisdiction to review criminal cases by way of appeal against AP judgments
 - a) Criminal proceedings which are to be heard at the High Courts of Justice as provided by the statute of the self-governing region.
 - b) Preliminary inquiries and decisions on criminal proceedings against judges, magistrates, public prosecution officers for any offences or infractions perpetrated by them in the discharge of their duties in the self-governing region when jurisdiction over these matters is not vested in the Supreme Court.
 - c) It will hear appeals against sentences given in first instance by provincial courts and any other appeals vested in them by statute.
 - d) Decisions on conflicts of jurisdiction between criminal courts which have their seat in the territory of the self-governing region when there is no higher court that may hear this matter.
 - e) Independent seizure procedures for those crimes they are competent to hear.

FREE LEGAL AID

ART. 119 SC:

“Justice shall remain free when thus provided by law, and shall in any case be so in respect to those who have insufficient means to litigate.”

- Developed by Act 1/1996, of 10 January, of Free Legal Aid.

FREE LEGAL AID

Content of the right (services included)

1. Advice and guidance prior to the proceedings.
2. Assistance of a lawyer for a detainee or convict in criminal matters.
3. Defense and representation by a lawyer and solicitor.
4. Publication of obligatory notices in official journals.
5. Expert assistance (peritos).
6. Procurement of certified copies, testimonies, instruments and notarial deeds.
7. Reduction in fees (up to 80%)

FREE LEGAL AID

BENEFICIARIES:

- **Economic requirements**

Spanish citizens and nationals of other EU countries or foreigners who are in Spain; public interest organisations; registered foundations.

- **Regardless of the economic resources**

Victims of violence against women, terrorism; minors or disabled people in cases of abuse or maltreatment; associations of victims of terrorism; managing organisations and standard services of the social security system.

FREE LEGAL AID

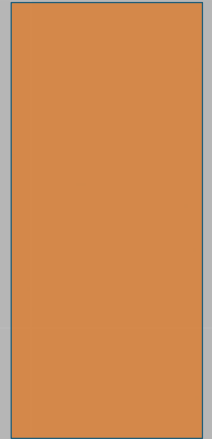
PROCEDURE:

- Application made by the party or ex officio on a standard form accompanied with all the necessary documentation must be presented to the Legal Guidance Service of the Bar Association.
- If the application is accepted, a lawyer will be provisionally allocated and the documentation sent to the Legal Aid Commission.
- If the application is unfounded, it will be sent to the Legal Aid Commission.
- Legal Aid Commission has 30 days to decide whether it accepts or rejects the application

END

LESSON 12: NATURE AND CLASSES OF PROCESSES

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Procedural Law I



CLASSES OF PROCESSES

CRITERIA:

- **According to the right applied** → Civil and criminal.
- **According to the claim/petition** →

Declaratory → Purpose is to judge

Enforcement → Judgment is enforced fulfilling the obligations the ruling imposes on the guilty party.

Precautionary → Enable the effective judicial protection of the right in question once the procedure has come to an end

- **According to the proceeding and type of proceeding**

Ordinary and privileged (special) protection. (Special proc. Regulated in Book IV of the CPA).

PROCESS VS. PROCEEDING

Process = Jurisdictional function (potestas)

Proceeding = Succession of acts

External activity

Process = Link between acts, parties, requirements, and circumstances, conditions, etc.

There are judicial proceedings that are not the external form of the process

CIVIL PROCESS – CRIMINAL PROCESS

- Depending on the existence of a penalty
- The state is the only holder of the power to create and implement criminal law.
- Differences
 - ❖ Civil process: **principle of opportunity / discretionary prosecution** (principio de oportunidad)
 - ❖ Criminal process: **principle of necessity** (principio de necesidad)

PRINCIPLE OF OPPORTUNITY/ DISPOSITIVE PRINCIPLE

The principle under which the parties delimit the scope of proceedings

Starting point → Private and individual interests

- **Autonomy of the will**, recognition of this right and the subjective rights derived from the legal relationships.
- Individuals apply for legal protection (not ex officio)
- Freedom of choice for the individual to choose another means of out-of-court dispute resolution.
- Active legitimation corresponds to the right holder.

DISPOSITIVE PRINCIPLE

Consequences:

- a) **Derived of the principle of opportunity** → the right holder can initiate the procedure.
- b) **The determination of the scope of the process** corresponds to the claimant/applicant, whereas the sued party will contribute to fix and specify the object of the case.
- c) **'Principle of party disposition' (Justicia rogada). Congruence.**
- d) **The parties can end the process** by: transaction, withdrawal, settlement.

PRINCIPLE OF PRODUCTION OF EVIDENCE

Material faculty of the parties.

The principle of production of evidence means that it is for the parties to cite evidence of the facts of the case, in the manner and to the extent that it is in their interest, thus configuring its subject-matter and binding the court, which is required to rule *secundum allegata et probata partium*

- a) The parts are **free to accept some facts alleged by the contrary as proven**. If both parties agree in the proven facts, the judge is associated and there will not be any evidence.
- b) The parties have the right to demonstrate or produce evidence about those disputed facts (facts at issue).

PRINCIPLE OF NECESSITY

Compulsory prosecution / Mandatory prosecution

Public interests

The prosecutor is required to press charges when he has sufficient evidence to support a conviction.

The public prosecution services must prosecute all offences that come to their knowledge. The intentional violation of this duty may be prosecuted as a form of perverting the course of justice. The few exceptions follow the principle of discretionary prosecution according to which bringing charges falls under the discretion of the prosecution authorities.

- The penalty is imposed by public authorities (by courts and tribunals that hold the potestas)
- Principle of exclusivity of the state to apply the potestas.

Consequence of the compulsory prosecution principle → prosecution's preparatory stage (pre-trial phase)

DECLARATORY, ENFORCEMENT AND PRECAUTIONARY

Art. 117.3 SC: “The exercise of judicial authority in any kind of action, both in passing judgment and **having judgments executed**”

- Process of statement/declarative procedure → **declarative pretence**
- Process of execution → **executive claim**

+ Precautionary procedure (interim measures)

DECLARATORY PROCEEDINGS

A. Pretences exclusively declaratory:

- Statement on the existence (positive) or nonexistence (negative) of a right or legal relation.
- The sentence **does not require subsequent execution.**
- It produces *ex effects tunc* → from the beginning.

B. Constitutive claims:

- Creation, modification, or extinction of an existent legal relation.
- On occasions, the process is necessary (divorce or legal disability) while on other occasions, agreement between the parties is enough (dissolution).
- It produces *ex effects nunc* → from this time onwards

C. Declarative pretences of claim for conviction:

- The sentence **requires activity, payment from the defendant.** Sometimes the judge has to enforce the sentence.
- This claim is within criminal procedure.

ENFORCEMENT PROCEEDINGS

Claim by a party who demands that the court carries out the necessary processes to obtain by coercion a determined amount in the plaintiff's favour.

- **Voluntary enforcement vs. coercive enforcement:** whether the debtor, under their own initiative, fulfills the obligations contained in the court order, or whether they refused to comply voluntarily with the order.
- **Monetary enforcement vs. non-monetary enforcement**
- **Enforcement of court orders vs. enforcement of extrajudicial orders**
- **Proper enforcement vs. improper enforcement** (improper from the rendering of constitutive and mere declaratory judgments)

PRECAUTIONARY PROCEEDINGS

GOAL→ To assure the plaintiff that the right whose protection s/he requests in their claim, if recognised, can be protected by the judgment, and taking the appropriate measures for this purpose

Conditions:

- Appearance of good law or a prima facie case, or *fumus boni iuris*
- Risks arising over the course of time, or *periculum in mora*
- Guarantee (*cautio*)

INTERIM MEASURES CIVIL PROCEDURE (727 LEC)

- Precautionary attachment (embargo preventivo de bienes), aimed at ensuring the enforcement of judgments ordering the delivery of amounts of money or yields, rents and fungible goods that can be estimated in cash by applying fixed prices.
- Judicial administration or court-ordered receivership of productive assets [la intervención o la administración de bienes productivos], when a judgment is sought ordering their delivery under the title of owner, usufructuary, or any other title involving a legitimate interest in maintaining or improving productivity or when guaranteeing the latter is of paramount importance for the effectiveness of the judgment to be made in due time.
- The impounding of a movable asset [el depósito de cosa mueble], when the claim seeks an order to deliver the said asset and the latter is in the possession of the defendant.
- The drawing up of inventories of assets [la formación de inventarios de bienes], in accordance with the conditions specified by the court.
- The provisional filing of claims [la anotación preventiva de demanda], when it concerns assets or rights subject to registration in public registries.
- Other registry entries [otras anotaciones registrales], in cases where the public nature of the registry may help achieve a satisfactory outcome.

INTERIM MEASURES CIVIL PROCEDURE (727 LEC)

- A court order to provisionally cease an activity [la orden judicial de cesar provisionalmente en una actividad]; an order to temporarily abstain from behaving in a certain way; or a temporary ban preventing the interruption or withdrawal of a service that was being provided.
- Seizure and confiscation of revenue [la intervención y depósito de ingresos] obtained through an activity considered illicit and whose prohibition or cessation is requested in the claim, as well as the consignment or deposit of the amounts claimed as compensation for intellectual property.
- The temporary confiscation of examples of the works or objects [el depósito temporal de ejemplares de las obras u objetos] allegedly produced contrary to the rules on intellectual and industrial property, as well as the deposit of the material employed for their production.
- The suspension of contested corporate decisions [la suspensión de acuerdos sociales], when the claimant or claimants represent at least 1 or 5 per cent of the share capital, depending on whether or not the defendant company had issued securities that, at the time of the contest, were admitted to trading on an official secondary market.
- Any other measures expressly established by law for the protection of certain rights or deemed necessary to ensure the effectiveness of the judicial protection that may be granted in the judgment that may be handed down at the trial.

INTERIM MEASURES CIVIL PROCEDURE

- Proceedings on the legal capacity of persons: Article 726 of the LEC permits the court to officially adopt the measures it considers necessary for the protection of a person presumed to lack capacity or of their estate.
- Proceedings concerning parenthood, paternity and maternity: Article 768 of the LEC provides protection measures for the person and assets under the authority of whoever may appear to be a parent and the granting of provisional alimony to the claimant, including without a prior hearing in urgent cases.
- Protection of the estate of a deceased person: it may be necessary to secure the estate's assets and the deceased's documents, administer the estate, or verify the deceased's relatives, among other measures (Articles 790 to 796 LEC).

SPECIFIC INTERIM MEASURES CIVIL PROCEDURE

- Law on Intellectual Property (Royal Legislative Decree 1/1996 of 12 April 1996), Articles 138 and 141 (seizure and confiscation of income arising from the illicit activity in question, suspension of reproduction, distribution and public communication activity, confiscation of the items produced, seizure of equipment, apparatus and physical media, etc.).
- Trademark Law (Act 17/2001 of 7 December 2001), Article 61 (preventive filing of the claim in the Trademark Register).
- Patent Law (Act 24/2015 of 24 July 2015), Article 11 (suspension of the procedure for granting a patent) and Articles 117 and 127 et seq. (cessation of acts liable to infringe the rights of the applicant, seizure and retention of the goods alleged to infringe the rights of the patent holder, guarantee of compensation for damages and the ensuing registry entries).
- Bankruptcy Law (Act 22/2003 of 9 July 2013), Article 48(b) (attachment of goods of corporate administrators) and Article 17 (ensuring non-disposal of debtor's assets, inter alia).
- Maritime Navigation Law (Act 14/2014 of 24 July 2014), Article 43 and Article 470 et seq. (arrest of seagoing ships).
- Commonhold Property Law (Act 49/1960 of 21 July 1960), Article 7 (cessation of prohibited activity) and Article 28 (suspension of agreements adopted by owners' associations).

INTERIM MEASURES CRIMINAL PROCEDURE

- Civil interim measures (some of them)
- Preventive detention / temporary custody
- Detention (European detention order)
- Restraining order
- Provisional release

ORDINARY PROCEDURE

ORDINARY PROCESS → resolve any judicial controversy, regardless of the matter in dispute

- In practice, a single ordinary process does not exist.
- **Civil matter** → two ordinary declaratory procedures according to matter or quantity (ordinary proceeding for claims of more than €3000 and verbal proceedings)
- **Criminal matter** → three ordinary procedures according to the crime committed (ordinary procedure, abbreviated process, and minor offence procedure).

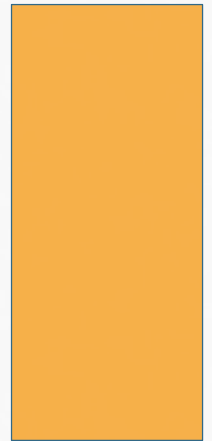
SPECIAL PROCEDURES

- **Civil matter** → by reason of the matter. Book IV CPA
- **Criminal matter** → trials with politicians “aforados”
→ Supreme Court and High Court of Justice

END

LESSON 13: GENERAL PRINCIPLES OF THE PROCESS

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COMMON PRINCIPLES TO ALL THE PROCESSES

Actum trium personarum

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graph TD; A["Actum trium personarum"] --> B["Two partial (confronted) parties"]; A --> C["Impartial third party"]; B --> D["Duality"]; B --> E["Contradiction"]; B --> F["Equality"]; C --> G["Jurisdictional function"];
```

Two partial
(confronted) parties

Impartial third party

Duality

Contradiction

Equality

Jurisdictional
function

DUALITY OF POSITIONS / DUAL PARTIES

- The presence of two confronted parties is necessary
- **Civil process** → claimant/plaintiff vs. defendant
- **Criminal process** → Charging party; public prosecutor vs. defendant

Duality of positions, plurality of parties

DUALITY OF POSITIONS

Civil procedure

- Several people form a single complex party
- The parties are plaintiff and defendant
- Positions can be integrated by more than one person (party)
- Process with plurality of parts or multi-part procedures and duality of positions
- Example: ten-person partnership where one partner claims against the rest
- The defendant position is 9 people
- Autonomous and independent performance

Criminal procedure

- Charging party
 - +public prosecutor
 - + private prosecution
 - Autonomous and independent performance
- Defendant
 - Each defendant must be individually prosecuted and judged
 - There is a process for each defendant, although they are sued jointly

CONTRADICTION AND RIGHT OF DEFENCE

Audiatur et altera pars i nemo inauditus damnari potest

No one may be subjected to any penalty without having been heard and convicted in a trial and without the penalty having been imposed by a final judgment of a judge or competent authority. In the event of enforcement orders, or like measures in civil or labour matters, and of fines or arrest in police matters, the defendant must always be heard

CONTRADICTION AND RIGHT OF DEFENSE

Audiatur et altera pars i nemo inauditus damnari potest



Principle of contradiction or adversarial principle

Principle of *Audi alteram partem* (*audiatur et altera pars*)

"Listen to the other side", or "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them

Right of defence



CONTRADICTION AND RIGHT OF DEFENCE

Fundamental right of audience or defense

- Subject holders of the right
 - Both parties have the right of defence and fair hearing
- Autonomous right
 - The right not to suffer judicial helplessness (right of defence)
 - Different from effective judicial protection (art 24.1 SC)
 - Different from specific guarantees (art 24.2 SC)
- The rights of a party, or his lawyers, to confront the witnesses against him/her, to have a fair opportunity to challenge the evidence presented by the other party, to summon one's own witnesses and to present evidence, and to have counsel, if necessary at public expense, in order to make case properly.
 - Right to be heard
 - Real possibility to be heard (default of appearance vs judgment in absentia)
 - Right to argue and produce evidence

CONTRADICTION AND RIGHT OF DEFENCE

Respect vs infringement of the right

Civil procedure:

The right is respected with a real possibility to be heard

Criminal procedure:

A trial cannot be held in absentia

Exc.: PA (art 784.4 y 786.1 LECrim) and minor offences (art 971 LECrim)

There is no infringement every time a procedural rule is violated, the right of defence must be denied

1. If some of the facts or the legal basis claimed has been denied to a party

2. Prevented from alleging what is deemed necessary for its defense, either against its allegations or against those of the opponent

CONTRADICTION AND RIGHT OF DEFENCE

- Mandate addressed to the legislator to regulate the different judicial processes respecting the principle of contradiction, in order to guarantee the principle of audience (and, consequently, the right of defence)
- The **principle of contradiction** is a way of organising the process that serves to respect the fundamental right to defense



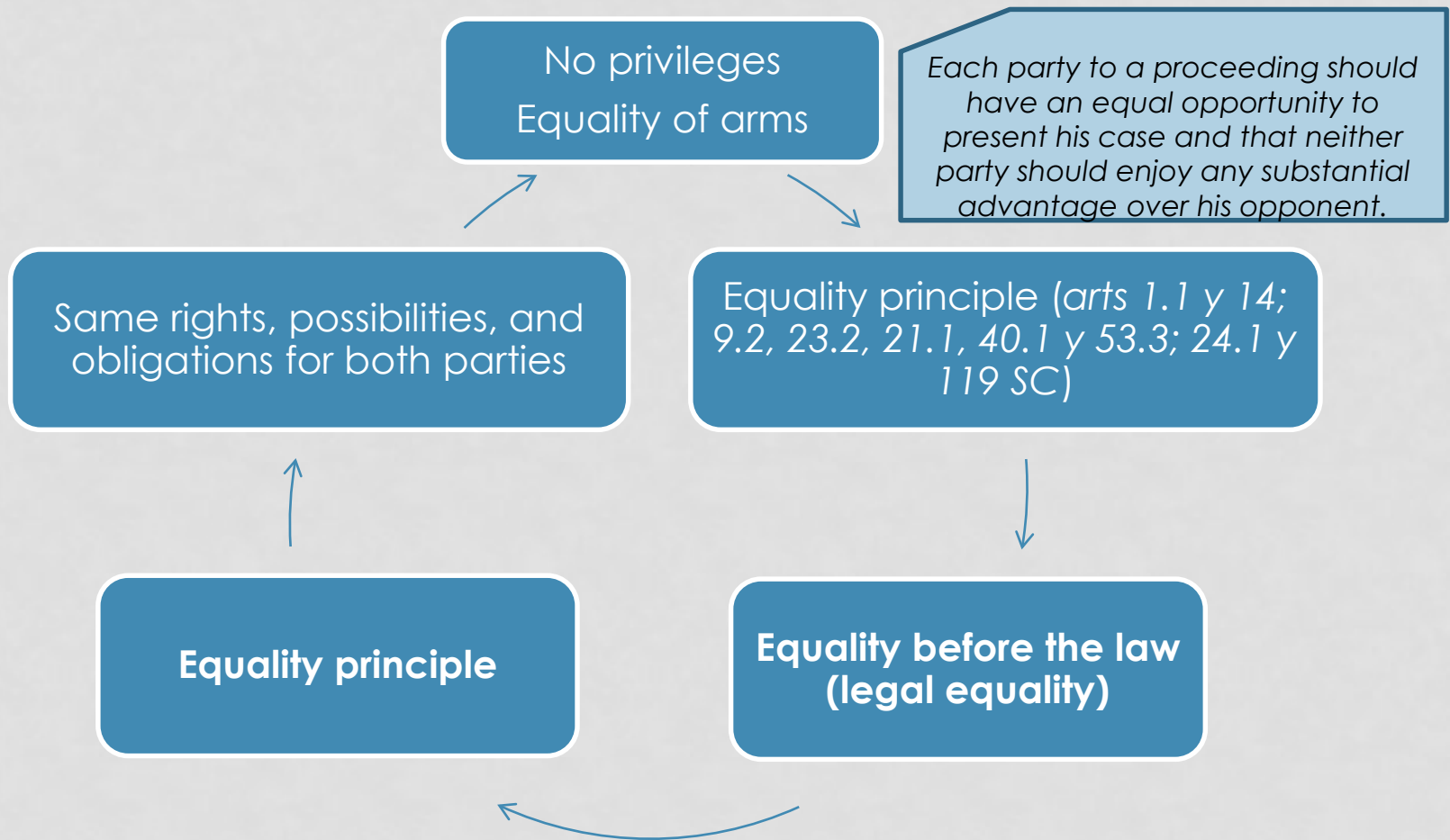
- ✓ It is a psychological device to guarantee the exact application of the law and the impartiality of the judge
- ✓ Seeks the technical instrument that respects the constitutional principles and rules, otherwise it can be declared unconstitutional



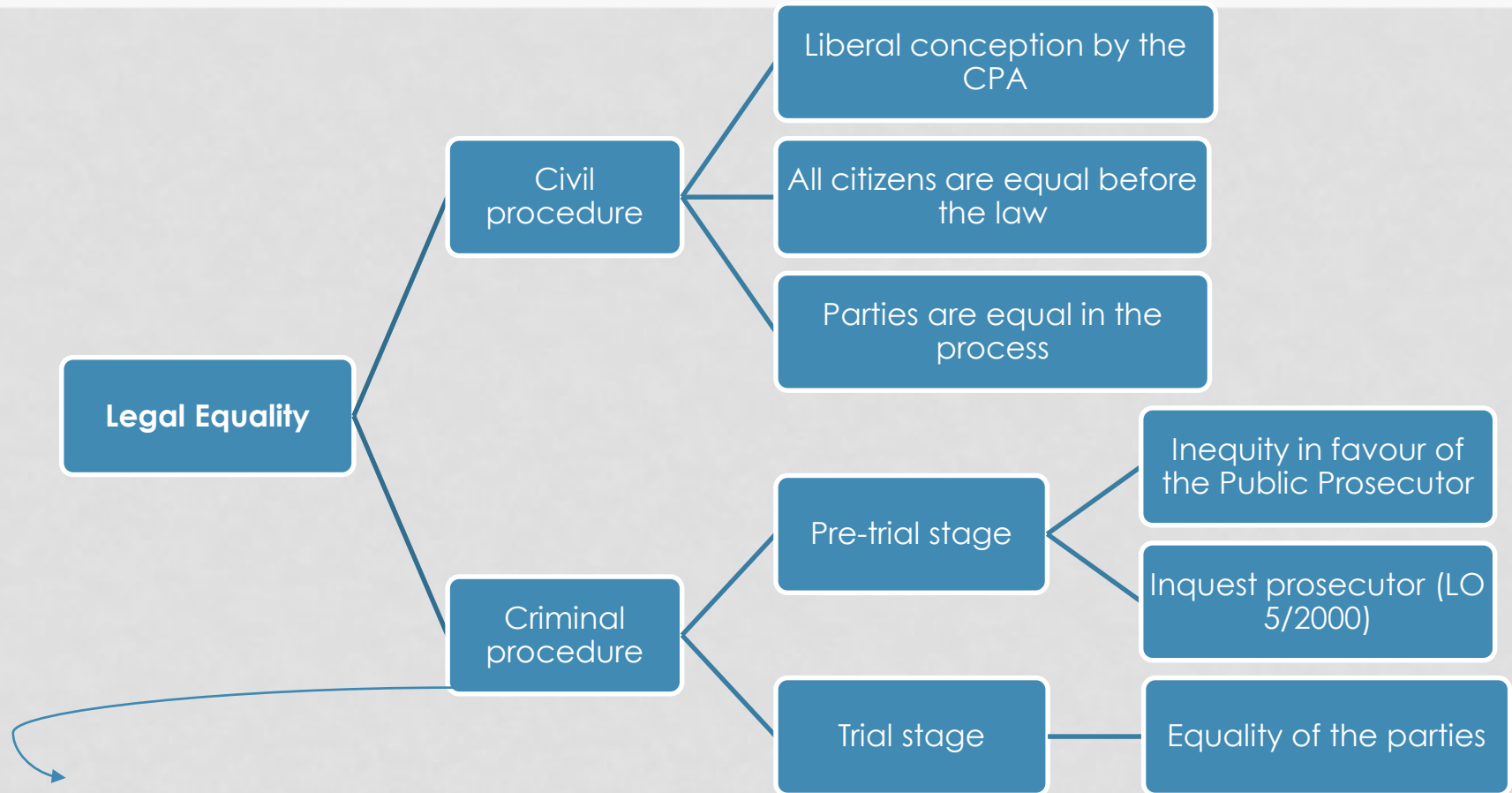
No contradiction → question of unconstitutionality
No defence → writ of protection

EQUALITY OF THE PARTIES

The different parties acting in a process must have access to the same resources in forming their respective claims and defences



EQUALITY OF THE PARTIES



The principle of equality must be guaranteed throughout the pre-trial and trial stages, as every suspected or accused person has the right not to be discriminated against in the way the investigation or trial is conducted or in the way the law is applied to them. The principle of equality also means that every human being must have equal access to the courts in order to claim his or her rights. In particular, women must have access to courts on an equal footing with men, in order to be able to claim their rights effectively.

EQUALITY OF THE PARTIES

Practical Equality

Systems to correct the inequality.
Inadmissible systems

1. Equality for compensation
2. Judge forms the procedure for the specific case
3. Judge is protective of the weaker party

The right of action in art. 24 SC repeals all obstacles and legal limitations to its exercise

Simplification of the types of processes.
Privileged protection incompatible with equality

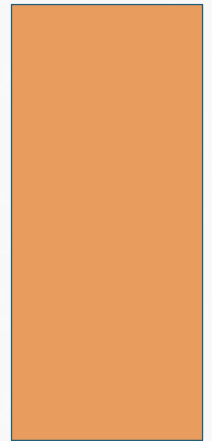
Civil process: promote parity.
Criminal process: reduce the PP to the condition of a party and weigh the duration of the process

Complementary measures ✓ □

END

LESSON 14: CIVIL PROCESS PRINCIPLES

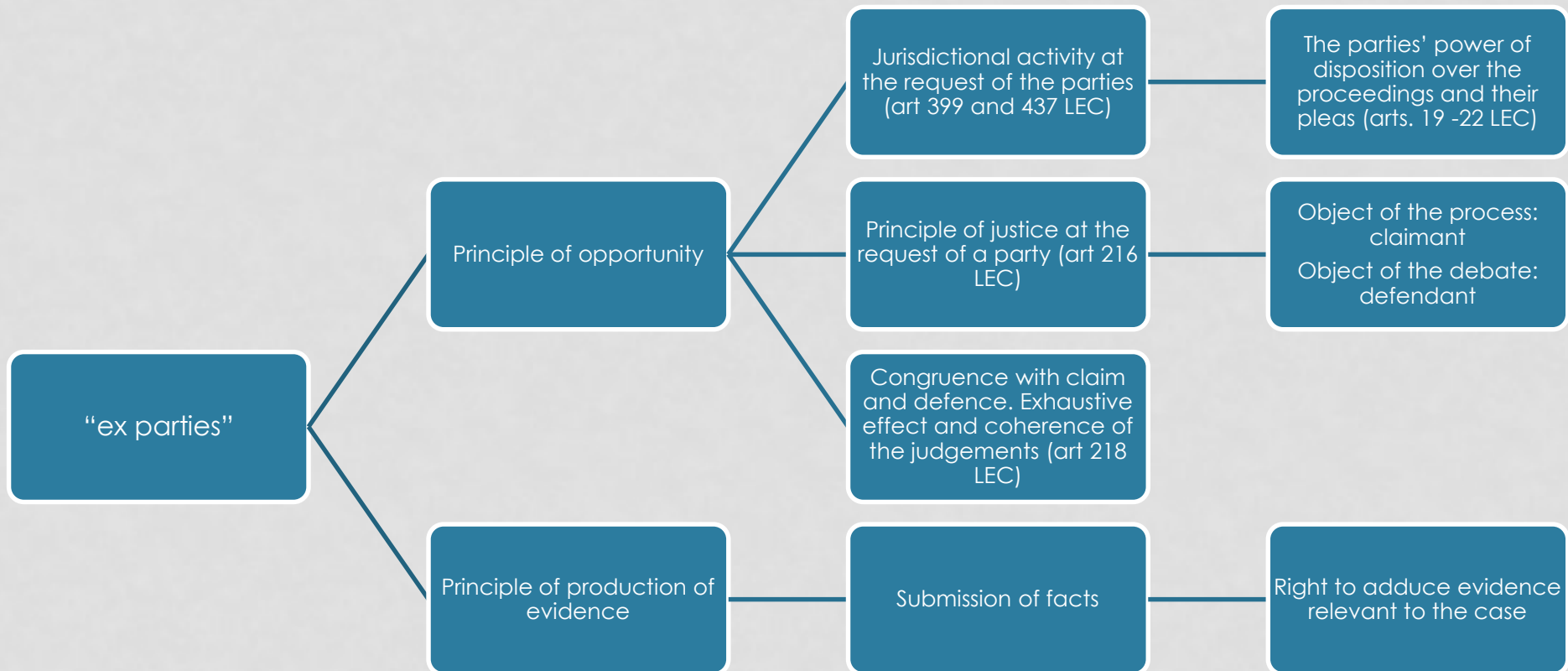
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SUMMARY

1. The principle of opportunity (right of disposition) and the economic system
2. Dispositive principle
3. “Publicisation” (*publicización*) of the process
4. Procedural faculties of management
5. Material faculties of management
6. The established rules for the analysis of the evidence
7. Special civil processes

THE RIGHT OF DISPOSITION



PUBLICATION OF THE PROCESS

Distrust of liberalism against the state

- The process is evil
- It affects the national economy

Publication of the process

- Resolve conflict between parties quickly
- Convert the judge to the person in charge of the process to serve the values and interests of the parties

The state is interested in the best development of the process

- It cannot deny the full application of the dispositive principle
 - It would deny the private nature
- It cannot deny the increase in the powers of the judge
 - At the request of the party

THE PROCEDURAL FACULTIES OF MANAGEMENT

Formal management

- Control the concurrence of budgets and procedural requirements
- Impulse the process

About the budget...


- The budgets refer to the whole process and the lack of something implies that the process has not been carried out in a valid way
- The requirements to achieve a certain process and the lack of a requirement for the invalidity of a certain act
- Distinguish between
 - - True budgets: controlled
 - - Simple impediments: alleged by the parties
- The modern conception leads the court to control *ex officio* all the procedural obstacles that prevent the pronouncement on the merits of the matter (art 425 LEC)
- Almost no obstacles but there are budgets
- Inadmission *in limine* or initial demand
- Faculty of not admitting proceedings when there is a certain procedural budget
- Cannot wait for the chances of success of the claim
- The decision of the judge can affect to the concurrence of budgets and the fulfillment of requirements, but not the question of merits

THE PROCEDURAL FACULTIES OF MANAGEMENT




... To instigate the procedure

The 'principle of party disposition' (Justicia Rogada) is a general principle of law under which the parties exercise, in principle, sole control over legal proceedings.



The **management and procedural handling of the case** will be entrusted to the court, which will adopt ex officio all of the measures it deems necessary for valid, effective, and prompt progress to ensure that it does not stall or suffer unwarranted delays.

Art 179.1 LEC: "the court clerk shall give the proceedings the corresponding progression ex officio and shall issue the decisions required for this purpose"



MATERIAL FACULTIES OF MANAGEMENT

Submission of the facts

The object of
the process

*Petitum
and
causa
petendi*

*Iudex
iudicare
debet
secundum
allegata*

The object of
the debate

The defendant
in formulating his
resistance can
expand the
terms of the
debate or
complete what
must be
decided in the
sentence

The judge
cannot make
contributions

The object of
the evidence

Facts
affirmed
by one
party or
another

Facts in issue
(hechos
controvertidos)

THE MATERIAL FACULTIES OF MANAGEMENT

- **The determination of applicable law**
- ***Iura novit curia***

The principle that "the court knows the law", i.e., that the parties to a legal dispute do not need to plead or prove the law that applies to their case.

The court alone is responsible for determining which law applies to a particular case, and how. The court applies the law *ex officio*, that is, without being limited to the legal arguments advanced by the parties (although the court is normally limited to granting the relief sought by the parties).

- ***Da mihi factum dabo tibi ius***

"Give me the facts and I shall give you the law". Sometimes also given as *narra mihi factum, narro tibi ius*: it is incumbent on the parties to furnish the facts of a case and the responsibility of the judge to establish the applicable law. The maxim also means the parties cannot limit the court's legal cognition (the authority to determine the applicable law)

- ✓ An unclaimed fact does not exist for the judge
- ✓ The rules exist or not regardless of whether the parties cite them
- ✓ Article 218.1.II LEC will resolve according to the rules applicable to the case, although they have not been cited or alleged

THE MATERIAL FACULTIES OF MANAGEMENT

- **The proposition of evidence**

- The parties must start the process → The only means of evidence that must be practiced are those proposed by the parties
- Increase or decrease in the probative powers of the judge responds to procedural political models

- ***Iudex iudicare debet secundum allegata et probata***

The judge must judge according to the allegations and that proven by the parties.

RULES FOR THE ANALYSIS OF THE EVIDENCE

- The assessment of evidence is an operation by which the trial judge either asserts his inner conviction (l'intime conviction, freie Uberzeugung) on the existence or non-existence of facts suggested by the evidence gathered and administered, or declares that under legal rules applicable to evidence, the fact has to be taken as proven [Jorg Sladic & Alan Uzelac]
- Three systems of assessment of evidence: modernised legal proof, preponderance of evidence, and free assessment of evidence

RULES FOR THE ANALYSIS OF THE EVIDENCE

- **Legal assessment:**
- Established by law in an abstract manner
- Divine intervention
- XIII century: preferred the general and a priori criterion on the individual reasoning of each judge
- Maximum of experience
- Legal security and guarantees for individuals (E.P.)

A strict, formalised, and almost mathematical legality in methodical questions of assessment of evidence in civil procedure in order to avoid discretionary and arbitrary decisions

RULES FOR THE ANALYSIS OF THE EVIDENCE

- **Free assessment**
- In European common law jurisdictions the judge shall only decide which party's allegations seem to be more credible.
- Adjudication as evaluation of the contest of the private parties seems to support a specific standard to be applied by the judge in assessing the evidence, the standard being the balance of probabilities.

RULES FOR THE ANALYSIS OF THE EVIDENCE

- **Spanish assessment of evidence:**
- The Spanish system is mixed
- The judge operates under a system of the 'rules of sound critical approach' (las reglas de la sana critica), a mixed system is generally based on free assessment of evidence, but with specific means of evidence governed by legal proof (la prueba legal o tassada), in particular, regarding the use of documents and testimony of the parties.

THE SPECIAL CIVIL PROCESSES (NON-DISPOSITIVE PROCESSES)

It has its origin in the existence of civil norms of ius cogens or imperatives

The determinant is not the autonomy of the will, but the application in its exact terms

Book IV of the LEC, Title I
General rules

Capacity of persons, filiation, paternity, maternity, nullity of marriage, separation and divorce and minors

Problem: there is no single process

Common characteristics

SPECIAL CIVIL PROCESSES

- **Specific determination of legitimation**
 - Ordinary legitimisation: affirmation by the claimant of their ownership of a subjective right
 - Matters regulated imperatively
 - ✓ The law determines in a specific way the legitimised rights
 - ✓ Marriage nullity, separation, divorce, filiation, disability. They are not material rules, but procedural.
- **The Public Prosecutor's Office**
 - Has all the powers inherent to the condition of the parties
 - The judge remains an impartial third party
 - Decreases the dispositive powers of the parties

THE SPECIAL CIVIL PROCESSES

**Exclusion of
the
abnormal
ending of
the
procedure**

Judgment that
contains
contradictory
reasoning

As a general rule,
there are no acts
of disposition of
the process (art.
751 LEC)

**No
admission
of facts**

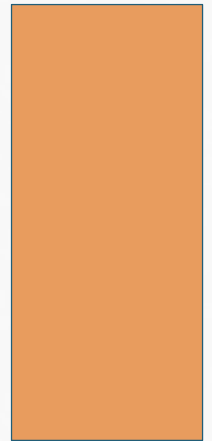
Legal rule
contrary to the
dispositive
process

The legal rules of
the assessment of
the test cannot
be applied (art.
752.2 LEC)

END

LESSON 15: PRINCIPLES OF THE CRIMINAL PROCESS

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Procedural Law I



SUMMARY

1. The jurisdictional guarantee in the application of the criminal law
2. Adaptation of the process to the imperatives of the performance of criminal law
3. The one who instructs cannot judge
4. Principles of the action
5. Rules of evidence

JURISDICTIONAL GUARANTEE IN THE APPLICATION OF CRIMINAL LAW

Criminal law applied by the state

- State holds the *ius puniendi*
- Judicial power: courts and tribunals
- Only through the process

Outcome: jurisdictional guarantee

- Criminal: *nullum crime sine legge*
- Penalty: *nulla poena sine legge*
- Jurisdictional: *nemo damnetur sine legale iudicium*
- Enforceability: penalties are enforced according to the law

Monopoly

- There is no legal criminal material relationship between those who have intervened in the commission of the crime
- Those damaged by the crime do not hold a subjective right to impose a penalty.
- Only the state can impose penalties
 - Legality
 - Not discretionary or arbitrary

ADAPTATION OF THE PROCESS TO THE IMPERATIVES OF THE PERFORMANCE OF CRIMINAL LAW

Art. 120 Constitution

1. Judicial proceedings shall be public, with the exception of those provided for in the laws of procedure.
2. Proceedings shall be predominantly oral, especially in criminal cases.
3. Judgments shall always contain the grounds therefore, and they shall be delivered in a public hearing.

• **The external differences**

✓ The public prosecutor as an artificial party

- The prosecution of crimes cannot be left in private hands -
Artificial creation of the PP keeping the basic scheme

- The PP is not the owner of the *ius puniendi*

- Public preparatory activity

- Prepare the subsequent trial

- Prevent the conclusion of the trial

• **Oral and public trial**

✓ International texts on fundamental human rights and art. 120 CE

✓ Written preliminary procedure and oral process

✓ The criminal trial has to be public and parties present

THE ONE WHO INSTRUCTS CANNOT JUDGE

Art. 219 LOPJ Grounds for abstention or recusation (judge)

11. If s/he has taken part in the inquiry stage of the criminal proceedings or has issued a judgment in a former instance of the suit or legal proceedings.

- *If s/he has issued a judgment in a former instance of the suit or legal proceedings*
 - Not properly related to impartiality
 - Same nature as appeals
 - Human error
- *has taken part in the inquiry stage of the criminal proceedings*
 - Neither impartiality can be the reason
 - The determining conviction of the sentence (absolutory or condemnatory) must be formed only and exclusively with the tests carried out in the JO
 - Incompatibility of functions between instructing and judging

THE PRINCIPLES RELATED TO CRIMINAL ACTION

Holders of the action

State

In Spain this corresponds to any person to prevent the prosecution of crimes depending on political decisions



The content of the criminal action

Admission of the complaint or lawsuit: the judge decides whether or not the facts are considered criminal

Application of substantive and procedural criminal rules to decide whether to open a second phase



Inexistence of criminal claim (subjects, causa petendi and petitum)

The accuser will have the right to accuse, never to punish

- Declaratory judgment of sentence
- The request for punishment does not delimit the process

lura novit curia

PRINCIPLES RELATED TO ACTION

Some specifications about the matter of the process

In the criminal process there is no claim in the civil sense, nor is it the one that serves to identify the object of the process

Legal qualification

1. *Iura novit curia*: The judge is not linked to the legal qualification of the facts
2. Principle of legality: the judge will issue the ruling according to the legal qualification that (s)he understands is correct

Penalty determined

The parties do not have availability of the material right

1. Nobody has subjective criminal rights
2. The penalty cannot be determined by accusations and admissions of a party

Presumption of innocence
Self-incrimination

RULES OF EVIDENCE

- **Presumption of innocence**

- ✓ Innocent unless proven guilty
- ✓ *Ei incumbit probatio qui dicit, non qui negat* → “the burden of proof is on the one who declares, not on one who denies”
- ✓ The legal burden of proof is thus on the prosecution, which must collect and present compelling evidence. The trier of fact (a judge or a jury) is thus restrained and ordered by law to consider only actual evidence and testimony presented in court.

- ***In dubio pro reo principle***

If reasonable doubt remains, the accused must be acquitted.

- **Motivation of the rulings**

- ✓ Public
- ✓ Control through appeals

RULES OF EVIDENCE

- With respect to the critical facts of the case - whether the crime charged was committed and whether the defendant was the person who committed the crime - the state has the entire burden of proof.
- With respect to the critical facts of the case, the defendant does not have any burden of proof whatsoever. The defendant does not have to testify, call witnesses or present any other evidence, and if the defendant elects not to testify or present evidence, this decision cannot be used against them.
- The jury or judge is not to draw any negative inferences from the fact the defendant has been charged with a crime and is present in court and represented by an attorney. They must decide the case solely on evidence presented during the trial.

The prosecution has the obligation to prove each element of the offense beyond a reasonable doubt (or some other level of proof depending on the criminal justice system) and the accused bears no burden of proof.

RULES OF EVIDENCE

- **Self-incrimination**

- Appearance is enforceable coercively
- Right to silence
- The burdens of civil proceedings cannot be imposed
 - ✓ Silence as admission of facts
 - ✓ Refusal to answer for confessed

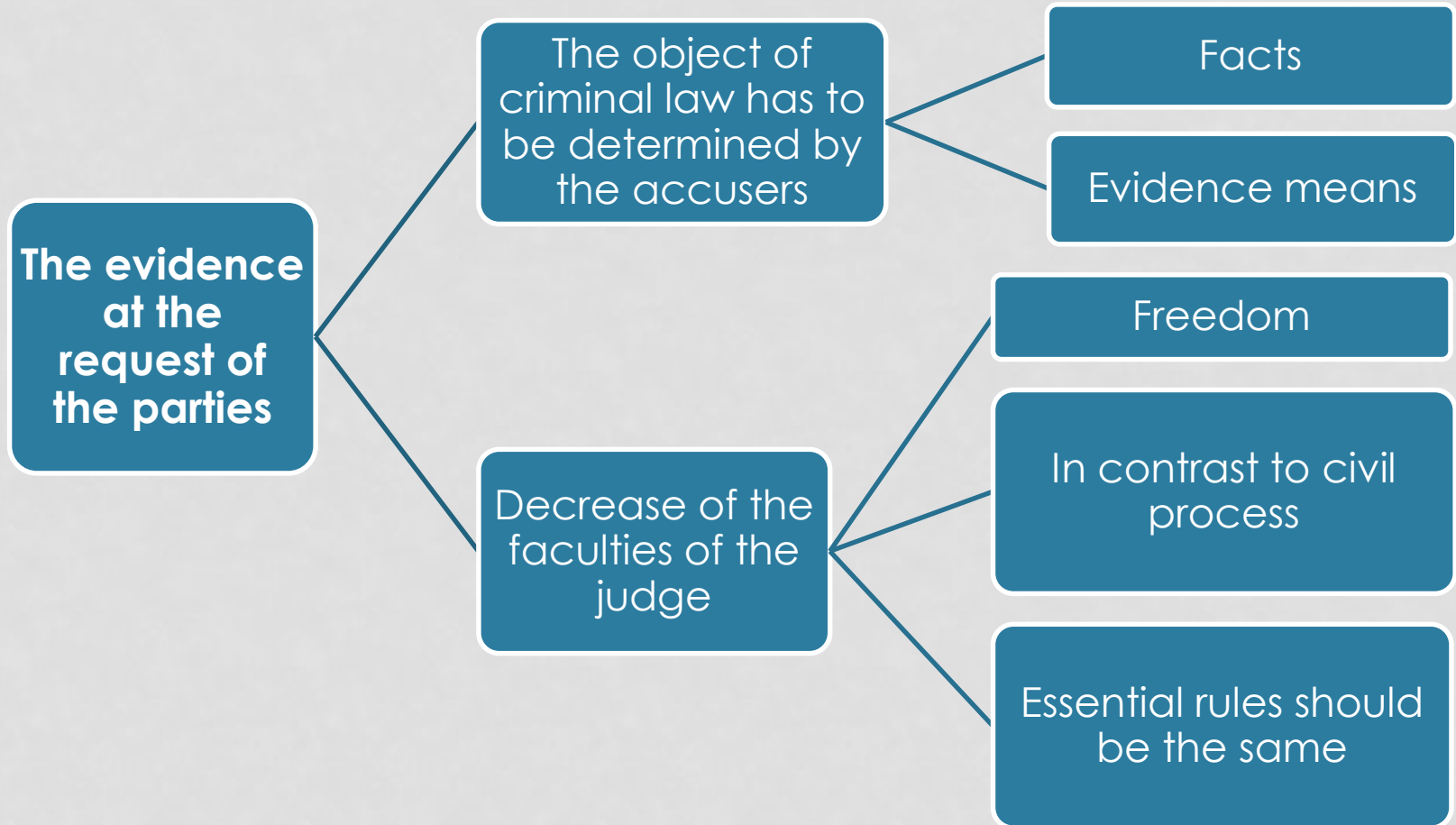
The **privilege** against self-incrimination is “a basic and substantive common law right, and not just a rule of evidence”.

The privilege is that a person is not bound to answer any question or produce any document if the answer or the document would expose, or would have a tendency to expose, the person to conviction for a crime

Pyneboard Pty Ltd v Trade Practices Commission

“The privilege is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and invasion of privacy which occurs in compulsory self-incrimination; it is society’s acceptance of the inviolability of the human personality.”

RULES OF EVIDENCE



RULES OF EVIDENCE

- **The proposition of evidence**

- The parties or the public prosecutor must start the process →
The only means of evidence that must be practiced are those proposed by the parties
- Decrease in the probative powers of the judge

- ***Iudex iudicare debet secundum allegata et probata***

The judge must judge according to the allegations proven by the parties.

RULES OF EVIDENCE

Free assessment

Tribunal R volutionnaire fran es (1793), Codice d'Instruction Criminille (1808) y LECrim (1882)

Not discretionary, not arbitrability

Subject to the appellate court control
The function of a reasoned judgment is to afford the parties the possibility of an effective appeal and to show to the parties that they have been heard

“Rules of sound critical approach” or “sound reasoning” has to be explained in writing and inserted at considerable length into the court judgment.

Mental operation consisting of a syllogism

1. The minor premise is a source-means of proof (the witness and his statement)
2. The major premise is a maxim of experience
3. The conclusion is the affirmation or denial of the existence of a fact

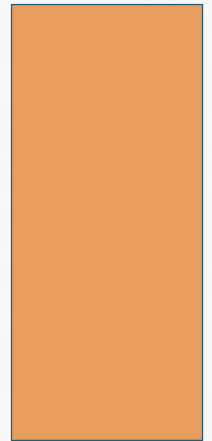
The legal premises refer to the existence of a principle of legal security that is imposed on the judge

LEGAL CERTAINTY

END

LESSON 16: PRINCIPLES OF PROCEEDING

Lecturer Dr Ana Isabel Blanco García
Procedural Law I



SUMMARY

1. Form and formalism
2. Orality and writing
3. Orality and consequence on principles
4. Writing and consequence on principles
5. Constitutionalisation of orality

FORM AND FORMALISM

Freedom of form

Freedom to address the judicial body in the way considered most appropriate

It has not had practical reality in any country

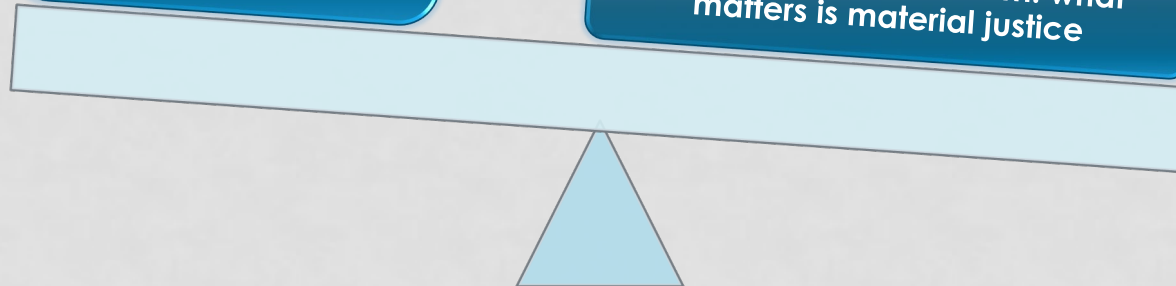
Legality of forms

The form is the necessary condition for certainty, the price of legal security (Montesquieu)

Form and formalism have two problems

1. Risk that the legislator will incur in formal excess

2. Contempt for the form: what matters is material justice



ORALITY AND WRITING

Orality

Immediacy

Concentration

Openness to the public


Writing

Temporal mediacy

Dispersion (preclusion)

Secrecy

In Spain, the traditional doctrine had sustained that the principle of orality determined - except some cases - that only the word in trial could be valued.

 The orality and writing are two ways to do the process.

ORALITY AND ITS CONSEQUENCE ON PRINCIPLES

- The oral procedure usually ends with an oral hearing
- Criminal process: oral trial
- Civil process: preliminary hearing and oral trial

Immediacy

- Evidential procedures
- Criminal process: the entire trial is based on the immediacy
- Civil process: the possibility of practice before a different judge is exceptional
- The material immediacy principle requires that during the trial the evidence should be based on the most primary sources in order to ensure the verifiability of the information contained.

Concentration

- Procedural activity: procedural acts must be developed in a hearing or, in the last case, in a few upcoming hearings
- Content of the process: the preliminary, incidental, and prejudicial issues are concentrated in a single act of hearing

Publicity

- Political character and dependence on orality
- A process without immediacy is constitutional
- A process without publicity is undemocratic.

WRITING AND ITS CONSEQUENCE ON PRINCIPLES

- The written form predominates in procedural acts
- The fact that in an oral procedure the act performed is documented does not violate the orality

Temporal mediacy

- There is some element between the judge and the evidence
- Traditional that the rules provide that the evidence must be practiced in the presence of the judge, but this does not have to introduce mediation
- Change of judge and judicial assistance

Dispersion and preclusion

- Lapses of time for each party to make their written
- Preclusion / termination: if the party does not perform the act on time, the party loses the right
- For the judge, there is no preclusion, but disciplinary responsibility

Secrecy

- The general public does not have access to the procedures
- Without knowledge of the writings, the practice of the test is unintelligible
- Broadcast media
- Possibility of secrecy of actions

THE CONSTITUTIONALISATION OF ORALITY

Art. 120 Constitution

1. Judicial proceedings shall be public, with the exception of those provided for in the laws of procedure.
2. Proceedings shall be predominantly oral, especially in criminal cases

There are processes or phases in which orality adds nothing or even disturbs the processing

Art. 429.8 CPA

Where the only evidence admitted consists of documents without being contested, or where expert reports have been filed and neither the parties nor the court have requested the expert presence at the hearing to ratify their reports, the court shall proceed to issue a judgment with no oral hearing

Art. 464 CPA

The appeal can be completely written, but it will not be if evidence must be produced and proven

Art. 52.2 LOTC

It is possible to hold a hearing in the processing of the legal protection appeal. In practice, this constitutional appeal is a legal issue and, therefore, the oral hearing becomes unnecessary

END