This file corresponds to the principles relating to the form of Criminal Procedural Law in Portugal.

Principles Regarding Form

The principles relating to the way in which a criminal decision is reached apply to all procedural phases. They do, however, have a particular impact on the trial hearing, helping to shape the structure of the hearing, but not exclusively. We are faced with principles that are linked to those we have already studied, such as, for example, that of immediacy is related to that of free appreciation.

Principle of Orality

Notion and Content

This principle determines that the criminal decision given by the judge must be based on evidence obtained or presented orally before the entity responsible for deciding, and not based on evidence collected at other stages and documented in the case file.

This does not apply to the investigation or instruction phase, and is fully valid at the trial hearing:

Inquiry: Witnesses and the accused would be heard by those who have the power to decide, that is, by the MP. However, it is not the MP who, as a rule, listens to the accused, as such tasks are delegated to MP employees and criminal police bodies. The statements are written in records and the MP evaluates them, that is, decides whether to accuse them or archive them. Its decision is made based on evidence that was not produced before the MP;

Hearing: Even if this principle is in force, the existence of records, the transcription of evidence produced orally is convenient, as minutes and protocols are important in the records of oral production, especially in the context of control in appeal of the evidence produced. It is necessary to preserve information that, because it was produced orally, could be lost.

In other words, it is advisable to write minutes and acts that are useful not only for their preparatory, documentary value, but so that the judge, at the time of deciding, can recall incomplete aspects, as well as guaranteeing evidentiary supervision in the context of an appeal. . It is also useful for the court judges to see whether or not the decision on facts was taken taking into account the evidence. The evidence has already been produced, or would be produced on appeal, or access to the evidence is through the media on which the evidence is documented or recorded.

This principle not only does not preclude the need for written support that translates into the preparation of minutes, records, among others, but also does not prohibit the existence of a written record, meaning that the court is permitted to record procedural acts in records or minutes, in order to effects of preparing the decision or controlling it during an appeal. However, the rule is that the sentence must be based on the memory of the evidence that was produced orally and not on the documents present in the case.

These are important, therefore, our legislator in article 99 CPP explicitly regulates the case and at various moments in the process establishes how they are done:

Inquiry Phase - Article 275.º/1 CPP: According to this article, the evidentiary efforts are reduced to the record, which is written in a summary (the witness is heard and a summary of what was said will be made), but allows the MP not to document steps that he considers to be unnecessary. There appears to be a certain margin of discretion, but the doctrine understands that all steps must be documented.

Instruction Phase - Articles 296 and 305 CPP: Includes instructive debate, with rules for writing the report in instructive debate, rules set out in article 305 CPP. Regarding instructional acts, there are also documentation rules, article 296.

Trial Phase: Documentation is provided for in articles 363 and 364: this documentary record, audio or video recording, facilitates access to the evidence by higher courts, serving to compensate for the judge's memory failure. This registration is mandatory under penalty of procedural nullity - article 363 - so the test will only be repeated in exceptional cases.

Ime Principlediation

Notion and Content: Subjective or Formal Immediacy and Objective or Material Immediacy

There is a close connection between the principles of orality and immediacy. The principle of immediacy essentially means that the judicial decision can only be made by someone who has witnessed the production of evidence and the discussion of the case by the prosecution and the defense, but it also means that when assessing the evidence, preference must be given to the means of evidence that are in a more direct relationship with the facts being probated (e.g., preference of in-person witnesses to “hearsay” witnesses, of original documents to their copies, among others) and is done as soon as possible, as soon as the trial hearing ends . Experience shows that immediacy is the enemy of delay, as impressions and memories fade or fade over time.

It can be seen in the formal or subjective sense and in the material or objective sense:

Subjective or Formal Meaning: Determines that the judge has direct and immediate contact with evidence whose contribution he must value. This is particularly relevant in the context of procedural evidence, as the judge must hear the witnesses, the accused and the expert in person. Basically, he must establish a close communication relationship with the participants in the process to have his own and personal perception of the material. It is a possibility provided for and enshrined in our code in article 355 - in this article, it is said that evidence that has not been produced at a hearing, produced and examined before a judge who must take it into consideration, is not valid in the trial.

Material Meaning or Objective: It requires the judge to use immediate sources of information to the detriment of substitute evidence, in

other words, that the judge must prioritize the means of evidence that are closest to the facts in question when deciding the case.
The principle of immediacy concerns the relationship between evidence and facts to be proven: evidence must be as close as possible to the facts to be proven, because it has more guarantees. This material dimension is covered in articles 129, 356 and 357 of the CPP.
The Prohibition of “I Heard” Testimonies (Article 129 CPP) and the Prohibition of Reading Statements in the Files (Articles 335 and ss. CPP)
The judge must value the testimonial testimony to the detriment of minutes or records in the same process, because the witness's testimony offers more guarantees than records or minutes. It is not a rule of absolute prohibition of substitutes, as there is always a compromise between demands for truth, when there is no other means of proof that are more reliable, in certain cases, it is allowed that less reliable means of proof are considered.
According to article 129 CPP:
The judge cannot value testimony given by a witness when he comes to say what he heard.
The reason why indirect testimony is prohibited is due to the fact that the guarantee offered by this means of evidence is lower, compared to in-person testimony. They are witnesses where the error and distortion factor multiply. There is a preference for the in-person test, which is more reliable.
It is more fragile and less controllable testimony, because the hearsay witness is being heard by the judge, but the original source of the information escapes the contradiction of the defense and the judge's supervision. Not only is the evidence less reliable, but its acquisition is less controlled.
The legislator seeks a compromise between ensuring greater epistemic responsiveness to the evidence and the requirements of material discovery, therefore, when a witness is not present due to objective conditions, not controllable by the criminal prosecution authorities, then the legislator allows the testimony to be valued from hearing it said. When the witness is not allowed to be heard in person, it is this means of proof that is closest, or when the witness has died, or cannot be found.
Another giftWhere there is a compromise solution is when reading the witnesses' previous statements reproduced in the case file:
There are reasons of an epistemological nature to prefer the testimony of the witness: no matter how faithful the record is, the legislator establishes rules in article 99 for preparing the records, or no matter how faithful the audio reproduction is, nothing imitates personal experience of the judge on the means of evidence and sources of evidence and, therefore, the reading and evaluation of statements previously made, whether by witnesses or the accused, is generally prohibited.
The ban is not just about reading. What is prohibited is not reading, what cannot be valued. And in cases where it is allowed to value, exceptionally, he can value it even if he does not read it: this last statement is not peaceful, but it is what results from the ruling establishing jurisprudence, no. 8/2017, a question of knowing in the cases in which it is possible to value, whether they are valued if they are read or not. If you read the statements, it makes it easier to contradict. The STJ understood that it was not mandatory to read, but it must be recorded in the minutes, in accordance with article 356/9 CPP, which takes into account previous statements recorded in the case file, so as not to be a surprise to those subject to this assessment.
Not only is reading prohibited, the judge is prohibited from considering the content of the statements, even if he has access through any means other than reading the record. The questioning of people who were present at the making of statements and know what the witness said is prohibited, article 356/7. If the law does not allow the valuation of what is in the case, even if nothing is said, it would follow from logic that it does not allow the valuation of the witnesses who were present at the time of making the statements, because allowing this would allow the law to be defrauded.
The law repudiates the valuation of statements contained in the records for epistemological reasons, appealing to two aspects:
Intrinsic fragility of the records. It is difficult, no matter how perfectly, to reproduce the statement in its entirety. Around 1/3 is not reflected in the record. Even in the part where it is recorded there is a certain transposition of the witness' language into the bureaucratic language of the court. They are converted into standardized language in the police and MP. The richness of the witness' speech is lost, due to the conversion of this speech into standardized language.
Possible and greater difficulty in controlling the correspondence between what is recorded in the record and the truth. It is easier to control the veracity of the testimony when the witness testifies before the judge or another entity, than in cases where he sees the testimony recorded, and his reactions are better taken into account.
These criticisms mainly affect written documents. They are not entirely valid for audio or video recording, although there is some loss there too, especially because you cannot “question” that video.
Despite the greater fragility of the records and video recordings, there are compromise situations in which it is possible to evaluate what the witness said in the previous phase. It is regulated in article 356, which applies to testimonies of witnesses and all people, except for the accused, which is regulated in article 357.
We must distinguish between acquisitive reading permission situations and non-acquisitive reading situations:
Acquisitive Reading: Intended for valuing the statement, where the statement is read to be valued. The statements are read to stand alone as evidence supporting the court's convictions.

Non-Acquisitive Reading: It is not done to value, but to, through reading, clarify contradictions, complement or monitor this testimony and what is provided at the trial hearing.

There are three sections in which previous statements can be read (articles 356.º/1 and 356.º/2/a) referring to articles 319.º, 320.º and 271.º):

Cases of Making Declarations for Future Memory: Regulated in articles 271 and 294 CPP. It happens that, due to a serious illness of witness or dislocationtion for foreigners, regulated in the cases of article 271 and in the law on the protection of witnesses and in the statute of the victim, the witness is heard in advance with similar guarantees to those provided in the trial hearing. He is heard before the judge and with the guarantee of adversarial proceedings, with the defense attorney being summoned and asking questions to the witnesses. Guarantees of judiciality that are typical of the trial hearing are complied with. Such as the practice of procedural acts under articles 319 and 320 of the Criminal Procedure Code. These are cases in which the witness was unable to give testimony and is heard at an earlier stage, in which there is fear that the witness will die or in which the witness is ill and can give statements from his home. Here, reading is permitted, because these are statements that offer guarantees of the same epistemological quality as those produced in the absence of a trial, minimum guarantees of judiciality are ensured, in the presence of the judge. Article 356.º/4: The reading and assessment of statements made before a judicial authority is permitted: either before a judge or a Public Prosecutor's Office magistrate, if the declarants are unable to appear due to death, subsequent mental illness or long-term impossibility, similar to art. 129.º/2. Exceptions that apply to assessing testimony are also legitimate in this case if they are made before a judge or a Public Prosecutor's Office. The reason for this solution is the compromise solution. Ideally, only what was said at the hearing would be assessed, but if the witness cannot be present for objective reasons, then these compromises between fidelity and guarantee of adversarial proceedings give way to ensuring the discovery of the material truth.

Article 356.º/2/b): When the procedural subjects agree on their reading, then they can be read and assessed: regardless of who the entity before which the statements were made, article 356.º/5 extends the possibility to when they are made before a Public Prosecutor's Office. Emphasis is placed on the agreement. The reading of statements to clarify contradictions has a different meaning, as it is a non-acquisitive reading. It is possible to read previous statements to clarify statements that were made at the hearing, but what is involved is the assessment of the testimony at the hearing (article 356, no. 3). This is permitted when there are contradictions and in cases where the witness does not remember. Article 96/3 of the Criminal Procedure Code states that the witness may use notes to aid his/her memory, and that his/her spontaneity must be controlled. The law also regulates exceptional cases in which it is possible to assess the defendant's previous statements. It is possible to read them when he/she requests it, for whatever reason, and this possibility is set out in article 357/1/paragraph a).

This is the defendant's freedom of expression; the defendant may choose whether or not to speak, and if he/she chooses to speak, he/she can control the content and manner of the statements. If the defendant has freedom of expression, by choosing to speak, he/she chooses the manner, time, content and circumstances of the statements. You can choose to speak or not to speak, and you can say something to repeat what you have already said.

Another recurring situation in paragraph b) of article 357.º/11: There are situations in which statements made by the defendant can be assessed, as long as three requirements are met:

Supplied before a judicial entity, before a judge, JIC or magistrate of the Public Prosecutor's Office; the law states who these entities are in article 141.º/4, paragraph b) (reference).

Statements made with a defense attorney, whether mandated or officially appointed, who is present. The law in article 64.º, paragraph b), states that the defense attorney's presence is mandatory during interrogations.

The defendant must be informed that he has the right to remain silent and must be informed that, if he decides to testify, the statements he makes may be assessed against him, article 141.º/4, paragraph b). This information is given in all interrogations that the defendant makes, except when he makes statements before the police, in accordance with article 144.º/2, which speaks of interrogationsbefore the judicial police and exceptions.

It is not a requirement, but it is an additional precaution provided for in 141.º/7: When your interrogation is heard, it is also recorded, through audio or audiovisual recording, and you can use other means that can reproduce the statements, such as, likewise, the self.

This solution came into existence after 2013.

Advertising Principle

Notion and Content

It is enshrined in article 206 CRP, in relation to the trial hearing, and is important because it is a subjective guarantee according to article 6/1 ECHR (the right to a “fair trial”, a public trial in an impartial court), but also an objective guarantee of the community (art. 86/6 CPP), as it allows it to control the way in which criminal justice is exercised. It is a way of dispelling any distrust that the community might have about the way in which criminal justice is carried out. One criticism of the criminal process is the lack of direct democracy in justice. Now, advertising is a way of compensating for this lack of direct democracy on the part of judges, assuming this democratic function. It then allows the community to monitor the administration of justice and compensates for the lack of direct democracy on the

part of judges.
The publicity of the process is justified in view of an objective, independent and impartial exercise of criminal justice, and the guarantees of defense of the accused and the bringing of citizens, in general, to the administration of criminal justice, with clear gains in terms of control of this same administration and the reaffirmation of the validity of the norm violated by the commission of the crime.
The principle of publicity implies: assistance by the public, in general, in carrying out certain procedural acts, namely, carrying out the instructional debate and procedural acts in the trial phase; the narration of procedural acts or the reproduction of their terms through the media; and consulting the file and obtaining copies, extracts and certificates of any parts of the process.
In addition to its constitutional enshrinement, this principle is densified with regard to criminal proceedings in articles 86 et seq. What is the content of this principle? Publicity of the process implies the rights of:
Assistance, by the general public, in carrying out the instructional debate and procedural acts in the trial phase, articles 86/4, paragraph a), 87 and 321 of the CPP;
Narration of procedural acts, or reproduction of their terms, by the media, articles 86/6 paragraph b) and 88 of the CPP;
Consultation of the file and obtaining copies, extracts and certificates of any parts of the process, articles 86/6 paragraph c), 89 and 90 of the CPP.
The principle of publicity does not apply equally throughout the entire process. It is of greater importance in the trial hearing, as trial hearings are public by constitutional determination - article 206 of the CRP says that trial hearings are obligatorily public. This constitutional norm is implemented in article 321/1 of the CPP, which states that trial hearings are public, under penalty of irremediable nullity. Nullity, when it is irremediable, can be known ex officio by the court, argued by anyone and assessed at any stage of the process until the decision becomes final – it can be known at any time.
Restrictions on Advertising and Legal Secrecy. External Secret and Internal Secret
Although we have a constitutional imposition under penalty of nullity, this does not imply that there cannot be restrictions or exceptions to advertising, articles 206 and 87/2 of the CPP, which aim to safeguard people's dignity and public morals and ensuring the normal functioning of the hearing:
When talking about “guaranteeing the normal functioning of the hearing”, it is worth mentioning that, sometimes, if some crimes are likely to cause disorder in the court, the court may limit the publicity of the hearing.
With regard to “safeguarding people’s dignity”,in cases involving crimes that touch on the sphere of restricted privacy and where it is necessary to preserve the privacy of the people involved and the honor and good name.
As far as “public morals” is concerned, there are cases in which, whether the crime of trafficking in organs, people or freedom and sexual self-determination is at stake, the rule is reversed: instead of being publicity for the audience, it is the the exclusion of advertising from the audience.
Note: In May 2009, an amendment to the CPP was approved, which intended to transpose a European Union directive on the protection of minor defendants. One of the measures was the rule of excluding publicity from the hearing whenever the defendant was a minor. In September, the legislator had to amend the CPP, introducing the rule excluding publicity from the hearing regarding organ trafficking crimes. The legislator was working with the version prior to the May draft and, without conscience, deleted the change introduced in May again. Minors were only covered by law between May and September, and art. 87.º/3 CPP target of a legislative accident.
Outside of cases referred to in paragraph 3, the judge's order in which he decides to exclude or restrict the publicity of a procedural act must be:
Reasoned, articles 87.º/1 and 2, and 97.º/5 of the CPP;
This order must be revoked as soon as the reasons that gave rise to it cease, article 87.º/2, final part, of the CPP.
As the rule is the publicity of the process, the decision to exclude or restrict the publicity of the hearing is, whenever possible, preceded by a contradictory hearing of the interested procedural subjects, and must be included in the minutes of the hearing (articles 321 and 362. º/paragraph e) of the CPP).
Be that as it may, there is a moment of the trial hearing that is always public, which is the reading of the sentence – there is, at least, a stronghold of publicity, article 87/5.
We can also verify the presence of a relationship between justice and the media:
Still with regard to the trial hearing, it is not just public attendance at the trial hearing that is limited. The right to freedom of information and press may also be limited.
This is an area of great tension:
On the one hand, there is the right to freedom of information and press, articles 37 and 38 CRP;

On the other hand, it is necessary to take care of other constitutional values

that may represent restrictions on the freedom to inform, such as, in particular, the defendant's rights of defense, protection of honor and good name, resocialization, privacy of victims of crimes and dignity of judicial activity.

Justice is a privileged object of the media. The presence of a large technical apparatus at the trial hearing may harm the serenity with which the judicial function must be exercised.

Therefore, limits are established, enshrined in article 88, in order to prevent the amplification of the stigmatizing effect of criminal proceedings. It is expected that they will have the ability to narrate procedural acts that are not confidential. The law prohibits three fundamental things:

The reproduction of procedural documents or documents incorporated until the first instance ruling;

The transmission or recording of images or sounds relating to the performance of any procedural act, namely the hearing, unless there is an authorization order; the transmission or recording of images or sound recording relating to the person who objects;

The publication, by any means, of the identity of victims of crimes of human trafficking, against freedom and sexual self-determination, against honor or against the preservation of private life - article 88/2.

On the other hand, the narration of procedural acts prior to the decision on the publicity of the hearing is not authorized, when the judge has prohibited such narration on the basis of specific facts or circumstances that lead to the presumption that it would cause serious damage to the dignity of people. , public morals or the normal course of the act, article 88.º/3 of theCPP.

Violation of these prohibitions will result in criminal liability for the crime of disobedience, articles 88.º/2 and 3 of the CPP and 11.º/2 and 348.º/ 1 paragraph a) of the CP.

There was an institutionalization of judicial secrecy within the media. It was not clear that journalists could also commit crimes of violating legal secrecy, something that was clarified, under the terms of article 371 CP and art. 86th/8 CPP.

It is necessary to know how the principle of publicity applies in relation to the stages prior to the trial, as they have to coexist with judicial secrecy. We must contrast internal judicial secrecy and external judicial secrecy depending on the people bound by the secrecy and depending on the grounds:

Internal Secrecy: Limits access to the records and knowledge of the elements contained therein by the procedural subjects themselves. Naturally, we also talk about an information asymmetry between procedural subjects. Access to the files is always granted to the judge and the MP.

It aims to protect the effectiveness of the administration of criminal justice, as well as the effectiveness of criminal investigation.

It aims to prevent the accused or other people from carrying out acts that could jeopardize the investigation and evidence collection activities.

It goes against the interests of the defendant. It aims to ensure the interests of the functionality of the judicial machine and prevent the accused from hiding documents and conditioning witnesses.

External Secrecy: Keeps the community in general, people outside the specific criminal process from knowledge of its records and elements of the process, even though they may be known to the procedural subjects. Their reasons are as follows:

Along with guaranteeing a certain functionality of the judicial machine, the aim is to protect the honor and privacy of the people involved, both from the defendant's point of view, to protect the presumption of innocence and honor, and from the victim's point of view. , to protect intimacy and privacy.

Until 2007, the legislator diachronically disciplined/organized the spaces of concealment and publicity in the process:

The hearing was always public, except for the restrictions we saw. Therefore, at the trial hearing there was internal and external publicity.

In the instruction there was external judicial secrecy, but internal publicity. People outside the process could not know it, but the procedural subjects had access to the records.

In the investigation, there was internal and external secrecy.

This raised criticism both from the point of view of external judicial secrecy and from the point of view of internal judicial secrecy. We are more concerned about the issue of internal legal secrecy.

From the point of view of external secrecy, institutionalized violations of judicial secrecy were censored. There were crimes of violating judicial secrets that were systematically left unpunished. One of the reasons why they remained unpunished was because it was difficult to identify the source of information and it was not clear that the journalists (those who were known to have disclosed it) were themselves bound by judicial secrecy. The legislator clarified journalists' obligations under this secrecy regime and their susceptibility to committing crimes for violating legal secrecy when they made unauthorized disclosures of confidential information. And how did you clarify that? The law said that the secrecy of justice was binding on all procedural participants as well as people who had come into contact with the process and had knowledge of them – now the law states or and not and. Previously it was necessary to have had

contact with the process and have knowledge of elements belonging to the process, but now it is enough to have had contact with the process or know elements belonging to it. Before, as it was said and, doubts arose, but now with the replacement by or this clarified that one of these cs is enoughcircumstances to be bound by judicial secrecy (article 86/8).

Another thing that was done to end the violation of judicial secrecy was to reduce the scope of secrecy, because the less secret there is, the less it is violated.

Regarding internal secrecy, the major criticism was that the judicial secrecy regime, as it existed, compressed the defendant's defense guarantees in a constitutionally permissible way. There were even those who wanted to end internal secrecy – the aim was to reduce or even extinguish the internal judicial secrecy regime. There was one aspect in which the criticisms were correct and these concerned the defendant's access to the files when coercive measures were applied. Should the defendant have access to the files, should he be informed of the alleged facts and the evidence on which these facts were supported and should he also have access to the files to consult them, when a measure of coercion is applied to him, namely preventive detention? It was not safe for the defendant to be able to access the files even when a measure of coercion was applied to him, namely preventive detention. The TC, in 1997, in ruling no. 121/97, understood that the rules were unconstitutional when interpreted in the sense that the accused should not be given access to the case files, particularly to appeal against a coercive measure of preventive detention, for violation of article 32/1 of the CRP, which enshrines the full defense guarantees of the accused. Later, in 2003, regarding the Casa Pia case, the issue was revived. The TC had already decided to judge as unconstitutional the rules of the code that did not allow the consultation of the records to appeal against an order applying preventive detention or other coercive measures. In 2003, in the Casa Pia case, the TC once again judged the CPP rules to be unconstitutional when interpreted in the sense that generic information is sufficient without contextualizing the time, place and manner in which the offenses were committed and without informing the accused of the evidence in question. that they are sustained during the interrogation prior to the decision applying coercive measures.

In short:

First, the TC ruled on the question of whether the defendant should be allowed access to the files so that he or she can appeal the order determining a given coercive measure, to correct any judicial error that may have been committed in the application of a coercive measure.

In 2003, there was a debate about whether or not information should be given to the defendant about facts that are specifically attributed to him (including circumstances of time, place and manner) and evidence about which facts are based on the interrogation prior to the application of a coercive measure. . It is no longer a matter of allowing consultation of the records to support the appeal, but rather a question of allowing access to the information contained in the records during judicial interrogation to avoid any possible miscarriage of justice and allow the accused to fully exercise his or her defense.

This influenced the legislator. In 2007, the legislator, in a reform that changed the entire procedural cycle, introduced the following provisions:

A duty to inform the accused about the alleged facts and the evidence on which they are based (article 141.º/1, paragraphs. d) and e));

A duty to give reasons for the decision applying the coercive measure, and this decision cannot be based on elements that have not been previously communicated to the defendant (article 194/6);

A right to consult the case file during judicial interrogation and within the time limit provided for appealing the order that applied the coercive measure (article 194/8).

The law says that the accused has the right to be informed of the specific facts alleged against him, including the circumstances of time, place and manner, unless it is specifically found that the disclosure of this information/evidence would jeopardize the investigation or when makes it impossible to discover the truth or creates danger to life, physical or mental integrityor the freedom of procedural participants or victims of crime. In this case, there is no information about the evidence. Afterwards, the person will be presented to the judge and must provide this information. Given this information, the defendant has an interest in defending himself against the charges by highlighting the lack of sufficient evidence to apply the coercive measure or that there is no precautionary danger since the precautionary measure can only be applied if this danger exists. But the defendant can only defend himself from this if he is given the opportunity and means to do so. Now it is expected that the defendant can consult the files and can see the information that is in the file, but this does not mean consulting all of the files.

The right to consult the case files is triple limited:

The defendant can only consult the records during a period of time defined by the legislator (during judicial interrogation – maximum of 48 hours) and during the period he has to appeal the decision (period of 30 days), that is, he does not have free access to the cars.

The defendant is also limited in terms of the matter – he cannot consult them in their entirety, but only those that served to support the MP's promotion and on the basis of which the judge will have to base his decision. The MP may keep some information if he understands that it suits him from a procedural strategy point of view, but he runs the strategic risk that, by not revealing everything, his promotion will be less well-founded and the request to apply a coercive measure will be unsuccessful or will be a less serious coercive measure than the one requested was applied. Only what is mentioned in the MP promotion is consulted.

The defendant may only consult the elements in the case when such consultation does not jeopardize the investigation or when it does not make it impossible to discover the truth or create a danger to the life, physical or mental integrity or freedom of the procedural participants or victims of the crime. (article 194.º/6, paragraph b), referred to by article 194.º/8). The formula of article 194.º/6, al. b) is similar to that of article 141.º/4, al. It is).

As we have already seen, the system in force until 2007 was strongly restrictive of advertising and was therefore the subject of great criticism, especially with regard to internal secrecy, that is, the secrecy that binds the participants in the criminal process and prohibits them from accessing it. to the cars. The legislator diachronically established spaces of secrecy and publicity. The investigation was dominated by internal and external secrecy, that is, neither the participants themselves nor people outside the process could have access to the information contained in it.

In the instruction there was internal publicity, but there continued to be external secrecy. And at the hearing stage, the process was finally public. In the investigation phase, where highly restrictive DF measures may be applied, namely coercive measures, and where restrictive DF measures are applicable, it is important to ensure the defendant's rights of defense in relation to these measures:

Upstream to avoid the commission of possible judicial errors;

Downstream to allow the defendant to effectively challenge the DF restrictive measures applied to him.

Let us think about the essentials of coercive measures. The defendant could not effectively exercise the adversarial process in relation to coercive measures if he was not aware of the facts imputed to him and the elements of the process on which the suspicion of these facts are based, just as he could not effectively appeal the order imposing a coercive measure. coercion if he was not aware of the facts and the elements on which those facts are based. It would be a mere legal appeal, because if the defendant does not know the facts that substantiate the suspicion of committing a crime or the conviction that there is a danger of escape, a danger of disrupting the investigation or a danger of continuation of criminal activity (etc.), his defense would be based only on legal norms. The constitutional court had the opportunity to ruler on this issue, deeming the provisions of the Criminal Procedure Code unconstitutional insofar as they prevented defendants from accessing the case files at all times and under any circumstances without specifically considering the conflicting interests:

Interest in guaranteeing the defendant's defence, on the one hand;

Interest in the effectiveness of the criminal investigation, on the other.

The legislator was sensitive to this and ended up establishing a general regime in Article 141 and a specific regime in Article 194 for access to the case files when the application of coercive measures is at stake. We have already seen this regime. This regime applies and is important when the investigation phase of the case is conducted in secret.

In 2007, the legislator went further and completely changed the paradigm in terms of secret justice, establishing in Article 86, paragraph 1 that all criminal proceedings are public in all phases, under penalty of nullity. All criminal proceedings are public, under penalty of nullity unless a decision by the Public Prosecutor's Office or the Court of First Instance determines that the investigation is subject to judicial secrecy (only the investigation phase can be subject to judicial secrecy).

The decision may be made by the Public Prosecutor's Office or the Court of First Instance, but it is always a decision that specifically weighs up conflicting interests – at its core is the idea that the reasons that dictate secrecy outweigh the reasons that advise against it:

The decision will be made by the Public Prosecutor's Office in the cases referred to in Article 86.º/3, that is, whenever the Public Prosecutor's Office understands that the interests of the criminal investigation advise that the investigation be subject to secrecy, it may determine the application of the judicial secrecy regime. This decision is subject to judicial validation within 72 hours (Article 86.º/3). If the investigation is subject to secrecy under these terms, any of the procedural subjects may, at any time, request the Public Prosecutor's Office to lift the secrecy. The Public Prosecutor's Office itself, if it understands that the reasons that justified the secrecy are no longer justified, may lift the judicial secrecy. If these procedural subjects request the lifting of the secrecy of justice and the Public Prosecutor's Office does not lift the secrecy, the records are sent to the JIC, which decides by means of an unappealable ruling (article 86.º/5).

The decision to make the case confidential may also be made by the JIC, but in this case the reasons for the confidentiality are different: the interest is that of the procedural subjects themselves and not the interest of the criminal investigation. The defendant himself may have an interest in the investigation being conducted under secrecy because he believes that the suspicion is clearly unfounded and that this will be clarified during the investigation, and he wants to safeguard his honor and good name by preventing news of the existence of the case from being made public. Of course, the procedural subjects themselves will also be denied access to the records. The victim may also have an interest because he may want to see his image, intimacy and privacy protected from possible intrusion by third parties. Therefore, the procedural subjects may have an interest in the provision of a secrecy regime and in this case it will be the JIC that, after hearing the Public Prosecutor's Office, will determine the subjection to judicial secrecy and this decision by the judge is final (article 86.º/2).

Criticism of this Model: The jurisdiction is two-headed, but in both cases the final word belongs to the judge. It should be noted that when it is the Public Prosecutor's Office that decides, the judge must validate the decision within 72 hours and there are situations in

which it is up to the judge himself to decide. On the one hand, this seems to be a good solution from the point of view of protecting the Federal District because the decision is handed over to the judiciary, but on the other hand, it seems to disturb the balance that the code intended to establish between the two judicial authorities that can intervene in the investigation phase. By assigning jurisdiction to the judge, in some way the judge is being given an active role in conducting procedural strategy in the investigation phase, which he should not have and, from this point of view, the precaution that should be taken is to emphasize that the judge should always intervene only as a judge of guarantees or freedoms. That is, he will not be theThe judge who will judge the interests of the investigation must take the interests of the investigation as they are presented to him by the Public Prosecutor's Office and will limit himself to weighing these interests with the opposing interests of the procedural subjects, operating a practical agreement.

If the investigation is subject to judicial secrecy, the judicial secrecy has the content provided for in article 86.º/8. We have already seen that it binds all procedural subjects and participants, but also people who are external to the process, as well as people who, for any reason, have had contact with the process or knowledge of elements pertaining to it. The judicial secrecy also binds journalists.

When judicial secrecy is in force, this implies that people are prohibited from attending or knowing the content of procedural acts and prohibited from disclosing the occurrence of the procedural act or its terms (content) – article 86.º/8. However, only the disclosure of the elements of the process constitutes a crime.

It follows from this that, where judicial secrecy exists, access to the files cannot be granted. The confidentiality of justice is valid for as long as necessary, provided there is a decision determining it, binding both procedural subjects and persons external to the proceedings.

As for internal confidentiality, it is possible for it to be lifted before external confidentiality. Under the terms of article 89.º/6, when the normal time limits for the duration of the investigation end, the procedural subjects have the right to access the files. The investigation and the investigation are subject to deadlines. These deadlines are frequently exceeded. What are the consequences of exceeding these deadlines? If they were peremptory, the possibility of exercising the right to which this deadline is linked would be precluded. In this case, the investigation and the investigation would end ope legis once the deadline had expired. However, it has been understood that these are merely regulatory deadlines, that is, deadlines that do not have the consequence of preventing the investigation proceedings when these deadlines have expired. This does not mean that there are no consequences arising from the violation of deadlines. First of all, there are:

Consequences in the disciplinary sphere;

The possibility of filing an incident to expedite the proceedings (article 108 of the Criminal Procedure Code);

The lifting of internal secrecy under the terms of article 89/6. From the moment the deadlines end, the procedural subjects may access the files, but this access may be postponed. The law states that this period may be postponed for a period of 3 months, and this period may be extended only once when particularly serious crimes are involved (paragraphs i) to m) of article 1), in which case the extension of the postponement takes place within the period objectively necessary for the conclusion of the investigation. The general rule is that internal secrecy ends when the investigation ends, but, despite this, access to the files may be postponed for an initial period of 3 months by decision of the JIC, and if particularly serious crimes are involved, this 3-month postponement may still be extended for a second period, and the law states that this second period is the period objectively necessary for the conclusion of the investigations. There were two possible interpretations in this regard:

The first stated that the first postponement would be for 3 months and the second postponement would also have an absolute limit of 3 months but would also be subject to a relative limit, that is, the maximum would be 3 months but within those 3 months for the period objectively necessary to conclude the investigation.

The other interpretation, which is the dominant one, was the one that resulted from the uniformizing case law ruling 5/2010, according to which the first period could not exceed 3 months, but the second postponement was not subject to the absolute limit of 3 months, it was for any period as long as it was the time objectively necessary to conclude the investigations. It was this interpretation that prevailed and that dominates the courts.

Criticism of this Interpretationaction: This does not seem, however, to be the best interpretation. The strongest argument in favor of this interpretation is that these are particularly serious crimes and in relation to them this will often justify postponements that in total exceed 6 months. If that were the legislator's intention, he would have to establish two different rules depending on the nature of the crimes in question. For crimes in general, the period would only be 3 months. For crimes in those categories, the period would be necessary to complete the investigations. It makes no sense to establish a first deadline of 3 months and then extend it to be longer than the final deadline. It makes no sense either logically or in terms of the letter of the law. The legislator wanted to limit it, and the deadline could only be extended once – if it wanted to adjust the postponement of access to the files to the seriousness of the crime and the complexity of the investigation, it would allow postponements as necessary.

The fact that, by virtue of this rule, procedural subjects can have access to the files, does not necessarily mean that they have access to all the files. There has already been a ruling by the constitutional court considering this rule unconstitutional due to violation of privacy rights in a situation in which the investigation deadlines and the deadlines for postponing access to the files referred to in article

89/6 had ended, but the MP had not yet decided on the relevance of certain banking information collected in the investigation in order to decide whether this banking information, much of it relating to third parties, should be kept in the files or was irrelevant to the decision of the case and should be destroyed or returned to the their holders. Therefore, in a situation in which there are elements that concern the private sphere of third parties that are in the case file and in relation to which the MP has not yet been able to comment on their relevance in order to decide whether they are of interest in discovering the truth and being maintained in the case files or on the contrary if they must be destroyed and returned to the third parties to whom they concern, in which case allowing access to the case files by procedural subjects in an indiscriminate manner would violate the CRP – ruling no. 428/2008. It is necessary to make these CPP standards compatible with constitutional standards. If the records contain information relating to other people, it is necessary to ensure protection of their privacy and only when the Public Prosecutor determines whether these elements are of interest or not, can the accused have access to them.

The legislator may have gone too far. Those solutions that we saw first regarding the lifting of internal secrecy when restrictive DF measures are applied are solutions that we must investigate. Naturally, the defendant must be allowed to know the facts alleged against him and the elements of the process on which these facts are based in order to be able to react against decisions that restrict his freedom, but the effectiveness of the criminal investigation, especially in the most serious crimes , assumes that there is judicial secrecy. The CRP itself elevates judicial secrecy to an institutional guarantee. It says in article 20/3 of the CRP that the law will ensure the adequate protection of judicial secrecy.

The fact that the legislator has excluded judicial secrecy from the investigation phase as a rule leads, on the other hand, to a perversion which is to anticipate dynamics that would be typical of the trial to the investigation phase. It is during the trial that the criminal case is discussed and decided. The investigation is necessary because no one should be subjected to trial without there being a well-founded suspicion, because that would be conditioning the sphere of the person's honor and good name without the slightest basis. The inquiry serves to see whether the suspicion is founded and whether this legitimizes that person's subjection to trial. But what happens more and more is that inquiry and instruction become anticipated judgments, with the dynamics typical of a trial. The fact that the investigation phase is nowpublic policy encourages the dynamics of judgment to be imported into the investigation phase, making the criminal process more complex because we now have long, very conflictual phases (because, with publicity and contradictions, there is more conflict), and causing entropies are such that, upon reaching the trial hearing, agreements on the sentence that resolve the criminal case outside the trial become desirable. The trial phase, which was the essential phase of the process, is now dispensable as excessive weight is given to the previous phases converted into early judgments.