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THE JUDICIAL POLICE IN THE FACE OF THE REFORM OF CRIMINAL PROCEDURE

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THE JUDICIAL POLICE IN THE FACE OF THE REFORM OF CRIMINAL PROCEEDINGS

Abstract: The reform of criminal procedure is a hot topic, raising the question of who should be the governing body: the Examining Magistrate or the Prosecutor in charge of the investigation. However, the current importance of the Criminal Police cannot be overlooked, as it must become one of the essential pillars on which change hinges. Whoever procedurally directs the investigation must be adequately supported by an investigative police unit that fulfills its function of investigating the criminal acts and uncovering those responsible with technical rigor and efficiency. Despite the debate generated, our legal system already provides for a Prosecutor with investigative powers and managerial capacity vis-à-vis the Criminal Police, something that, admittedly, is limited by the presence of the Examining Magistrate. In any case, what is the current situation of the Criminal Police? What is its relationship with the Judge and the Prosecutor? What does comparative law teach us? And, finally, is it possible to establish another form of police investigation?

Resumen: La reforma del procesal penal es un asunto candente donde se plantea la duda de quién debe ser el órgano rector si el Juez de Instrucción o el Fiscal encargado de la investigación. Sin embargo, no puede olvidarse el protagonismo actual de la Policía Judicial que tiene que convertirse en uno de los ejes esenciales sobre el que pivote el cambio. Quien dirija procesalmente la indagación debe verse adecuadamente acompañado de una unidad policial investigadora que cumpla con rigor técnico, y eficacia, su función de averiguar los hechos delictivos y descubrir a los responsables. A pesar del debate generado, nuestro ordenamiento ya prevé un Fiscal con facultades de investigación y capacidad directiva con respecto a la Policía Judicial algo que, es cierto, se ve limitado por la presencia del Juez Instructor. En todo caso, ¿Qué situación tiene la Policía Judicial en la actualidad? ¿Cómo es su relación con el Juez y el Fiscal? ¿Qué nos enseña el Derecho comparado? Y, finalmente, ¿Es posible establecer otra forma de investigación policial?

Keywords: Criminal Police. Prosecutor. Judge. Criminal proceedings

Palabras clave: Policía Judicial. Fiscal. Juez Instructor. Proceso penal

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ABBREVIATIONS

ALECRIM: Preliminary Draft Law on Criminal Proceedings.

BLECRIM: Draft Law on Criminal Proceedings.

EC: Spanish Constitution.

CPPF: French Code of Criminal Procedure.

CPPI: Italian Code of Criminal Procedure.

CPPP: Portuguese Code of Criminal Procedure.

CRI: Constitution of the Italian Republic.

DIA: Anti-Mafia Investigation Directorate.

EOMF: Organic Statute of the Public Prosecutor's Office.

FGE: General State Prosecutor's Office.

FJ: Legal Basis.

LDD: Law on the Right of Defence.

LECRIM: Criminal Procedure Act.

LOPJ: Organic Law of the Judiciary.

LORRPM: Organic Law Regulating the Criminal Responsibility of Minors.

RD: Royal Decree.

RMF: Regulations of the Public Prosecutor's Office.

STC: Constitutional Court Ruling.

STS: Supreme Court Ruling.

ECHR: European Court of Human Rights Ruling.

1. GENERAL CONSIDERATIONS ON THE POLICE MODEL

The role of the Judicial Police in criminal proceedings, elliptically reflected in Article 126 EC, is essential. Firstly, it acts as a receiver of complaints and carries out the first steps to verify the facts presented to it by victims and/or injured parties. Secondly, the police authority can initiate measures with an impact on fundamental rights, which gives it considerable power in the personal sphere of the persons under investigation. Thirdly, the result of the investigation takes the form of a document, the attestation, which sets out a framework of assessment, an initial version of the evidence, which guides the work of judges and prosecutors, which is no small matter, given that it is the material with which they work and which is used to resolve key issues such as the freedom of the person under investigation or the adoption of precautionary measures restricting their rights.

In view of the above, we have witnessed a clear separation between police functions, which are responsible for protecting "public safety", and those of investigating the criminal act. Therefore, there is a task that encompasses the so-called "Governmental Police", proper to Art. 104 CE, where the prevention of crime becomes a core task, that is, to protect people and property by preserving "public tranquillity" (SSTC 104/1989, 8 June, FJ 3º; 55/1990, 28 March, FJ 5º; 175/1999, 30 September, FJ 5º), a function which we differentiate from the task of investigating the crime and its authorship (STC 303/1993, 25 October, FJ 4º). This determines a kind of asymmetry which, necessarily, helps to delimit the former from an operational task which serves to feed the judicial work (or that of the Public Prosecutor's Office) as an investigative police activity of *a preparatory, pre-procedural and administrative nature* where the limitation of fundamental rights, with the exception of detention, is a strictly judicial task. Likewise, as long as it is not reported to the judge or the public prosecutor, it is *autonomous* in nature, in such a way that until the investigated facts emerge in court, the investigating unit develops and carries out the procedures it deems appropriate.

It should be pointed out, returning to initial doubts, that despite speaking of "Judicial Police", what this expression really outlines is the *function itself* (Moreno Catena, 1988, pp.144-145), but not the existence of an independent, autonomous body, completely detached from the governmental function of security. As stated in Instruction 1/2008 of the FGE on the direction of judicial police units by the Public Prosecutor, "The constitutional text does not establish the existence of an independent, autonomous body, completely detached from the governmental function of security:

"The constitutional text does not establish a model for the Judicial Police, but only points out two sole requirements to the legislator: one, the need to create and regulate the Judicial Police and, two, that it should have a functional dependence on Judges, Courts and the Public Prosecutor's Office. In the terms of Consultation 2/1999 of the State Attorney General's Office, the Constitution sets out the task incumbent on the Judicial Police, but does not attribute the function to any body, nor does it make the material and geographical distribution of competence. Strictly speaking, neither does it predetermine whether it is to be constituted as a specific body or as a mere function exercisable by the Security Forces, nor whether its system of dependence on Judges and Prosecutors should be organic or functional, thus leaving the legislator a wide margin of free configuration".

Nor should it be forgotten that our country has a *plurality of bodies with police functions*. State bodies such as the Guardia Civil, the National Police or the Customs Surveillance Service coexist with the police forces of the Autonomous Communities with comprehensive models (Catalonia, Basque Country and Navarre; STC 184/2016, 3 November, FJ 4º). To this scenario we add the Local Police, which depend on the City Councils and which also participate in criminal proceedings (ATS 299/2017, 26 January, Chamber II, Speaker: Soriano Soriano, FJ 1º) or the functions attributed to forestry agents (art. 58.a) of the Ley de Montes 43/2003, 21 November) whose specific training in matters of fires, and their causes, would make them collaborators of the investigating unit in charge of delimiting the identity of the perpetrators for the purposes of integrating the attestation, although they should not strictly speaking be considered a police force (Rodríguez Fernández, 2007, pp. 2452-2453).

All of them, in the exercise of their functions, act or may come to act as "Judicial Police", which, in addition to the lack of definition, leads to a *situation of deconcentration* in the exercise of this function. Likewise, those who act as "Judicial Police" find themselves in a situation of *double dependence*. On the one hand, the functional dependence of the investigative units on judges and prosecutors. On the other hand, there is the organic dependence that translates into a vertical chain of command with their incardination in an administrative body (Ministry, Department of the Interior or City Council), in such a way that a general dependence coexists, due to the insertion of the police forces in the Executive, which is combined with a specific dependence on the judicial bodies and the public prosecution with regard to the specific investigation underway, with the obligation to obey their instructions, particularly in cases of obligatory secrecy (STS 424/2023, of 29 March, Chamber III, FJ 7º; Speaker: Requero Ibáñez).

The lack of a single judicial police force may be due to the lack of historical precedents in our country, together with the evident freedom granted to the legislator to make a decision on this matter. Progress has been made with the creation of the so-called "Organic Units" - specific Judicial Police - which is an affirmation of the investigative activity within the framework of the judicial investigation or the preliminary investigation of the Public Prosecutor's Office, but which is far from the creation of an agency that would serve as the "Police of Justice". In this sense, it should not be forgotten that police investigative activity is part of criminal policy, which can be understood as a set of actions aimed at improving the welfare of citizens, ranging from the definition of the areas that fall within the scope of criminal reproach, through the material organisation of the bodies and means available to the Executive, to the exercise of criminal actions before the courts when an offence has occurred (Moreno Catena, 2007, p. 77), which implies a certain degree of conflation with the criminal justice system.), which implies a certain confluence of objectives that should be clearly delimited, and in a singular manner, in the judicial investigation of the criminal proceedings, as the legitimate political aims of the prosecution of the offence should not be confused with the deduction of liability for its commission.

In any case, in view of art. 126 CE, it is ruled out that bodies other than Judges and Prosecutors with the assistance of the Judicial Police can carry out criminal investigation tasks (STC 85/2018, of 18 July, FJ 6º) with what is an exclusive function of certain actors. Thus, the possible reform of criminal proceedings in which the Judge cedes the role of witness to the Prosecutor in the direction of investigations to the Prosecutor, , raises the question of what role the Judicial Police should play and whether the current scheme

should be reformulated in the face of a change of paradigm.

2. THE INVESTIGATING JUDGE AND HIS COMPLEX "INVESTIGATIVE" ROLE

Criminal procedure in our country is the result of a Criminal Procedure Act (LECRIM) approved on 14 September 1882 and which has survived, after countless reforms, to the present day. In this sense, the figure of the Examining Magistrate is the pivot on which all the procedural steps are based, the director of the summary proceedings who decides on the fundamental rights at stake. However, despite his undisputed leading role, he coexists with the Judicial Police and the Public Prosecutor's Office in the task of investigation. In this sense, we must not forget the nature of the investigation, which our SC has clarified in STS 228/2015, of 21 April, of Chamber II (Speaker: Martínez Arrieta) FJ 1º, when it indicates, echoing previous positions, that:

"We said in STS 228/2013, of 22 March, that the judicial investigation of the facts is an administrative and, in part, jurisdictional function, hence the dual inquisitorial and accusatory nature that characterises it. The investigating judge is entrusted with the function of investigating criminal cases. It is therefore a manifestation of the principle of officialdom - or of necessity or legality - that criminal proceedings must begin when the judge becomes aware of conduct that appears to be criminal. In our current legal system, this original jurisdiction over the investigative proceedings is shared with the functions that may act on their own authority, or by delegation of the judge, the Judicial Police, acting under his authority or that of the Public Prosecutor's Office, and the Public Prosecutor's Office itself, with a pre-procedural character. It is not a jurisdictional function, but prior to the judicial investigation".

The mixed nature set out in jurisprudence makes it necessary to differentiate between "investigative activity", which is clearly jurisdictional, which would imply, in guarantee functions (Art. 117.4 EC), judicially adopting measures aimed at limiting fundamental rights and their ordered infringement (entry and search of homes, decision on pre-trial detention, opening of correspondence, interception of telephone and telematic communications, capture and recording of oral communications or the use of technical monitoring devices, among others) of what is "investigative activity", which is administrative and instrumental, and which implies the discovery of the criminal act, the elements of its commission and the perpetrator, which includes various proceedings, with the insurmountable limit of fundamental rights, which can be adopted motu proprio by the police (art. 282 LECRIM), or the Public Prosecutor's Office in the development of its preliminary investigations (art. 5 EOMF and art. 773 LECRIM), but, as is usual, they are carried out within the framework of an investigation directed by the judge (art. 299 LECRIM), which represents the container in which the investigation is introduced as one of its elements.

It must be borne in mind that *what* the judicial investigation *seeks are indications of the commission of a criminal act*, which, if confirmed, would force the subject to be sent back to trial, or to close the investigation in the absence of such indications, without any evidence being carried out, which must be carried out in the trial, except for anticipated or pre-constituted evidence (STS 491/2019, of 19 October, Chamber II FJ 9.2, Speaker: H.E. Mr. Llarena Conde). In such a way that it is necessary to rule out an evidential activity in the investigation, and this, regardless of who the promoter is, a

question which is not minor in that it must be ruled out, out of respect for the right to defence and the presumption of innocence (art. 24.2 CE), that the guilt or innocence of a person is the result of the investigative or investigative work.

The above necessarily leads us to highlight the delicate position of the judge who directs the investigation due to the development of a dual role which appears to be antagonistic. Thus, the judicial authority has to assume the role of guarantor of the rights of the same subjects that it has to investigate, thus confronting the success of the investigation and its end with the wall of constitutional guarantees that it has to protect. This affects the position of the judicial police, who see the judge as the key to the measures that can make their investigations prosper, as the crossing of certain thresholds depends on his procedural consent, but he is also the brake, a sort of customs guarantor (Alfonso Rodríguez, 2024, p. 23), which can frustrate the advances that are sought. This implies a sort of somewhat dysfunctional relationship, in which procedural guarantees can either be resented if there is full identification between the judicial authority and the police, or there is a permanent tension when investigative measures are denied. In both cases, those who may benefit from such circumstances are the suspects who, depending on the pre-eminence of either of the aforementioned levels, may allege violations of fundamental rights or avoid criminal liability in a situation of judicial restrictions on the investigative unit.

In any case, the functions of the Judicial Police (Organic Unit) by the Examining Magistrate can be seen in the possibility of "commissioning" it (art. 11 RD 769/1987, of 19 June) to carry out the procedures that are entrusted to them (art. 287 LECRIM) together with the possibility of a "direct understanding" (art. 288 LECRIM) between the judicial authority and the Judicial Police itself (its investigators) being able to give them orders (arts. 21 and 29 RD 769/1987, of 19 June). Both possibilities undoubtedly reflect functional dependence. However, certain elements that limit and affect this connection must be taken into account:

Firstly, judicial independence, constitutionally protected, determines that the criteria of action of the Judicial Police can be mutated depending on the issuing authority. In other words, each judge has his or her own way of conceiving the investigation and his or her priorities, which means that the possible unity of operational action is conditioned by each judicial perspective in terms of the specific acts of investigation. This situation clashes with the relatively uniform procedures that shape the actions of the investigative units, who confront their work with the individual criteria of each judge, a criterion that has a decisive impact on the adoption of the most relevant investigative measures and which, ordinarily, clash with fundamental rights.

Secondly, although the examining magistrate could keep a confidential record of the behaviour of civil servants (art. 298 LECRIM), a record whose appearance is strange, the fact is that there are no specific elements of control or capacity for disciplinary sanction and the only thing that can be done is to request it from superiors (art. 35 d) LOFCS 2/1986, of 13 March), which means that there is no capacity to respond to a deficient execution of their orders.

Thirdly, it is necessary to distinguish the work of decision making from the function of execution, which cannot lead to a confusion of roles; on the contrary, police work must be clearly separated from the activity of judges and courts, a situation that cannot be

mixed, as expressed in STS 873/2001, of 18 May, of Chamber II in its FJ 4º (Speaker: Mr. Conde-Pumpido Touron). Conde-Pumpido Touron) stating that "The Examining Magistrate is a judge and not a policeman; he impartially carries out a preparatory investigation for the oral trial, both for the prosecution and for the defence, that is, recording and assessing all the circumstances, both adverse and favourable to the present defendant, and to this end he must legally direct and control the police investigation, but it is not legally imperative that he personally carry out police work such as the search for and seizure of material evidence". It is necessary to avoid a situation of contamination (Ferrajoli, 2006, p.582) that could condition the decisions of the investigation, something which, on the other hand, should not prevent the existence of a fluid and coordinated relationship under a principle of mutual trust. In any case, the role of the examining magistrate is not that of an "enemy" of the person under investigation (STS 20716/2009 (Special Case), 9 February, Chamber II (Speaker: Mr Colmenero Menéndez de Luarca) FJ 11), precisely as a result of his status as guarantor.

Fourthly, we can speak of a kind of duplicity of actions which are carried out by the police but which are reiterated judicially as a hearing of the investigated person (arts. 385 and following, LECRIM), whose confession does not prevent him from verifying the facts (art. 405 LECRIM), the victim (art. 109 LECRIM), or the witnesses (art. 410 et seq., LECRIM), which is a sort of filter of the police work previously done (Porres Ortiz de Urbina, 2009, p. 38) but which ends up slowing down the investigation itself. In this sense, there is talk, not without some reason, of judicially "sanctifying" what has been done by the police without changing its nature (De Llera Suarez-Bárcena, 2001, p.100).

Fifthly, it should not be forgotten that the work of judicial direction of the investigators has a decisive impact on the oral trial. In such a way that it cannot be accepted that once the police investigations have concluded, the rest of the procedural events could be irrelevant for the investigating units, something that cannot be accepted. This is because the plenary (oral trial) is the setting for analysing what has been investigated, the police work is subjected to a test of resistance and, above all, to the possibility of a nullity of the proceedings which would allow them to extract the elements of evidence which imply a violation of fundamental rights (art. 11 LOPJ). 11 LOPJ), so that judicial control and correct police practice "ex ante", and during the investigation, are essential, without any possible shortcuts being admissible in the prosecution of the criminal act (STS 875/2021, 15 November, Chamber II, FJ 2.4º (Speaker: Marchena Gómez)), in order to avoid unlawful evidence (SSTC 114/1984, 29 November, FJ 4º and 49/1999, 5 April, FJ 12º) which could lead to impunity for criminal conduct.

In view of the above premises, although there is no discussion of the constitutionality of the current model (SSTC 145/1988, 12 July 1988, FJ 5º 41/1998, 24 February 1998, FJ 14), the delicate role of the judicial authority in charge of the investigation, within the framework of its capacities, must be pointed out, as it plays a paradoxical dual role. Its role as a guarantor (STC 32/1994, 31 January 1994, FJ 3º) conditions its capacity as an investigator and, at the same time, its position as the person responsible for the investigation can weaken its role as guarantor. In this sense, its relationship with the Judicial Police is not free of complexities because it must act as a driving force, , but simultaneously as a brake on any diligence that does not fit in with the procedural scheme that safeguards fundamental rights, which can lead to logical tensions between the intended aim (to determine facts, perpetrators and responsibilities indirectly) and the means employed (particularly those that clash with arts. 17, 18 and 19, not

forgetting 24 of the EC). This forces us to reflect on the possibility of removing the investigating judge's investigative capacity from the investigating judge and giving it to the Public Prosecutor's Office so that it can maintain its role as guarantor intact, which would ultimately lead to an extraordinary change in the criminal process as we know it.

3. A JUDICIAL POLICE LED BY THE PUBLIC PROSECUTOR'S OFFICE?

A Judicial Police led by the public prosecution is a proposal that has been floating around, in the context of the reform of criminal procedure, for quite some time and above all as a result of the different projects, and attempts at projects, that have been presented in our country (ALECRIM 2011, BLECRIM 2013 or ALECRIM 2020). In any case, we must avoid any interpretation that seeks to place both actors in the same scenario, as already stated in STC 206/2003, of 1 December that "On the other hand, the institutional position of the Public Prosecutor's Office is very different from that of the police. Indeed, it is a body integrated with functional autonomy in the Judiciary..." (FJ 5º). However, there is a clear need for police investigative bodies to assist the Public Prosecutor's Office in the exercise of its functions, a situation which, nevertheless, presents some risks, especially in the way in which their relations are articulated, the framework of autonomy-dependence or the possibility of delegation by the Prosecutors of the practice of proceedings. If we were to limit ourselves to changing the ordering subject, but maintain the same working scheme, it would be a half-reform.

The European reality is clear in attributing to the public prosecutors unique directive powers over police investigations, and this is due to the non-existence of a figure analogous to the Investigating Judge, but with a "Judge of Guarantees" before whom the measures that could affect fundamental rights are requested. The most obvious cases are *Germany, Italy and Portugal*, where the Public Prosecutor's Office assumes the function of investigating criminal offences as a single body in close cooperation with the judicial police. As is the case here, the police forces are dependent on the Executive (Ministry of the Interior and Defence or even Finance) and this allows us to translate it into the following scenario: an auxiliary system, with a certain police autonomy, as in Germany; a system of dual dependence, but with strong links to the Public Prosecutor's Office as far as the Italian criminal process is concerned; and finally, a system of dual dependence with the possibility of delegation of actions by the Public Prosecutor's Office to the Judicial Police in Portugal (Alfonso Rodríguez, 2023, p. 77).

The Italian Public Prosecutor's Office is an *independent magistracy, part of the Judiciary but distinguishable in its functions,* which is obliged to prosecute (art. 112 CRI). This consideration places it outside the common anatomy of most of the systems around us, characterised by a link, to a greater or lesser extent, between the public prosecution and the Executive, something that does not occur in the Italian procedural system. Here, the "autoritá giudiziaria" controls the Judicial Police (art. 109 CRI), therefore, the Public Prosecutor's Office has a directing role in the course of the investigations carried out by the investigative units. Thus, the *Polizia Guidiziaria* is organised into sections, which are constituted together with each of the headquarters of the *Procura della Repubblica (*art. 59.1 CPPI). The importance of these sections allows the Public Prosecutor's Office to have great autonomy in its actions, relying on the police officers of a section, which produces a situation of immediacy in the direction of the Public Prosecutor (Mateos Rodríguez-Arias, 1994, p. 265). This assignment allows effective control of the preliminary investigation (*indagine preliminare)* by the Magistrate of the Public

Prosecutor's Office without there being an autonomous scope of action by the Judicial Police, as the delegations must be specific for the practice of proceedings that he deems appropriate (Martin Pastor, 2005, p.131). In this sense, the delegation can even include interrogations and confrontations in which the person under investigation participates (art. 370.1 CPPI), something unthinkable in our criminal procedural system where it is not possible to open a trial without the judge having taken the appropriate statement from the person under investigation (STC 277/1994, 17 October, FJ 14º), even if it has already been made by the police.

In Italian procedural law, the *Polizia Giudiziaria* plays an essential role as a basic pivot, together with the Public Prosecutor's Office, on which the investigation procedure revolves (Novelli, 1989, p.5). Thus, its competences can be summarised, in view of art. 55 CPPI, as receiving the news of the commission of the criminal act and preventing its subsequent consequences, searching for the perpetrators, and carrying out the necessary acts to secure the sources of evidence, including everything that is useful for the procedure and the application of the Law. During this phase, the police are responsible for carrying out identification tasks, using any means of evidence such as fingerprints, photographs, anthropometric tests, when the person does not present means of identification (art. 349 CPPI), carrying out personal searches or searches of places in case objects or traces of the crime can be found (art. 352.1 CPPI), although a report must be sent to the Public Prosecutor within a maximum period of 48 hours for a decree to validate the search (art. 352.4 CPPI). Likewise, although the general rule is to send closed packages to the Public Prosecutor for opening (art. 353.1 CPPI), he may urgently request the Public Prosecutor's Office to open them immediately (art. 353.2 CPPI).

In all this activity, the counterbalance is represented by the Judge for Preliminary Investigations (*Giudice per la indagini preliminari* or GIP) who is a single-person body, integrated in a special section of the Court in the territorial area where he carries out his function and is the element of a certain restraint against the activity of the Prosecutor's Office and which translates, as far as the investigation is concerned, into the adoption of decisions on telephone interceptions (art. 266, 266 bis and 266 bis and 266 bis). 266, 266 bis and 267 CPPI), the adoption of personal precautionary measures (arts. 272-351 CPPI) or even real precautionary measures (arts. 316-325 CPPI). This means that he or she is kept away from the preliminary investigation, except for the possible adoption of measures aimed at violating fundamental rights that may be of interest to the Public Prosecutor's Office and, by extension, to the Judicial Police.

Finally, in the area of organised crime, the Italians have opted for special bodies both in terms of police and public prosecution. Thus, the *Direzione investigativa antimafia (Anti-mafia Investigation* Directorate or DIA) is the police body in charge of investigating mafia criminal phenomena. It is defined in art. 108 of the *Legislative Decree of 6 September 2011 n.159*, and is designed as a public security subject, therefore integrated in the Ministry of the Interior, which acts as a driving, coordinating and liaison element in relation to the complex of investigations involving crime mafia[1] becoming a specific Judicial Police body (with officers from Carabinieri, State Police and Financial

[1] Art. 108. 1. of the aforementioned Royal Decree states "E' istituita, nell'ambito del Dipartimento della pubblica sicurezza, una Direzione investigativa antimafia (D.I.A.) con il compito di assicurare lo svolgimento, in forma coordinata, delle attivita' di investigazione preventiva attinenti alla criminalita' organizzata, nonche' di effettuare indagini di polizia giudiziaria relative esclusivamente a delitti di associazione di tipo mafioso o comunque ricollegabili all'associazione medesima".

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Guard) for the investigation of the phenomenon of organised crime in the broad sense, This body has a counterpart, from the point of view of public prosecution, with a National Antimafia and Antiterrorist Prosecutor (*Procuratore Nazionale Antimafia e Antiterrorismo)*, who heads the *Direzione Nazionale Antimafia*, and coordinates the District Antimafia Directorates (*Direzione distrettuale antimafia* or DDA*)* in the different territories. The *DDA* is in charge of the investigation of the facts correlated with the crimes (*reato*) of Mafia association (art. 416 bis CPI). This intensifies the direction of the Judicial Police by the Public Prosecutor's Office in relation to a specific criminal phenomenon that requires maximum coordination, cooperation and organisational concentration between the fundamental actors involved in its confrontation, and this without an active judicial presence in its development.

The *German case* shows the enormous importance of the role of the police in the development of the preparatory investigation phase (*Ermittlungsverfahren)* led by the Public Prosecutor's Office, linked to the Executive (Flores Prada, 1999, pp. 173-174) although, in fact, it is considered to be the true investigative body (Gómez Colomer, 2001, p.102). Each *Land* has its own police force, integrated into its Ministry of the Interior, as distinct from the Federal Criminal Police Office (*Bundeskriminalamt*; BKA), together with the Federal Police with border protection functions, among others, incardinated in the Federal Ministry of the Interior. However, the ability of the police to investigate and take urgent measures to prevent concealment, as a duty of first activity (Roxin, 1982 p. 172), results from § 163.1 of the Criminal Procedure *Ordinance* or *Strafprozessordnung* (StPO), which de facto allows the police to control the investigation, something which, on the other hand, is supported by § 161.1 in that the Public Prosecutor's Office can carry out the investigations through the police itself. It is the police forces that have significant technical and material resources at their disposal, which means that there is a situation of significant dependence for the progress of the prosecution's investigations, which makes them auxiliary forces with autonomy and without there being any effective direction by the public prosecution.

In *Portugal*, the Code of Criminal Procedure (CPPP) assigns the direction of the investigation *(inquerito)* to the Public Prosecutor's Office, assisted by the Criminal Police (263.1 CPPP), whose task is to verify the existence of a crime, determine the perpetrators, their responsibilities and the elements that would allow a decision on the indictment (art. 262.1 CPPP). Decree-Law 137/2019, of 13 September, approves the organisational structure of the Judicial Police, which is configured as a superior body of criminal police, dependent on the Ministry of Justice and endowed with administrative autonomy (art. 1 DL 137/2019) whose top is represented by a National Director (art. 22 DL 137/2019). Although the organisational dependence is on the Ministry of Justice, the functional dependence in the development of the *inquiry* is with respect to the Prosecutor's Office, who can authorise certain acts of investigation to the Judicial Police (art. 270 CPPP), entrusting it with any procedure related to the *inquiry* (art. 270.1 CPPP) with specific exceptions such as those which fall under the jurisdiction of the judge (art. 270.2 CPPP), or by generic delegation from the judge, which implies the possibility of carrying out investigative procedures within a specific type of crime or penalty applicable to the crimes under investigation (art. 270.4 CPPP).

As a counterbalance, the examining magistrate authorises certain acts exclusively, such as house searches, interception of correspondence and telephone communications, and any others requiring judicial authorisation (art. 269 CPPP). Likewise, the adoption of

personal precautionary measures (periodic presentation, pre-trial detention, suspension from duty, among others (arts. 196 et seq., CPPP) and patrimonial measures (art. 228 CPPP) is also the responsibility of the court. It is also up to the judge to take evidence in advance (*declaraçoes para memoria futura*), respecting the principle of contradiction with the accused (art. 271 CPPP). The Portuguese model contrasts a Judicial Police that acts as a delegate of the Public Prosecutor who directs the investigative phase and a Judge of Guarantees who can also make use of the investigative unit to carry out the *investigation* (*instruçao;* art. 286. 1 CPPP), which is an optional phase aimed at completing the investigation of the public accusation, controlling the accusation itself. In this sense, as mentioned above, it is possible for the judge to make use of the Judicial Police to carry out actions within the framework of this strictly jurisdictional phase (art. 290. 2 CPPP). In short, there is a police dependence at the organic level on the Ministry of Justice and a clear functional subordination to the Prosecutor's Office, with an important role which, as a result of the delegations, can determine the result of the preliminary investigation (Gómez-Escolar Mazuela, 1994 p.81).

In *France,* the scenario is similar, but not identical, to that in Spain, where the Public Prosecutor's Office and the Investigating Judge concur, although it is the Public Prosecutor who directs the Judicial Police (art. 12 CPPF) in the development of preliminary investigations (*enquête préliminaire;* 75 CPPF). In any case, the investigative units are integrated with the National Police and the Gendarmerie, both of which are part of the Executive (Ministry of the Interior, together with the Ministry of the Armed Forces). However, the connection between them and the Public Prosecutor's Office seems to flow naturally due to the strong links between the public prosecution and the Government, specifically with the Ministry of Justice, which can issue general instructions to prosecutors (art. 30 CPPF), with a strong legal-political trust in the institution (Lanzarote Martínez, 2008, p. 315), which dispels doubts regarding its work and without the figure of the State Prosecutor General as the person with ultimate responsibility for the whole territory. Criminal policy is a core element that is present in the development of the functions of the Public Prosecutor's Office (Art. 39-1 CPPF), which justifies the consideration that the public prosecutor himself is considered the head of the Judicial Police, which allows him to give "general and specific instructions" to the investigators, supervising the course of their actions (Art. 39-3 CPPF) and directing the investigative activity (Art. 41).

In the *British system,* the Public Prosecutor's Office did not appear as a real prosecutorial actor until the creation of the *Crown Prosecution Service* (CPS) in 1986, supported by the Prosecution of Offences Act of 1985. The late emergence of a public prosecution system in the UK can be explained for two reasons. Firstly, because of the weight that the public prosecution has always had, which means that any person is entitled to prosecute on behalf of the Crown (Diez-Picazo Giménez, 2000 pp. 37-38). Secondly, because of the prominent role played by the police in investigations with an original autonomy, since the submission of the Chief *Constable* (*Chief Constable*) only to the Law acted as a guarantee against the possibility of deviations, and because of their original consideration as Justices of the Peace, which were more part of the Judicial Power than of the Executive (Aulet Barros, 1998, p. 656). In any case, the existence of territorial forces contrasts with the existence of the Metropolitan Police (Scotland Yard) as a reference point for the central power (Vogler, 2003, p. 36). In this sense, there is no precise relationship of subordination between the Crown Prosecution Service and the police, and this is strongly conditioned by the historical police autonomy in the development of

investigations in such a way that the preliminary investigative phase is fundamentally police and, therefore, the presentation of charges continues to be, except in serious cases, a matter of their strict competence. We cannot properly speak of a Judicial Police-Prosecutor's Office relationship in the same way as we have analysed above, and this is conditioned by the decentralised police model and a relatively new Public Prosecutor's Office which, perhaps, is still limited by the weight of organisational tradition.

Finally, it is relevant to bear in mind that in our country the figure of the *European Public Prosecutor* has been introduced[2] , with jurisdiction throughout the national territory, which implies a paradoxical coexistence between procedural systems in our legal system (Investigating Judge and national investigating Prosecutor with investigating Prosecutor and Judge of Guarantees in the field of own prosecution referred to the interests of the EU) inserted by Law 9/2021, of 1 July, implementing Council Regulation (EU) 2017/1939 , of 12 October 2017. The scope of the investigation covers offences against the Union's public finances, European subsidy and aid fraud, money laundering, bribery and smuggling against the interests of the Union and "inextricably linked" offences, as well as criminal organisation to commit these offences (art. 4).

Thus, in the performance of the above functions, European Public Prosecutors are allowed to give orders to members of the judicial police (Art. 5.2), who will provide them with the necessary assistance (Art. 5.1)..2), who will provide support (Art. 16.3) and to whom they will report (Art. 18.3) and in which the judicial police can "in urgent cases and under the direction, where appropriate, of the Deputy European Public Prosecutor, take the measures that are essential to guarantee the effectiveness of the investigation", informing him, within a maximum period of 24 hours, of what has been done and the reasons for it and informing him of the initiation of those investigations for which they are competent (Art. 10.2). The judicial police may enter a closed place, other than a home, authorised by the European Public Prosecutor (Art. 46 II), and may be delegated to carry out an investigative measure previously authorised by the European Public Prosecutor (Art. 74.2) and be responsible for bringing before the European Public Prosecutor a person whose arrest has been ordered by him (Art. 78.1 II).

At a glance, and we have only analysed five countries with a different political organisation and also with a different procedural model, we can see how the direction of the Judicial Police by the Public Prosecutor's Office in the countries around us is a reality that is crystal clear and should serve as an element of inspiration for our future reform of criminal procedure, above all to avoid excessive bias in investigations, which would end up turning the Public Prosecutor's Office into a mere validator of actions or a mere "police chief" who limits himself to procedurally channelling the previous investigation carried out[3] . We cannot confuse criminal prosecution as an expression of a specific criminal policy with criminal prosecution as a staging of the punitive capacity of the state, avoiding

[2] It is a figure regulated in the Treaty on the Functioning of the European Union (TFEU), Regulation 2017/19 (RFE) together with Directive 2017/1371 on the protection of the Union's financial interests (DPIF). To these rules we add Royal Decree 882/2022, of 18 October, on the selection of the European Public Prosecutor in our country.

[3] Circular 1/89, of 8 March 1989, of the FGE on the abbreviated procedure introduced by Organic Law 7/1989, of 28 December, stated that "It is not necessary to emphasise to prosecutors that both the direction of the police investigation and the delegation to it of the practice of specific proceedings cannot mean that the Prosecutor becomes a "Chief" of the Police , nor that this delegation constitutes a free action by the police, in such a way that the Prosecutor becomes a mere approver of police actions".

diluting the Public Prosecutor's Office as an institution in a public policy. It is a question of defending the effective assumption by the Public Prosecutor's Office of its functions of directing the investigation (Miranda Estampres, 2006, p. 6), with the Judicial Police playing an essential role as it is the one who, operationally, and independently of the directing body, compiles most of the elements of investigation and evidence (Campos Navas, 2002, p. 69). The question is how to articulate a relationship that is profitable, efficient and transparent.

4. THE PROSECUTOR'S AND THE JUDICIAL POLICE'S INVESTIGATIVE ACTIONS

The creation of an investigating prosecutor in our system is not necessary. It already exists. The public prosecution can articulate, once the *notitia criminis* is denounced or known, its investigative diligences of art. 9.1º Reglamento Ministerio Fiscal 305/22, de 3 de mayo (RMF) in accordance with its Organic Statute (art. 5 EOMF), the LECRIM (art. 773.2) and the body of doctrine available at[4] , particularly the recent Circular 2/2022, of 20 December on the extra-procedural activity of the Public Prosecutor's Office, which contributes to designing a *pre-procedural* activity (STS 871/2022, of 7 November, Chamber II, FJ 2.2, Speaker: Marchena Gómez), *preliminary and instrumental to the criminal action* (STC 59/2023, of 23 May, FJ 4º), *aimed at the opening of a judicial (investigative) process (*STS 882/2014, of 19 December, of the Chamber II (Speaker: Hon. Ferrer García), FJ 9º) , *without evidentiary value,* despite its presumption of authenticity, an effect that only results from its practice in the plenary in the immediate judicial presence with publicity, orality and contradiction (SSTC 182/1989, of 3 November, FJ 2º; 67/2001, of 17 March, FJ 6º; 195/2002, of 28 October, FJ 2º; 206/2003, of 1 December,

[4] Thus the doctrine of the Public Prosecutor's Office results from the following: FGE Circular No. 1/1989, on the abbreviated procedure introduced by Organic Law 7/1988, of 28 December, FGE Instruction No. 1/1995, on the attributions and competences of special anti-drug prosecutors in the different territories, FGE Consultation No. 2/1995, on two questions regarding the prosecutor's investigative proceedings: their destination and the alleged requirement of exhaustiveness, FGE Consultation No. 1/2005, on the competence of special anti-drug prosecutors in the different territories, FGE Consultation No. 1/2005, on the competence of special anti-drug prosecutors in the different territories. 1/2005, on the competence of Public Prosecutor's Offices to process investigation proceedings affecting persons with aforesaid status, FGE Instruction no. 11/2005, on the effective instrumentalisation of the principle of unity of action established in art. 124 CE, FGE Instruction no. 12/2005, on attributions and competences of the Special Prosecutor's Office for the prevention and repression of illegal drug trafficking and its delegated prosecutors, FGE Instruction no. 4/2006, on attributions and organisation of the Special Prosecutor's Office for the prevention and repression of illegal drug trafficking and its delegated prosecutors, FGE Instruction no. 4/2006, on attributions and organisation of the Special Prosecutor's Office for the prevention and repression of illegal drug trafficking. 4/2006, on attributions and organisation of the Special Prosecutor's Office for the repression of economic crimes related to corruption and on the actions of prosecutors specialised in organised crime, FGE Instruction no. 1/2008, on the direction by the Public Prosecutor's Office of Judicial Police actions, FGE Circular no. 2/2012, on the unification of criteria in proceedings for the abduction of newborn children, FGE Instruction no. 2/2013, on some issues related to the prosecution of the abduction of newborn children, FGE Instruction no. 2/2013, on some issues related to the prosecution of organised crime. 2/2013, on some issues related to associations promoting cannabis consumption, FGE Circular no. 4/2013, on investigation proceedings, FGE Consultation no. 1/2015, on access to the proceedings of the investigation proceedings for those who invoke a legitimate interest, FGE Circular no. 3/2018, on the right to information on the right of access to the proceedings, FGE Circular no. 3/2018, on the right of access to the proceedings, FGE Circular no. 3/2018, on the right of access to the proceedings, FGE Circular no. 3/2018, on the right of access to the proceedings, FGE Circular no. 3/2018, on the right of access to the proceedings. 3/2018, on the right to information of those under investigation in criminal proceedings, FGE Circular no. 1/2021, on the time limits for the judicial investigation of Article 324 of the Criminal Procedure Act.

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FJ 2º; 345/2006, of 11 December, FJ 3º)[5] , and *without the capacity to interrupt the criminal statute of limitations (*STS 228/2013, of 22 March, of Chamber II, Speaker: Berdugo Gómez de la Torre, FJ 2º) *or administrative* (Circular 2/2022 Fiscalía General del Estado).

It cannot be assumed that these proceedings are *exhaustive* in nature (STS 980/2016, of 11 January, Chamber II, Speaker: Marchena Gómez, FJ 2º, stating that "it is a restricted functional space") and in any case it is not sufficient to open oral proceedings against any person as it requires as an indispensable diligence the declaration as a person under investigation before the judicial authority (STC 54/1991, FJ 3º), so they do not serve to present a direct accusation. The limit of the prosecution's diligences is given by those which involve a violation of fundamental rights and which must be authorised by the judicial authority and whose adoption is forbidden to the public prosecution. On the other hand, their practice is subject to a *time limit* (6 months up to a maximum of 12 months, unless extended by decree of the Public Prosecutor General ex. art. 5.2 IV EOMF). Finally, *it cannot be used for prospective purposes* (STC 41/1998, of 24 January, FJ 15º or STS 314/2015, of 4 May, of Chamber II Rapporteur: Mr Sánchez Melgar, FJ 2º).

It should be noted that it is also *a guaranteeing activity* which is evident in the development of its actions when taking *the suspect's statement* (art. 5.2 EOMF), who can exercise the right of defence by being able to take knowledge of the proceedings, particularly of the essential elements (SSTC 83/2019, of 17 June, FFJJ 5º a 7º; 180/2020; of 14 December, FFJJ 2º to 4º, and 80/2021, of 19 April, FJ 4º, 59/2023, of 23 May, FJ 4º) in cases in which his detention has been ordered, and he may be assisted by a lawyer of his confidence with the appropriate proposal of discharge proceedings (STC 59/2023, of 23 May, FJ 4º)[6] . The Public Prosecutor's Office can also take *statements from the victim/defendant*[7] *and witnesses to the facts* (art. 773.2 II LECRIM).

However, for the practice of another series of diligences, it necessarily requires technical assistance and police support, and this in a directive capacity as long as a judicial investigation is not opened, which would result in the cessation of investigations by the

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[5] However, STC 80/1991, of 15 April, stated that ".....although only evidence produced in the oral trial can be considered authentic evidence binding on the criminal justice bodies at the time of sentencing, this rule cannot be understood in such a radical sense that it leads to denying all evidential effectiveness to police or summary proceedings carried out with the formalities established by the Constitution and the procedural system, provided that they are reproduced in the oral trial in conditions that allow the defence of the accused to contradict them (SSTC 80/1986, 82/1988, 201/1989, 217/1989 and 161/1990, among many others). The italics are mine.

[6]As the SC has forcefully pointed out: "In short, whatever the difficulties in correctly classifying these investigative proceedings by the Public Prosecutor - preliminary, pre-procedural, preparatory - the truth is that this label *can never be conceived as an excuse to deprive the citizen of the guarantees and limits that our constitutional system imposes on the investigative activity of the public authorities*, whether it is a suspect called by the Prosecutor or another citizen who, without having been called, becomes aware that he is being investigated by the Public Prosecutor's Office. " (STS 980/2016, of 11 January, Chamber II Rapporteur: Excellency Marchena Gómez, FJ 2º). The italics are mine.

[7]Instruction 8/2005, of 26 July, FGE on the duty of information in the protection of victims in criminal proceedings states that "The victim, in the not always easy path to achieve reparation for the harm done, must feel protected. Protection and attention with respect for their dignity, their right to testify and be informed, to understand and be understood, to be protected at the various stages of the proceedings, in the words of the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings".

Public Prosecutor's Office. Doctrinally, in Circular 2/2022, the Public Prosecutor's Office (FGE) recognises that it is responsible for directing its own investigations, with the intention of taking a decision in the light of the evidence presented to it. The Circular points out that this direction is exercised, on the one hand, through the issuing of general instructions by the Chief Prosecutors on "investigation criteria to be followed, methods of action, coordination of investigations and other similar matters" and, on the other hand, through the office of the heads of the investigative units (art. 21 II RD 769/1987)[8] . In this sense, the concept of "general instruction" should be seen as a general framework for action and its application in similar matters (Begué Lezaun, 2006, p. 13) and should be linked to a principle of hierarchy, which means that the State Prosecutor General must approve these instructions at the proposal of the Coordinating and Delegated Prosecutors, the High Prosecutors of the Autonomous Communities or the Provincial Chief Prosecutors in order to preserve the principle of unity of action.

The concept of "particular instruction" refers fundamentally to the specific matter that is the object of investigation, i.e. the working guidelines with respect to preliminary proceedings that are open and in progress "which may be given by the Prosecutors in charge of the specific matters..." (Instruction 1/2008 FGE on the direction by the Public Prosecutor's Office of the actions of the Judicial Police). We are talking about orders regarding the lines of investigation, or indications regarding the practice of certain proceedings, which are relevant to the facts under investigation. The private investigation could include elements that entail certain precautions in the preparation of reports .[9]

However, there is an important issue that lies behind the existence of the power to issue instructions and that is that it must enable a legal system of communication between the Public Prosecutor's Office and the Police from the beginning of the preliminary investigation until its conclusion (De Llera-Suarez Bárcena, 2006, p. 15), an issue that does not seem to be adequately resolved in our legal system, apart from internal impulses in this sense[10] . One tool could be to strengthen the *Provincial Commissions of Judicial Police* (art. 34 RD 769/1987)[11] which would serve to establish working protocols in

[8]The precept states "... Likewise, the Judicial or Prosecutorial Authority may order that the specific police officer(s) to whom the said Headquarters has entrusted the execution *appear before them*, as many times as it deems appropriate, in order to give the instructions it deems pertinent, indicate the lines of action and control the fulfilment of their duties or the evolution of their investigations". Instruction 2/88 FGE states: "The Chief Prosecutors of the respective Courts *shall, at least on a weekly basis, dispatch* with the Heads of the Provincial Organic Units of the Judicial Police, both of the National Police Force and the Guardia Civil, those matters which the Public Prosecutor's Office must deal with by virtue of the provisions of Article 20 of the aforementioned Royal Decree". The italics are mine.

[9]An example is reflected institutionally by the FGE in its 2023 Report on the orders of the Cáceres Public Prosecutor's Office regarding data referring to victims, stating "This has led to instructions being given by the Public Prosecutor's Office to the judicial police not to include in police proceedings the addresses of victims, witnesses or experts, telephone numbers, mailing addresses or ID numbers, as this data should be collected in a separate file" (Fiscalía General del Estado, 2024, p. 932).

[10]As Circular 2/2022 FGE points out, "Consequently, the provincial and area chief prosecutors will articulate the mechanisms that allow for the individualisation in each case, taking into account the characteristics and peculiarities of the different prosecutor's offices, of the terms in which the Judicial Police are obliged to provide accounts in accordance with Art. 20 of RD 769/1987 (...) The senior prosecutors and the Public Prosecutor's Inspectorate will verify, through their powers of inspection, the mechanisms put in place by the headquarters to articulate agile, effective and efficient channels of communication with the Judicial Police units that allow effective and reasonable compliance with the provisions contained in art. 20 RD 769/1987".

[11]Something which was already preached by the Consulta 1/89 FGE when it stated that "2. General instructions to the Judicial Police Units, similar in tenor to the previous section and especially for the

matters of investigation aimed at coordinating and making the work more efficient, above all from the perspective of unifying criteria and resolving doubts in the face of the usual legislative changes, facilitating models of action for the investigation units and to resolve questions that could arise, placing, above all, the emphasis on maintaining the balance between the demands of the investigation and the obligatory guarantee of fundamental rights.

In any case, the issuing of instructions determines two important elements. Firstly, the procedures to be carried out by the judicial police. Secondly, the way they are to be carried out, and this is because Circular 2/2022 FGE states that "this power cannot be delegated in a generic way to the Judicial Police". Therefore, a relationship based not only on dependence, but also on the specific nature of the actions to be carried out is necessary.

The investigation by the public prosecution requires the existence of a crime reported to the Public Prosecutor's Office itself, an ex officio action on its own initiative (Del Moral García, 2006, p. 4) or by referral of anonymous reports.) or by referral of anonymous reports (SSTS 318/2013, of 11 April, of Chamber II, FJ 2º (Speaker: Mr. Marchena Gómez); 224/2021, of 11 March, of Chamber II, FJ 3.2º (Speaker: Mr. Hurtado Adrián), among others) so that the appropriate decree of initiation can be issued by the Chief Prosecutor. This decree must detail the following points: *Facts under investigation, identification of the suspect, provisional technical qualification of the facts, proceedings to be carried out, verification that there is no judicial investigation and a reflection of the identity of the Prosecutor in charge of directing the proceedings* (Circular 2/2022 FGE).

In any case, if it considers that the facts brought to its attention do not constitute a crime, it can issue a decree to close the case, which would not prevent the complaint from being reiterated in court. Once the investigation proceedings have been initiated, in addition to taking the appropriate statement from the victim/victim, witness/s or the "suspects", i.e. those under investigation, the Public Prosecutor's Office can commission the Judicial Police to carry out a series of proceedings which are not minor and which are in line with many actions that can be carried out autonomously by the police. Thus, to carry out the identification of persons and facts, can arrange the practice of **photographic recognitions**[12] or the **recognition in a line-up**[13] which do not acquire the status of

coordination of the investigation of specific facts in the different Corps, *during the procedural phase*, i.e., *when judicial proceedings exist*. They will be carried out through the Provincial Coordination Commissions of the Judicial Police". The italics are mine. Note that it highlights the possibility of using the Commissions, but only for the judicial investigation phase, which does not prevent extending it to the investigation by the Public Prosecutor's Office.

[12]As pointed out by STS 28/2018, of 18 January, of Chamber II (Speaker: Honourable Mrs. Ferrer García) "Although this Chamber has pointed out that photographic recognition must be carried out through the exhibition of as many photographic clichés as possible, made up of faces that, at least some of them, have certain similarities between them in their physical characteristics (sex, approximate age, race, etc.), coinciding with those offered in the photographs.), coinciding with those initially offered, in their first statements, by the person making the identification, the specific circumstances of the case cannot be disregarded" (FJ 9.7º).

[13] The SC points out that "1) It is true that for those cases in which doubt arises as to the identity of the person against whom charges or accusations are brought for the crime, the LECrim, regulates -arts. 368 to 376 - an identification procedure or diligence, by virtue of which the visual recognition of that person by the complainant is sought, with certain guarantees, which tend to preserve the spontaneity and sincerity of the identification, derived from the required method, consisting of placing the person to be recognised among other persons of similar physical characteristics, in order to prevent that recognition from being

evidence until the moment in which the identifications are carried out in the trial (*Cfr.* SSTS 35/2016, of 2 February, of Chamber II, FJ 2º Speaker: Excmo. Mr. Marchena Gómez; 444/2016, of 25 May, of Chamber II, FJ 5º Speaker: Excmo. Mr. Conde-Pumpido Touron; 4/2020, of 16 January, of Chamber II, FJ 2º Ponente: Magro Servet) and **also voice recognition**. It may order **discreet police surveillance and monitoring without interfering with fundamental rights-no beacons or geolocations are allowed- or violating them** (*Vid.* STS 610/2016, of 7 July, Chamber II, FJ 1º Speaker: Mr Granados Pérez). The police may order the **location of assets or rights** in confiscation proceedings (art. 807 ter q) LECRIM).

The public prosecutor in the course of preliminary investigations can carry out or delegate the police to carry out an **ocular inspection** (art. 28 a) RD 769/1987). It is a direct means of investigation, without obstacles, as there is no element of interposition between the person inspecting and the inspected (Moreno Catena, 2017, p.250)[14] . In any case, its value, given its unrepeatability, would allow for pre-constitution of evidence in cases of urgency and necessity (STC 303/1993, 25 October, FJ 4º).

The Public Prosecutor, in the course of the investigation**, can gather information of a patrimonial nature**[15] which is fundamental for the prosecution of certain types of crime (particularly economic or patrimonial crimes) or accessories to others (for example, drug trafficking crimes which allow the inference of unjustified enrichment or in relation to the suspect's working life). On the other hand, , the Public Prosecutor's Office can itself or through the investigative unit obtain information from transparency portals or **access to open digital sources (**STS 197/2021 of 4 March, Chamber II (Speaker: Mr Del Moral) states that "judicial authorisation is not required to obtain what is public and it is the user of the network who has introduced it into the same" (FJ 5º)). **incorporation of sources of evidence obtained by private individuals (recordings)** [16] and **journalistic information** (Circular 1/1989 FGE, of 8 March FGE). Likewise, the Public Prosecutor's Office can order, or delegate to the police, in the development of its investigations, the

induced to converge on a single person by virtue of mere appearances created by the diligence itself" (STS 428/2013, of 29 May, Chamber II (Speaker: Excmo. Mr. Berdugo de la Torre, FJ 1º).

[14]Thus, STS 231/1996, of 20 January, of the Second Chamber (Speaker: Hon. Martín Pallín) pointed out that "...*Without ruling out the documentary nature that can be derived from a personal inspection carried out by members of the Public Prosecutor's Office*, it is certain that its evidential effectiveness cannot go beyond that which the procedural system attributes to the ocular inspections carried out by the Examining Magistrate with the assistance of the Judicial Secretary who holds judicial public faith (...).) In any case, and despite the presumption of authenticity that the law attributes to the pre-procedural proceedings of the Public Prosecutor's Office, their evidential value is not greater than that of an ocular inspection and therefore does not, in itself, evidence the error of the judge ..." (FJ 7º)...." (FJ 7º). The italics are mine.

[15]Circular 4/2010 of the FGE on asset investigation has indicated the institutions from which data may be requested and thus, the investigating prosecutor may request, by decree, that they be sent from the Spanish Confederation of Savings Banks (CECA) or the Spanish Banking Association (AEB), with respect to banking data. With regard to public entities, data may be requested from the General Treasury of the Social Security, the Mercantile, Movable Goods and Property Register, the General Directorate of Traffic, the Aircraft Registration Register dependent on the Tax Agency and the General Directorate of Cadastre. Finally, data can be obtained from the Single Computerised Notarial Index, which telematically collects data authorised by the different Notaries' Offices.

[16] As pointed out in Circular 2/2019 FGE, on the interception of telephone and telematic communications, "Conversely, conversations recorded or broadcast by one of the interlocutors would not be covered by the constitutional provision (SSTC no. 175/2000, of 26 June and 56/2003, of 24 March and STS no. 421/2014, of 16 May); radio communications (SSTS no. 209/2007, of 9 March; 1397/2011 of 22 December and 695/2013, of 22 July) ...".

collection of abandoned DNA[17] **and extraction of the DNA consented to by the investigated party** (Alfonso Rodríguez, 2022, pp. 50-51) or **exhumation of corpses** (Circular 2/2012 FGE and the repealed Circular 4/2013 FGE on investigative proceedings).

Within the framework of preliminary proceedings**, the Prosecutor can commission expert reports**[18] from the police forces themselves, such as **fingerprinting, identification, ballistic or chemical analysis**, without forgetting that "encourages the "prima facie" validity of their opinions and reports without the need for their ratification in the oral trial, provided that they have not been expressly challenged in the written conclusions" (STS 115/2015, of 5 March, Chamber II (Rapporteur: Berdugo Gómez de la Torre), FJ 9º). It is worth highlighting the practice of the **alcohol test**, which is an expert report (STC 89/1988, of 9 May, FJ 1º) that can be considered as evidence (STC 303/1993, of 25 October, FJ 5º). The Public Prosecutor's Office can obtain the **IMSI or IMEI of mobile phones**, which can be discovered by means of a scanner used by the Judicial Police without the need for judicial authorisation (*Vid*. and prior to the regulation of the LECRIM, STS 249/2008, of 20 May, of Chamber II, FJ 4, STS 227/2009, of 28 January, of Chamber II FJ 1 and STS 8461/2011, of 16 November, of Chamber II, FJ 6). Likewise, it can order police traces **to obtain the IP address of the computer** (art. 558 k LECRIM; Circular 2/2019, on interception of telephone and telematic communications) and **request or order the police to obtain data on the owners of terminals or connectivity devices** (art. 588 ter m LECRIM) .[19]

Finally, in certain types of crime, during the course of the investigation, the police can decide to appoint an **undercover agent - as** long as he is not a computer scientist, which is a judicial competence - reporting to the judicial authority (art. 282 bis LECRIM) and **the controlled movement and delivery** (art. 263 bis LECRIM), something that is only allowed in certain cases.

With regard to the **undercover agent**, which is the legalisation of an infiltration strategy in order to effectively carry out investigations against organised crime, a series

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[17] In this sense, we should not forget the Agreement of the Plenary of the Second Chamber of 31 January 2006, that "The Judicial Police can collect genetic remains or biological samples abandoned by the suspect without the need for judicial authorisation".

[18]Thus, in much earlier case law, the STS 4934/2007, of 30 May, of the Second Chamber (Rapporteur: Mr Marchena Gómez) states that "It is therefore beyond doubt that SEPRONA has the capacity, with functional subordination to the Judges and Courts or the Public Prosecutor's Office, to *collect samples that serve as a basis for the detection of these levels of contamination in the water discharged by any company that has been denounced. And the possibility of carrying out an initial chemical analysis* of such waste *by duly specialised medical personnel* is also unquestionable. A different matter, of course, would be the evidential value of these initial proceedings" (FJ 1º). The italics are mine. Circular 4/2011 of the FGE establishes that within the framework of the preliminary proceedings, the Public Prosecutor's Office may agree to the examination of the victim by the Forensic Expert. This faculty allows the collection of evidence, as it has been established that there is no need for ratification by the Forensic Doctors in the plenary session, unless the parties have expressed their disagreement with the report or with regard to the experts. In the area of property crimes, Circular 4/2010, on the functions of the Public Prosecutor in the area of property investigation, authorises the Tax Administration to request expert reports.

[19] Circular 2/2019 FGE states that "With regard to the specific data that can be obtained directly by the Public Prosecutor's Office or by the Judicial Police, the provision is not limited simply to obtaining the ownership of a telephone number or, conversely, obtaining the specific telephone number used by a person, but should be understood to include any request for data aimed at identifying the owner or the communication device, provided that it is not data linked to communication processes".

of clarifications must be made. Firstly, the measure can be agreed by the Public Prosecutor at the request of the police or without being requested, insofar as the LECRIM establishes that "he may authorise". Secondly, the Judicial Police can request it from the Judge or the Prosecutor, who can choose one or the other (STS 171/2019, of 28 March, Chamber II, Speaker: Ms. Polo García, FJ 3º)). Thirdly, if there is any type of affectation of fundamental rights, the judicial authority will necessarily have to be asked for those enabling resolutions insofar as its condition does not allow for an authorised infringement (STS 395/2014, of 13 May, of Chamber II, (Speaker: Excellency Mr. Martínez Arrieta), FJ 3º). Fourthly, the adoption of the measure by the Prosecutor will require a decree, adopted under the premises of proportionality, which will reflect the criminal indications and the constituent elements of organised crime, geographical, subjective and objective identification of the organisation ("large-scale criminal organisations" states STS 250/2017, of 5 April, Chamber II, Speaker: Sánchez Melgar, FJ 8º), duration of the investigation, activities authorised to the undercover agent, making reference to the real and supposed identity attributed to the agent. In any case, the immediate reporting to the judge, together with the additional need to have measures that involve the violation of a fundamental right (STS 140/2019, of 13 March, Chamber II, Speaker: Sánchez Melgar, FJ 4º), could make this measure less effective.

With regard to **controlled movement and controlled delivery**, the SC has pointed out that "The basis of this investigative technique is, therefore, according to settled case law, to allow, discover or identify the persons involved, it is an exceptional measure that must be proportional to the criminal offence under investigation, SSTS. 1248/95, 973/2011 of 29.5, "The fact that this means of investigation is ordered to "discover or identify the persons involved", or STS. 2114/2002 of 18.12 "to allow in this way the correct identification of the true addressee of the same and the determination prior to its delivery, of the content of the consignment..." (STS 15/2015, of 5 March, Chamber II (Rapporteur: Berdugo Gómez de la Torre), FJ 7º). The use of this measure is limited to serious criminal acts, particularly drug trafficking, although it is important to highlight the prudent use of this diligence (Circular 4/2010 FGE). Its adoption can be carried out at the initiative of the Judicial Police, which is then submitted to the Prosecutor, by decision of the latter at the request of the Judicial Police, or by the Prosecutor without being requested to do so by anyone , within the framework of preliminary proceedings.

With regard to the capacity of the investigating prosecutor to agree on precautionary measures limiting fundamental rights and in collaboration with the Judicial Police, **detention,** *as a sui generis and auxiliary measure* (Fuentes Soriano, 2005 p. 105) can only be agreed in cases in which there are no open judicial proceedings (Circular 2/2022 FGE). Detention must be carried out with prudence, and being careful, with respect for the dignity of the person (Instruction 3/2009 FGE regarding the mode and manner in the practice of detention). In any case, this circumstance should not be understood as a real advance, as the practice of the detention procedure can be carried out by a private individual or the police, so it is not a strange attribution (arts. 490 and 492 LECRIM).

The above provisions imply the development of an activity without the opening of a judicial investigation[20] as the opening of this would automatically imply, or should

[20]Circular 1/89 of 8 March 1989 states that "(...) The judicial proceedings that should give rise to the cessation of the Prosecutor's investigation should be those of a criminal nature, since it is a criminal investigation and Art. 785 bis is part of such a process. This means that neither the existence of civil lawsuits

imply, the cessation of the preliminary investigation by the Public Prosecutor's Office as there is a pre-eminence of judicial intervention as long as knowledge is accredited by the public prosecution. Although a judicial investigation and a parallel investigation by the Public Prosecutor's Office should not be admitted (Pedraz Penalva, 2009 p. 850), nevertheless, the Consulta 2/2022 FGE admits the practice of "auxiliary diligences", although "a considered use of this power should be made, prioritising - particularly during the investigation phase - the practice of the diligences by the judicial body", which would lead to particular orders to the Judicial Police, which is considered delicate to say the least, especially in view of a possible contradiction between judicial decisions and those of the public prosecution[21] . In any case, if it is carried out, which is highly debatable, the right of defence must be respected, and the persons under investigation must be informed. A different matter is the existence of an archive resulting from a provisional dismissal (art. 641 LECRIM), which could lead to the practice of "post-procedural" investigation diligences (Circular 2/2022 FGE) by the public prosecution and which would be used to reopen the case.

It should be noted that this scheme, in its case with the competent investigative unit, can be transferred to the Military Legal Prosecutor's Office by virtue of art. 123 of the Military Criminal Procedure Code 2/1989, of 13 April - a homonym of art. 773.2 LECRIM -, and its integration within the Public Prosecutor's Office and its leadership of the State Attorney General (Lozano Ramírez, 2017, p.133) and that neither can it be alien to an eventual reform of criminal proceedings by changing the role of the examining magistrate (Fiscalía General del Estado, 2022, p. 224). And remembering that in the process of Law 5/2000, of 12 January, on Criminal Responsibility of Minors (LORPM), where although there is talk of "instruction by the Prosecutor", the Public Prosecutor's Office acts as the governing body of the investigation, with respect to offenders over 14 to 17 years of age, with a Juvenile Judge who guarantees their rights[22] and is responsible for sentencing, so that the relationship with the police unit in charge of the investigation must necessarily be close, with the Prosecutor's Office being in charge of its direction so that ".... carry out the necessary actions to verify the offences and the participation of the minor in them, promoting the procedure" (art. 6 LORPM).

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on the facts, nor the initiation of indeterminate judicial proceedings, which by their very nature are indeterminate and neither constitute a procedure nor belong to a specific jurisdictional order, should prevent the criminal investigation by the Public Prosecutor...".

[21]As Instruction 1/2008 FGE points out "In short, even during the processing of the judicial proceedings, the Prosecutor can order the Judicial Police to carry out specific proceedings referring to specific aspects of the investigation. However, the necessary respect for the principle of impartiality that must govern the actions of the Public Prosecutor's Office, as well as respect for the principle of contradiction and defence, require that, once these proceedings have been ordered, it is absolutely necessary to contribute their results to the case, whatever the outcome may be. The contrary could be interpreted as a way of circumventing the investigative function that corresponds to the judicial body in our current system".

[22]STC 60/1995, of 17 March 1995, states that "It is clear from the wording of the precept that, unlike the classic model of the examining magistrate, here the precautionary detention of the minor can only be carried out by the judge at the express request of the public prosecutor and never ex officio, that is to say, as an extension of a previously adopted police detention. This circumstance, together with the fact that the appointment of a lawyer, *in such a case, becomes mandatory - which means that the criminal defence can effectively fight this decision limiting the right to liberty - means that the Judge for Minors can no longer be configured as an "investigating Judge" (given that the investigation has been separated from him and conferred on the Public Prosecutor), but rather as a "Judge of liberty" or guarantor* of the free exercise of fundamental rights..." (FJ 6º). The italics are mine.

5. POLICE INVESTIGATION AND FUNDAMENTAL RIGHTS

The activity of the Judicial Police represents, as mentioned above, one of the possible windows for carrying out the investigation of criminal acts. In other words, together with the Public Prosecutor's Office and the examining magistrate, it becomes an essential actor in the criminal prosecution of crime. Its function is not to configure evidence but to develop proceedings that allow the opening and progress of a judicial investigation (or investigation by the Public Prosecutor) and to provoke, by the force of evidence, the opening of a trial, which may even have probative value. Their work is synthesised in a police report that summarises all the activities carried out by the investigators and establishes an initial framework for their work. It is an *objective* document *limited to the reflection of facts and not of purely evaluative and personal elements of the investigator* (STS 78/2021, of 1 February, Chamber II, Speaker: Marchena Gómez, FJ 2.3º) *with a mere value of denunciation (*SSTC 145/1985, of 28 October, FJ 4º, 22/1988, of 18 February, FJ 3º; 217/1989, of 21 December, FJ 2º; 51/1995, of 23 February, FJ 2º; 303/1993, of 25 December, FJ 4º, among others) and, a priori, outside the category of evidence[23] . In any case, the set of measures that the Public Prosecutor's Office can carry out in the course of its intervention, as described in the previous section, can be carried out by the police.

The history of the evolution of procedural law has led to an increase in the role of the police in the investigation. Thus, in the development of the so-called rapid prosecution of certain crimes (arts. 795-801 LECRIM)[24] where, in application of a clear concentration of procedural acts and using only the police report as a basis, conviction by the investigating judge is possible, which is an investigative model of shared management (Marco Cos, 2002, p.7) and the eventual application of a rewarded conformity, the execution of which will be the responsibility of the Criminal Court, or the procedure for the prosecution of minor offences (art. 964 LECRIM), even immediately (art. 962 LECRIM), imply cases of "low intensity criminality" where the police report actually fulfils the real function of an initial indictment, as there is no judicial investigation, but rather a direct trial, except for the application of the principle of opportunity .[25]

Together with the increase of a powerful intervention in criminal proceedings, we

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[23] "As we have pointed out in our jurisprudence, for example STS 724/2002, of 24 April, it is clear that the Judicial Police, a technical police force specialising in the investigation of criminal acts, has its own powers to carry out investigative procedures with the scope and content provided for in the procedural laws. A different issue is the evaluation that should be given to the aforementioned police measures, as these are not evidence, without prejudice to their evaluation as testimonial evidence in the oral trial, subject to the requirements of testimonial evidence. *In short, it is not a pre-constituted expert but rather a police investigation procedure that acquires evidential relevance, as testimonial evidence, when the officers appear in the oral trial* to testify on what they sensorially appreciated" (STS 304/2012, of 24 April, of the Chamber (Speaker: Mr Berdugo Gómez de la Torre), FJ 2º). The italics are mine.

[24] Thus, Circular 1/2003, of 7 April, on the procedure for the rapid and immediate trial of certain crimes and misdemeanours and modification of the abbreviated procedure, considered the fundamental role of the police and above all that the architecture of the system should be based on the police report.

[25] As Circular 1/2015 on guidelines for the exercise of criminal action in relation to minor offences following the criminal reform introduced by LO 1/2015 makes clear, "The succession of acts that the rule seems to establish is as follows: preparation of the police report, in the course of which the police itself must carry out the offer of actions and the information to the complainant and the injured party required in arts. 109, 110 and 967 LECrim; judicial agreement to initiate proceedings for the prosecution of minor offences, after verifying their criminal relevance; then transfer to the Public Prosecutor so that he can decide whether to close the case on the grounds of expediency or hold the trial".

are witnessing the creation of a "Police Law" with administrative sanctioning capacity through the so-called Organic Law for the Protection and Security of the Citizen 4/2015, of 30 March (LOPSC) - in force at the time of writing this paper - which, although it tries to keep away from a Judicial Police function, intermingles with it at times (Rebollo Puig, 2019, p. 46). In a certain way, we can speak of *two-way measures with varying intensity*[26] depending on whether we are in the presence of an application of the LECRIM for the purpose of investigating the criminal act that may collide with fundamental rights, or whether it is a punitive intervention, with facts bordering on criminal conduct, and with an impact that should be imperceptible on fundamental rights. In any case, it is necessary to rule out the possibility of using the measures of the LOPSC for police investigation purposes by circumventing the scheme of constitutional guarantees (*Vid.* in its entirety STS 6/2021, of 13 January, of Chamber II, Rapporteur: Puente Segura).

Police intervention is activated, and develops its functions, when they become aware of alleged criminal acts known by virtue of a complaint, or due to confidences that lead to police verification actions (STS 159/2020, of 18 May, of Chamber II (Speaker: Honourable Lamela Díaz) FJ 2º) or due to their own knowledge. This first phase is built with an operational activity which, to a large extent, remains distant from the judicial function of guarantee, developing autonomously. It is a phase of investigating the facts and those responsible for verifying the existing elements and incorporating them into a criminal legal classification under a provisional situation which does not oblige immediate reporting to the judge as long as the proceedings are not considered to have been completed. In the course of these proceedings, only when the police activities prove to be insufficient in their autonomy to verify certain elements susceptible of being investigated, and it is necessary to carry out certain measures which imply the violation of fundamental rights (interception of communications, opening of correspondence, searches and searches...), it is necessary for the judge to be informed immediately....), this situation of reasonable police secrecy must be lifted, bringing the information to light and making the judge a participant in the facts under investigation so that, after a factual-legal assessment, he or she can decide on the measures to be submitted for his or her consideration.

The situation in which the suspect finds himself before the police investigation is, in the first place, one of absolute ignorance, and this is because the investigating unit cannot inform him of the development of its actions. The right of defence, therefore, is clearly blurred because during this phase, logically, nothing is communicated to him/her, nor does he/she have access to what has been done, nor to its results, a situation that only occurs a posteriori. Moreover, although the police investigation has already entered the judicial sphere, the situation of secrecy can also be maintained (art. 302 LECRIM; STC 176/1988, 4 October, FJ 3º). Therefore, measures limiting fundamental rights are adopted in a situation of ignorance by the affected party who sees their privacy sacrificed, be it personal, domicile or that referring to their communications (art. 18 EC)[27] but also, at

[26] This can be clearly seen in the analysis of the Preliminary Draft of the LOPSC. This is what the Council of State pointed out in its opinion 557/2014, of 26 June, differentiating, for example, between retention and detention, stating that it is a "provisional immobilisation that can only be maintained for the time necessary to carry out a specific police procedure, which is why it is excluded from the legal framework of detention. Its legitimacy derives from the existence of an express legal cover".

[27] As pointed out by STS 811/2015, of 9 December, Chamber II (Speaker: Mr. Maza Martin), "But in order to focus on the legal framework of detention, it is necessary to have a legal basis". Maza Martin) "But in order to focus on such a question in its proper terms, we must begin by pointing out how the strict

later ordinary moments, their personal freedom (art. 17 EC) and freedom of movement and movement (art. 19 EC).

Judicial authorisation becomes the essential prerequisite for the intrusion of the investigating unit into the protected sphere of the suspect (SSTC 207/1996, 16 December, FJ 4º; 25/2005, 14 February, FJ 6º; and 233/2005, 26 September, FJ 4º). However, there are cases in which *under the criterion of urgency (gefahr im verzug)* "for the investigation of the crime, the discovery of criminals or the obtaining of incriminating evidence..." (SSTC 115/2013, of 9 May, FJ 6º; 127/2000, of 16 May, FJ 3 a) and 292/2000, of 30 November, FJ 9º), *ex ante* police action is possible, although *ex post* judicial control is also possible (arts. 579.3, 588 ter d), 588 quinquies b) or 588 sexies c) LECRIM) always in accordance with a criterion of proportionality, which suspends, in certain cases, the guarantee of prior judicial authorisation that affects the privacy of the suspect by carrying out a subsequent validation by the judge (STC 70/2002, of 3 April, FJ 5º; STS 864/2015, of 10 December, Chamber II, Speaker: Del Moral García, FJ 7º). In any case, there are various cases that allow police interference in the right to privacy (art. 18.1 CE) such as access to an electronic file or telephone contact list of a mobile phone - without being able to enter into the communication process with incoming and outgoing calls - the opening of a diary on paper or the reading of the papers found in it, or light bodily inspections (STC 207/1996, of 16 December, FJ 4º).

Together with the premise of *urgency*, we have *flagrancy*, especially in cases where it serves to circumvent the *inviolability of the home* (18.2 EC; SSTC 22/1984, 17 February, FJ 5; 50/1995, 23 February, FJ 5; 133/1995, 25 September, FJ 4; 10/2002, 17 January, FJ 5; 189/2004, 2 November, FJ 2) with a specific regulation in art. 553 LECRIM which allows for house searches in specific cases. In this sense, together with the provision of art. 795.1º LECRIM, case law requires three elements: the immediacy of the criminal action, the immediacy of the personal activity, and the need for urgent police intervention due to the risk of the disappearance of the effects of the crime (STS 399/2018, of 12 September, Chamber II, FJ 7º Speaker: Ferrer García)[28] . Thus, entry into another person's home can only be permitted with the consent of the inhabitant or with judicial

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requirements of certain invasions inherent to the investigation should not be confused with such sensitive fundamental rights as the secrecy of communications, *whose practice is logically carried out in a situation of absolute ignorance of the holder of the right and, therefore, in a state of defencelessness that can only be remedied by* judicial *intervention*, authorising and controlling its execution..." (FJ 1º). The italics are mine.

[28] STS 399/2018 itself explains these three features: "The immediacy of the action, i.e. that the crime is being committed (actuality of commission) or has been committed moments before (temporal immediacy), means that the offender is caught at the moment of committing it. However, this requirement has also been considered to be fulfilled when the offender has been caught in the act of committing the offence or at a time subsequent to its commission. Personal immediacy is equivalent to the presence of an offender in relation to the object or instrument of the offence, which implies evidence of the offence and evidence that the caught person has participated in the offence. Such evidence may result from the direct perception of the offender at the scene of the offence or through the perceptions of other persons who alert the police to the fact that the offence is being committed. In any case, evidence can only be asserted when the trial can link the officers' perceptions to the commission of the crime and/or the involvement of a particular subject virtually instantaneously. If a more or less complex deductive process is required to establish the reality of the crime and the involvement of the offender in it, it cannot be considered a case of flagrante delicto. Finally, the urgent need for police intervention means that, due to the circumstances, the police are compelled to intervene immediately in order to prevent the progression of the crime or the spread of the evil that the offence entails, the arrest of the offender and/or the obtaining of evidence that would disappear if judicial authorisation were sought" (FJ 7º).

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authorisation, except in specific cases provided for by law such as "in flagrante delicto, when a criminal, immediately pursued by the agents of the authority, hides or takes refuge in a house or, in cases of exceptional or urgent need, in the case of those allegedly responsible for the actions referred to in Article 384 bis (terrorists), whatever the place or home where they hide or take refuge..." which also allows for a search with subsequent communication to the judge. Likewise, it may enter a home in accordance with the LOPSC to "avoid imminent and serious damage to persons and things, in cases of catastrophe, calamity, imminent ruin or other similar cases of extreme and urgent need" (art. 15.2).

Police custody, as a measure which violates the fundamental right of art. 17.3 CE, is the most restrictive measure to be applied by the investigating unit, and this is its own decision, being a *personal precautionary measure consisting of a temporary deprivation of liberty* which, as it is subordinated to a future criminal process, will determine its availability to the judge, unless a decision is taken on "police liberty" (art. 496 of the LECRIM). The detention of a person is only possible due to the existence of an alleged commission of acts that are crimes or acts that appear to be serious or less serious crimes (arts. 490, 491, 492, 494 LECRIM). Detention is not possible for a minor offence (art. 495 LECRIM), nor for an administrative offence except in the case of detention to identify the subject (art. 16.2 LOPSC). In this sense, the arrest must be motivated and justified in the police report (Varela Castejón, Ramírez Ortiz, 2010, p. 220) and can be carried out immediately after the commission of a criminal act, not only because it is indicatively constitutive of a criminal offence but also because its involvement is clear due to direct police intervention and perception (cases of flagrante delicto and generally to protect public safety). Likewise, the arrest can be carried out once the crime has been committed, but by virtue of the indications that arise after a laborious investigation resulting from the activity of the Judicial Police. In both cases there is a time limit of 72 hours - 24 hours if it is less - for the development of proceedings and subsequent presentation before the judicial authority, without it being possible to artificially exhaust, prolonging, the deprivation of liberty in an unjustified manner, opting for the shortest possible period of time (SSTC 199/1987, of 16 December, FJ 8º; 224/1998, of 24 November, FJ 3º) .[29]

Finally, the development of police proceedings and before the investigating unit requires full respect for the right of defence (art. 24.2 CE), recalling as STC 87/2001, of 2 April 2001, points out, "...the need to allow the accused to enter the proceedings from the preliminary investigation phase is only for the purposes of guaranteeing the full effectiveness of the right to a defence and to prevent material situations of defencelessness from arising against him, even in the investigation phase (SSTC 44/1985, 135/1989 and 273/1993)" (FJ 3) (FJ 3º). In this sense, the legitimacy of the criminal defence against the governmental (or judicial) machinery implies a maximum expression of the Rule of Law incompatible with any arbitrary violation of guarantees or fundamental rights[30]

[29] Reference should be made to the existence of cases of police detention in the case of terrorism (art. 520 bis LECRIM), characterised by a greater restriction of rights, with the possibility of incommunicado detention of the person under investigation and a greater extension of the detention period, as additional extensions of 48 hours are possible, and the case of police detention in marine areas (art. 520 ter LECRIM), which seeks to combine the particular situation in which the detention takes place with the necessary judicial availability.

[30] In this sense, STS 875/2021, 15 November, Chamber II, FJ 2. 4th Rapporteur: Marchena Gómez in pointing out "The starting point on which to build the jurisprudential treatment of the prohibition of unlawful evidence can be explained as follows: "... *the power of the State to prosecute and try unlawful*

although, legislatively, police interrogation, as such, is not regulated (Nieva Fenoll, 2008, p. 8) and questions such as a possible situation of disability and the mechanisms of facilitation in these cases in the course of police actions are not rigorously addressed, for example (Alfonso Rodríguez, 2023, pp. 68-69).

Once the arrest has been made, the suspect must be provided with accurate and precise information on the facts of the alleged offence (ECHR, Case of Pèllisier and Sassi v. France, 25 March 1999; Case of Dallos v. Hungary, 1 March 2001; Case of Sipavicius v. Lithuania, 21 February 2002; Case of Varela Geis v. Spain, 5 March 2013; Case of Sipavicius v. Lithuania, 21 February 2002; Case of Varela Geis v. Spain, 5 March 2013; Case of Pèllisier and Sassi v. France, 25 March 1999; and Case of Dallos v. Hungary, 1 March 2001. Spain, of 5 March 2013; STC 297/1993, of 18 October, in its FJ 3º) and that substantiates the granting of his status as a police investigator, *which motivates the deployment of the right of defence*[31] with legal assistance, something that clearly results from arts. 118 and 520 LECRIM, *particularly the right of access to essential actions* to challenge the detention (art. 520.2 d) LECRIM) and the reserved interview with the lawyer (art. 520. 6. d) LECRIM) to receive adequate advice (art. 6.2 b) LDD). The lawyer who assists him/her, as a general rule, must be of his/her choice and trust (STS 263/2013, of 3 April, Chamber II, FJ 5º, (Speaker: Excmo. Mr. Conde-Pumpido Tourón). If they do not make their own choice, the Judicial Police will have to take care of facilitating their free legal aid, therefore, *their intervention is not alien to a guaranteeing facet.* Likewise, the necessary assistance of a translator or interpreter is relevant in the event of not understanding the Spanish language (*Cfr.* STS 213/2016, of 26 January, Chamber II, FJ 3º: Speaker: Conde-Pumpido Tourón).

The lawyer must *effectively and actively* assist the person under investigation (Cfr. STS 3183/2015, of 29 June, of Chamber II, FJ 1º Speaker: Mr. Maza Martín) and to whom it is appropriate to provide the police file (art. 6.1 II LDD) scenario where the reserved interview between the two makes sense and without the possibility of knowing their communications which are confidential (arts. 118.4 and 520.7 LECRIM, and already before by STS 414/2012, of 9 February, of Chamber II, FJ 7.3, Speaker: Colmenero Menéndez de Luarca), except for the participation of the lawyer within the criminal dynamics itself. In any case, the suspect's statement to the Judicial Police *does not have evidentiary status* (SSTC 217/1989, of 21 December , FJ 2º 68/2010, of 18 October , FJ 5º)[32] , recalling, likewise, that the self-incriminating statement of an investigated person

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acts cannot use shortcuts. The exercise of the judicial function only conforms to the constitutional model when it is based on the principles that define the right to due process. These principles, which do not lack a genuine ethical dimension, act as a source of limitation of state activity. *The infringement of the rights of the accused, whether by an act of a criminal nature or by the violation of his fundamental rights and freedoms, opens a crack in the very structure of criminal proceedings*. Its contaminating effects reach other procedural acts connected to the original unlawfulness and which may be affected in their apparent validity"...". The italics are mine.

[31] The Law on the Right of Defence (**hereinafter LDD**) 5/2024 of 11 November also states the following in Art. 3.3 "In criminal cases, the right of defence also includes the right to be informed of the accusation, not to testify against oneself, not to confess guilt, the presumption of innocence and the right to a second hearing, in accordance with the Criminal Procedure Act, Organic Law 6/1985, of 1 July, on the Judiciary, Organic Law 2/1989, of 13 April, on Military Procedure, and Organic Law 5/2000, of 12 January, regulating the criminal responsibility of minors. These rights shall be applicable to administrative sanctioning and disciplinary proceedings, especially in the penitentiary sphere, in accordance with the laws that regulate them".

[32] It should not be forgotten that the Agreement of the non-jurisdictional Plenary of Chamber II of 28 November 2006 states: "*Statements validly made before the police may be subject to assessment by the*

without information of rights and without legal assistance will not be admitted as valid prosecution evidence (STS 4622/2014, of 15 October, Chamber II, FJ 4º, 5º and 6º, Speaker: Excellency Mr. Conde-Pumpido Tourón; STSJM 10400/2012 , of 14 February, of the Civil and Criminal Chamber, 2nd and 3rd FJ, Speaker: Fernández Castro, in relation to the nullity of a sentence handed down by the Jury Court). If the police statement does not have evidentiary status, silence cannot be considered a declaration of guilt either (STC 149/2008, of 17 November, in its FJ 6º) .[33]

Detention has its reverse side in the *habeas corpus* procedure aimed at verifying the lawfulness or unlawfulness of this police deprivation of liberty (SSTC 35/2008, 25 February, FJ 2 b); 147/2008, 10 November, FJ 2º b; 42/2015, 2 March, FJ 3º), which motivates the placing under judicial disposition with suspension of the proceedings, paralysing the development of the police investigations until a judicial decision is taken on the detention carried out.

It is easy to see that police action plays an important role which, without a doubt, has an impact on the procedural guarantees connected with the fundamental rights that may be affected (freedom, privacy or defence, among others). For this reason, rigorous technical and procedural intervention becomes a basic requirement for the judicial police, but it should not be overlooked that adequate coordination with the judicial and prosecutorial authority and with a new (and unique) procedural direction of the investigations would contribute to strengthening those guarantees. However, the question of whether the change should take place, which subject should be in charge and whether it is possible to introduce more immediate changes while awaiting a major reform that will revolutionise our procedural system is an immediate question.

6. CONCLUSIONS AND BRIEF CONTRIBUTIONS: NEW JUDICIAL POLICE OR NEW FORM OF INVESTIGATION?

The LECRIM of 1882, currently in force, represented a well-intentioned and advanced text at the time, however, despite the praiseworthiness of its aims, it has been the object of permanent legislative reform, with constant modifications and direct or indirect retouches, which allows us to view the text today with a certain distance, given that it makes provisions designed for an era that does not exist coexist with the realities resulting from social and technological changes. And in this framework, the reform of criminal procedure has become clear, as follows:

"It is unavoidable to tackle the drafting of a new criminal procedure law which, based on the pre-legislative work already existing in recent history, combines efficiency in the application of criminal law with the safeguarding of the rights of the accused; it articulates a modern, agile and balanced investigation system; It places the judicial bodies and the Public Prosecutor's Office in the role that constitutionally corresponds to them in this process; it overcomes the contradictions in the role currently played by the

Court, after their incorporation into the oral trial in one of the forms accepted by jurisprudence".

[33]In the case of his refusal to testify without legal assistance *with subsequent police* release, it does not annul the procedural acts in which he would have had the assistance of a lawyer, i.e., it *would annul the police statement* but without contaminating the rest of the proceedings (*Cfr.* SAP H 154/2007, 9 March, FJ 1º Ponente: García-Valdecasas García-Valdecasas).

Examining Magistrate; and it brings us into line with the model that, in a generalised manner, already exists in the countries of our cultural, legal and European environment. This necessarily leads to the establishment of a procedural model that, on the one hand, attributes the direction of the investigation to the Public Prosecutor's Office and, at the same time, creates a Judge of Guarantees and another judge for the trial of the accusation to rule on the fundamental rights of those under investigation and review the accusatory claims" (Fiscalía General del Estado, 2019, p. XXV).

There have been three attempts at modification that have not passed the threshold for parliamentary debate. Indeed, there has been an attempt to resituate the role of the examining magistrate to turn him into a judge "for" the investigation, placing the Public Prosecutor's Office at the head of the procedural management of investigations, with the European Public Prosecutor being seen as a kind of trial against the current system (Consejo General del Poder Judicial, 2021, p. 12), and perhaps the first attempt to change the role of the European Public Prosecutor's Office to a judge "for" the investigation. 12), and perhaps the first successful attempt to make a Copernican turn in our criminal procedure system, which leads us to reflect on the extraordinary paradox of having, in addition to a national investigating prosecutor and an investigating judge, a European Public Prosecutor in charge of investigations into certain economic crimes against the EU who, in turn, has a counterweight in a kind of judge of guarantees, as two different realities that imply a sort of heads and tails of the same coin.

In any case, there have so far been three procedural attempts in our country, as mentioned above: Preliminary Draft of the Criminal Procedure Act of 22 July 2011 (ALECRIM 2011; Minister Mr. Caamaño Domínguez), the Articulated Text of the Criminal Procedure Act drafted by the Institutional Commission created by agreement of the Council of Ministers of 2 March 2012 (TALECRIM 2013, Minister Mr. Ruiz-Gallardón Jiménez), also identified as Draft Code of Criminal Procedure, and the Anteproyecto Ley de Enjuiciamiento Criminal de (ALECRIM 2021; Minister Mr Campo Moreno y Llop Cuenca).

For the preliminary drafts and drafts, the Judicial Police becomes a central piece of the reform, however, the organisational elements should be separated in another norm, from the specifically procedural ones and its role as an operative actor in the development of the investigations[34] , which draws attention to the absolutely revolutionary formula intended by the TALECRIM of 2013, which is worth transcribing and which was included in art. 80 by establishing "1.-The Judicial Police is organically integrated in the Public Prosecutor's Office. The Law on the Organisation and Functioning of the Judicial Police shall establish its structure, the status of its personnel and its form of action. 2.- The State Public Prosecutor's Office shall issue the circulars and operating instructions of the Judicial Police that it deems necessary for the proper functioning of the service".

[34]In this sense, the ALECRIM 2021 states in the Explanatory Memorandum (EM) "A functional model of criminal procedure should not bring all aspects relating to the so-called "Judicial Police" into the scope of the Criminal Procedure Act. This is a multifaceted matter, in which substantial elements of public security and justice policies are intertwined. From the constitutional regulatory framework itself, we can deduce the logical separation of the regulation of organisational matters - which must be contemplated in an Organic Law on the Security Forces and Corps and in its implementing regulations - and material matters, referring fundamentally to the acts of investigation and the relationship of functional dependence that arises with the criminal justice bodies. It is the latter that must be included in the text of the new criminal procedure law.

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The previous regulation changed the consideration of the "Judicial Police" as a function and it became a single body under the responsibility of the State Prosecutor General, who assumed its leadership. The issue was not an easy one. Firstly, the possibility of organically splitting up the Judicial Police bodies within the Ministry of the Interior (National Police and Guardia Civil) or the Treasury (Customs Surveillance Service) in such a way that it would first be necessary to create this "Prosecution Police" and then remove it from its natural setting. Secondly, there are doubts regarding the cases referring to the Autonomous Police with specific bodies (Catalonia, the Basque Country and Navarre), which could lead to a confrontation of powers when integrating non-state bodies into the Public Prosecutor's Office, an issue that could be overcome by maintaining a single functional dependency of the specific autonomous Judicial Police bodies with respect to the public prosecution, but without affecting their organisational situation in relation to the respective Regional Ministry. Thirdly, there is the question of how to trace the relationship between the Public Prosecutor's Office and the Police in such a way that the public prosecution does not end up being diluted in the Police itself (López Ortega, Rodríguez Fernández, 2013, p. 12) and this is because it is necessary to delimit both levels which, although they must be absolutely coordinated, cannot converge to the point of becoming indistinguishable.

What ALECRIM 2011 and 2021 did was to continue to maintain the concept of "Judicial Police" as a function[35] which ruled out the creation of a specific and independent body , preferring to opt for the system that currently governs the current LECRIM with functional dependence on the investigating Prosecutor, preventing it from becoming the "super police" that could result from the TALECRIM 2013 without taking into account the training of the public prosecutors themselves (Rodríguez Sol, 2013, p.3).

[35] As ALECRIM 2021 (EM) points out, "In this sense, *the notion of Judicial Police established in the present law is, in accordance with what was already proposed in the 2011 Preliminary Draft, purely functional*. Hence, it simply refers to its ordinary exercise by the Security Forces and Corps under the functional dependence of the Public Prosecutor's Office. It also refers to the exceptional possibility, by provision of a regulation with the status of law, of certain investigative functions being exercised by law enforcement officers who do not belong to these forces and corps. Thus, *the notion of generic judicial police* is accepted, which has been consolidated in practice and which has allowed the occasional action of specialised units, such as the Customs Surveillance Service, a service which is now joined, with particular vigour, by the Asset Recovery and Management Office, which was already mentioned, before it became effectively operational, in the 2011 Preliminary Draft". The italics are mine.

We cannot speak of extraordinary powers in any of the preliminary drafts[36] or drafts[37] with regard to the competences that the Judicial Police can assume, although it is in any case positive that there is a complex of articles that distinguish, even if only the function, indicating what their specific competences are. It would be advisable for this new LECRIM to put an end to the unfortunate dispersion, and as far as criminal proceedings are concerned, that we suffer in this area, where various legal texts intervene[38] which do not help to simplify a central issue in criminal proceedings, perhaps this is where one of its main values would lie.

In any case, it is surprising that the question of dependence or the creation of a single body still continues to be a constant issue, even after the promulgation of the Constitution, and at the same time marks the difference between preliminary drafts and drafts. The issue is perhaps not so much the debate on the question of the dependency, and above all the organic insertion, but rather the value of the police proceedings and the need to put an end to the duplicity of actions that have to be repeated in order to have, at

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[36] In this sense, the **2011 ALECRIM** contemplates its competences in arts. 443-452, under the sole dependence of the Prosecutor in the development of the preliminary investigative activity with a series of specific attributions of its strict ownership and together with the attributions of inspection, searches, frisks and collection of samples, which are of particular relevance "*To receive a statement from the person under investigation, after having been informed of the rights recognised as such by the Constitution and this law*", "*To make arrests in the cases and with the guarantees provided for in Section 1 of Chapter I, Chapter I of Title II of Book II of this law*" and *"To receive statements from any persons who may provide useful information for the investigation and to this end summon witnesses of the investigated act to appear and testify at the police station*" (art. 446). 446). The **ALECRIM of 2021** regulates police activity in arts. 536-545, with a series of relevant powers, which include, in addition to those seen in accordance with the 2011 text - especially the detention, statement of the investigated person and witnesses - that determined in art. 539 of "*Obtaining photographic, lophoscopic and genetic identification analyses of persons arrested in accordance with the provisions of this law, as well as incorporating the data obtained into the respective police files, in accordance with their regulatory legislation and the rules on personal data protection"* together with the possibility of "*Requesting those responsible for any public or privately owned register to provide any information relating to the entries contained therein, when the authorisation of the prosecutor or the competent judge is not necessary and in any case with the limitations established in the data protection legislation".* To this we can add "*photographic identification of persons by complainants and witnesses in the manner and with the requirements established in this law"* or "*Carry out surveillance or observation of persons, places or things..." in* accordance with the provisions of the law itself.

[37] The **draft LECRIM or BCPP of 2013** contemplates as Judicial Police proceedings the arrest (art. 165), collection of effects of the crime and sources of evidence (arts. 208, 217, 218,), external body searches (art. 281), consented radiological examination (art. 282.1), collecting and obtaining genetic traces and taking samples (arts. 287-288), proceedings to determine drug and alcohol consumption (arts. 291-293), capturing images in public spaces (art. 330) or access to a home or closed place in cases of flagrante delicto (art. 334).

[37] Thus in the LECRIM 1882 (arts. 280- 298), also in the Organic Law of the Judiciary (LOPJ) 6/1985, of 1 July, modified for these purposes by Organic Law 19/2003, of 23 December, whose Title III of Book VII - arts. 547 to 550- is dedicated to the regulation of the Judicial Police together with the Organic Law of Security Forces and Corps (LOFCS) 2/1986, of 13 March, which, in Chapter V of its Title II, configures the so-called Judicial Police Units, as well as in RD 769/1987, of 19 June, on the regulation of the Judicial Police, modified by RD 54/2002, of 18 February, to incorporate those Autonomous Communities with statutory competence in this area into the Judicial Police Coordination Commissions, recalling that the Ertzaintza, the Mossos d'Escuadra and the Policía Foral de Navarra have Organic Judicial Police Units.

[38] Thus in the LECRIM 1882 (arts. 280- 298), as well as in the Organic Law of the Judiciary (LOPJ) 6/1985, of 1 July, modified for these purposes by Organic Law 19/2003, of 23 December, whose Title III of Book VII -arts. 547 to 550- is dedicated to the regulation of the Judicial Police together with the Organic Law of Security Forces and Corps (LOFCS) 2/1986, of 13 March, which, in Chapter V of its Title II, configures the so-called Judicial Police Units, as well as in RD 769/1987, of 19 June, on the regulation of the Judicial Police, modified by RD 54/2002, of 18 February, to incorporate those Autonomous Communities with statutory competence in this area into the Judicial Police Coordination Commissions, recalling that the Ertzaintza, the Mossos d'Escuadra and the Policía Foral de Navarra have Organic Judicial Police Units.

present, the judicial endorsement and which cause unnecessary delays in reaching the oral trial (Bacigalupo Zapater, 2005, p. 490). However, the debate on the role of the Judicial Police in the criminal process must be rethought in aspects that are not minor, aspects which, on the other hand, would give rise to an individualised scientific study.

In the first place, we must rethink the needs in terms of personnel resources. It must be borne in mind that new forms of criminality, particularly but not only linked to new technologies, require new profiles in the police forces that must be attracted and retained. Secondly, without entering into the debate on organisational dependence or integration, it is necessary to address the simple question of the physical situation of the investigative units of the Judicial Police. If they work with judges or prosecutors, it is logical to think that their place and location should be close to them, and therefore begin to locate the members of the police units in charge of carrying out the investigation in the judicial or prosecutor's offices. Thirdly, we should not forget the possible integration of joint teams with bodies or officials from other administrations (Treasury or Labour Inspectorate) that can contribute more effectively to the clarification of certain crimes[39] and highlight the importance of specialisation depending on the crime for a better investigation, precisely by assigning non-police officials, but with particular knowledge (accounting, scientific or technical), who can contribute to improving police procedures or to guiding the members of the units. Fourthly, the need to unify instructions on transcendental issues such as the infringement of fundamental rights to enable members of the investigative units to know the criteria and elements to be taken into account when carrying out requests for their infringement, whether in a report to the Public Prosecutor or in a direct request to the examining magistrate. And without forgetting the singular role played by the Judicial Police Commissions, which should have a greater role in coordinating the Police-Administrator of Justice with constant contributions.

But we can also consider the need to give greater weight to police investigations. This is not an issue which is already alien to our procedural legal system, where there would only be a judicial investigation when there are insufficient elements derived from the investigation to allow an accusation to be made (STC 186/1990, 15 November, FJ 4º), a path which has been followed by the system of rapid prosecution through the urgent proceedings procedure (arts. 795 and following, LECRIM).

In this sense, except for serious crimes which can lead to a complex investigation or enquiry, the procedural actions should serve to complement the reports drawn up by the investigating unit, which will verify the criminal act and the parties involved (victim/victim, witnesses and suspect), reflecting all the evidence available to it. In this sense, there are two important elements to take into account. On the one hand, the use of new technologies where all the statements made are duly recorded[40] , which is absolutely important, as there is no real authentic witness for the development of police

[39] This is already a reality and, **institutionally, the FGE states**: "The High Prosecutor of the Autonomous Community of the Balearic Islands celebrates the success that the creation of joint teams with the Judicial Police and AEAT technicians has meant for the investigation of criminal acts" (Fiscalía General del Estado, 2018, p. 805).

[40] As noted in the European Commission Recommendation of 27 November 2013 on procedural safeguards for vulnerable persons suspected or accused in criminal proceedings, "Any questioning of vulnerable persons during the pre-trial investigation phase should be recorded by audiovisual means.

investigations. And, secondly, the right of defence should become absolutely virtual within the police proceedings, with the possibility of providing elements of exoneration that should be recorded in these minutes, including all the exculpatory elements that should be known, at all times, by the defence. At present, the personal situation conditions the possibility of the defence. That is to say, except in cases of police-ordered release (496 LECRIM), the peremptory nature of the presentation in court currently prevents the proper articulation of a defence strategy that would allow for the provision of exculpatory elements within the police investigation itself.

The autonomous police investigation should be concluded when all the essential procedures have been carried out that would allow a subsequent decision to close the case on the grounds that there is no crime or perpetrator, or that the perpetrator is unknown, or could be used for the formulation of a direct accusation due to the sufficiency of the procedures carried out, which could lead to the immediate prosecution of the act. In any case, in the event of the need to carry out measures limiting fundamental rights (telephone tapping, searches and searches, beacons, interception of communications), which would imply the cessation of the police measures as, from that moment onwards, it would become, bearing in mind the authorised violation, a controlled investigation. The cessation of proceedings should also proceed when international cooperation actions are carried out, except for those requests that could be carried out autonomously, or in the event of complex expert opinions or the reconstitution of evidence (think of a key witness who is about to die or move out of the country), which would necessarily require judicial intervention. In any case, the procedural phase before the examining magistrate or the investigating prosecutor would mean that the investigating unit would become a commissioned or delegated body in the exercise of its functions.

We are, in any case, on the eve of a change that has already taken place on a structural level with the so-called *Organic Law 1/2025, of 2 January, on measures for the efficiency of the Public Justice Service* and which, although it has little impact on the actual organisation of the Judicial Police, implies a revolution, reforming the LOPJ, in the way in which the functioning of the judicial bodies will be conceived, in particular, the so-called "Investigation Sections", "Sections for violence against women" or "Sections for Violence against Children and Adolescents" which make up the so-called Court of First Instance in each judicial district, where the titular judge linked to his or her court will no longer make sense, as they will now work integrated within the same body, which will facilitate collegiality in the field of criminal investigation, at least until the enactment of a new LECRIM, which will have an impact on the scope of the relationship with the judicial police, the scope of which only time will determine.

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