THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

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PREFACE

The main topic "The Role and Function of Prosecution in Criminal Justice", generates a big general interest, and in my particular case, I feel drawn to the chance to obtain valuable knowledge which will help me to better perform my duties.

I have been working in the criminal prosecution area for seventeen years. Sometimes I have felt very satisfied by having cooperated in serving justice. However, on other occasions, I have felt a sour taste in realizing that the system is insufficient and that some transgressors triumph because their crime is not proven.

I firmly believe that disappointments make us stronger, and also, that we never lose courage in our obligation to cooperate in punishing the offender, releasing the innocent and transforming our society into a better one each day.

Thanks to the Government of Japan, to the Japan International Cooperation Agency and to the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) for giving me—on behalf of my country—the opportunity of improving our knowledge in the hope that our criminal justice administration system could be a source of pride for Costa Ricans.

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I. INTRODUCTION

Modern societies observe with alarm and consternation an increase in crime, not only in quantity but also in quality. More and more, a greater degree of violence is evident in the offender's behavior. It is enough to open the newspapers pages and observe that more frequently than expected there is a youngster who kills an elderly woman just to steal a few coins, a bank guardian has been murdered during an assault, or a child abused by his teacher. Faced with this situation, state intervention becomes imperative. By means of the penalties foreseen in the laws, the state is trying discourage this damaging behavior from affecting the peaceful coexistence of society.

It is true that it is the state which possesses the function of detecting, prosecuting and judging crimes, because it is impossible nowadays to think in terms of private revenge. However, there must be a balance between the penalty or punishment imposed on the transgressor and the absence of abuse of public power. To avoid abuse, the state must have an instrument which is subject to the law (the Legality Principle). It is known as the Criminal Procedure Law. In order to find the origins of modern procedure law, we must go back to the French Revolution and the ideas of the thinkers who preceded it.

The Republican Movement was established at the end of the XVIII century during the French Revolution. This movement fought very hard in favor of the division of powers that prevented the establishment of an undesirable concentration of powers in the state.

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In relation to justice administration, the big change of that period was the abolition of cruel and abusive inquisitorial procedures in which an anonymous accusation was enough to start a procedure against any person, and could even finish in death. Basically, the judgement originated from apparent transgressions from moral or religious norms, and of course, this was a valuable instrument of political control allowing the king and his followers to eliminate anybody who disagreed with his dispositions.

The Compound (Mixed) System appeared in 1808, with the promulgation of the French "Code d'instruction criminelle". This system has elements from the accusatorial system, takes the most valuable part of the inquisitorial system, and has the objective of proceeding the process in two different stages: basically, one is written, and the other is oral and definite, i.e., the trial.

This system, which has been in force in the majority of the Latin American countries—is also ruling today in Costa Rica, and an examining judge (known as Juez de Instrucción) is in charge of the investigation.

The character of a judge in charge of the investigation is like a viceroy taken from the authoritarian ideology and the power concentration which ruled before the French Revolution. The modern tendencies have demonstrated the inconveniences of this procedure, since the investigation in the charge of a judge is rigid, slow and different in each jurisdiction.

The nature of today's crime requires a quick and effective procedure that responds to a uniform strategy, mainly to fight non-conventional crime—in which big criminal organizations are involved—which possesses many resources, and, therefore, is hard to fight.

We—those who fight against crime—cannot waste resources in pursuing irrelevant matters, and we must direct our efforts against behaviors that seriously injure society. It is desirable to find a unified strategy to fight crime in all modern societies, as in Italy which developed a unified front to attack the Mafia.

Besides the inconveniences mentioned about the investigation by the examining judge, it is pointed out that the confusion of duties performed by just one person is not so desirable. The judge has the obligation of watching over the individual's rights, and at the same time, he is obligated to gather evidence against the same individual. Consequently, it is very difficult to keep objective and impartial, and it is highly probable that in a certain moment of the investigation, the judge—as a human being—could take sides in one or another sense.

To avoid those kinds of situations, the new procedure law tries to entrust the investigation to an independent entity not subjected to the rigidity imposed by the jurisdiction, which also meets the expectations of efficiency in the preparation of the penal action. Moreover, this could facilitate achieving more control between investigators and judges where the system of checks and balances, taken from the republican system of government, resulting in the raising of the state "ius puniendi".

The investigation assigned to a prosecutor allows each person to assume their corresponding role in the process: the judge, watches out for the fulfillment of its legality and consequently, that the rights of the parties are protected, including, of course, the accused; and the prosecutor, acting on behalf of society, collects all evidence that links the accused to the crime and in general, fights crime. Criminal investigation strengthens the principles of oral and immediate evidence, because when appearing in court, the prosecutor knows each and every piece of evidence that will serve as a basis for the indictment; and the judge will know of them only when presented at trial.

Another advantage of the prosecutor's investigation is that it diminishes delays in the administration of justice by eliminating the obligation of a written and formal procedure, which on many occasions forced persons to face a long process: months or even years.

The flexibility in the investigation by prosecutors will allow them to focus their attention on the really damaging behaviors of social groups. As it is pointed out on many occasions, criminal activity surpasses the community's ability to fight. No punitive system can attack every crime committed against it. Consequently, there appears the necessity to create a selection system that permits the screening of the state punitive function, whereby serious offenses are punished, and alternatives are sought which discourage petty conduct that disrupts normal coexistence without requiring direct intervention from the state.

It is true that when we talk about an investigation entrusted to a prosecutor, we assume that he or she must be objective and neutral. He must respect all the rights and guarantees of the defendant and the parties must be recognized by the political constitution and international law.

Besides, it is necessary that the prosecutor keep excellent relations with the police, since prosecutors essentially link judges and police.

Another important relationship to be kept is the one between the prosecutor and the victim, given that the latter charges the prosecutor with the rescue of his rights. To achieve this, the prosecutor in charge of the case must make the best use of his human and material resources in order to locate the corresponding proof and present it to the court in an adequate way. Afterwards, the judge is responsible for the final judgement.

Costa Rica, a democratic republic located in the heart of Latin America, counts with a Public Ministry assigned to the Judiciary Power. It functions since 1973 with a mixed criminal procedure system, and it has two very distinct stages: the first one, almost totally written, encharged to an examining judge, and the second one, oral, realized at the public trial.

The Public Ministry is headed by the Prosecutor General and the Attached Prosecutor General, both appointed by the Supreme Court of Justice. The prosecution personnel is appointed by the Prosecutor General.

Only public prosecutors have the authority to initiate prosecution, and private prosecution is not allowed.

II. BRIEF VIEW OF THE CURRENT LEGISLATION

In Costa Rica, public prosecutors handle two types of offenses called "public action crimes". The first encompasses those offenses which are punishable by a fine or three years' imprisonment. The second consists of those offenses punishable by more than three years' imprisonment. At the trial stage, the former are handled by a single judge once the prosecutor has finished the investigation.

For those serious crimes punishable by three or more years of imprisonment, a different procedure called "formal instruction" in the charge of an examining judge is necessary. Specifically, when an offense is reported, all initial investigations must be done by the police. When they are finished, the file must be delivered to the prosecutor, who will make a "Requirement of Formal Instruction" to the examining judge in accordance with Article 170 of the Criminal Procedure Code. The examining judge will handle the matter by receiving the statements of the accused and the witnesses, and requesting that the technical proof and any other evidence that he deems necessary be provided. At this stage, the function of the prosecutor is just to be vigilant that all procedures are correct

and that the necessary evidence is included in the case file. If the prosecutor disagrees with the judge, he is allowed to appeal to a higher court. Once the investigation is concluded, the examining judge delivers the case file to the prosecutor, who will make the indictment (C.P.C. art. 338). A collegiate body of three judges then takes cognizance of the matter for trial.

The trial stage is basically the same for the two categories of crimes mentioned above. First the indictment is read to the defendant so that he or she can know the contents of the accusation. Then the statements of witnesses are received orally and the documentary evidence are also read (C.P.C. arts. 369 to 391). Once this procedure is concluded, the prosecutor and the defense counsel will make the final oral arguments, and then the final step is the sentence given by the tribunal.

III. THE NEW LEGISLATION

Starting January 1, 1998, the New Criminal Procedure Code will be in force. It is modern and inspired by the German procedure ordinance and the procedure codes of Guatemala, Italy and Portugal. Now, the preliminary investigation of a penal action will be entrusted to the Public Ministry.

This modern procedure law is structured into three well-defined parts:

1. Preparatory. The main objective is to collect the necessary elements for making the indictment.
2. Intermediate. This part is assigned to a judge who controls if the indictment is in order, it keeps the forms, and it contains enough fundamentals to be viable.
3. Trial. At this stage, the issue will definitely be resolved, concluding if the accusation of the prosecutor has or not the right to be.

From these three parts, the first and the last are the most important ones, and there is a big relation between them. This new change has also imposed a big change of minds of the members of the Public Ministry.

Many prosecutors who have been working behind a desk up to now, must leave their offices and investigate and work side by side with the police. The prosecutor will no longer be a spectator waiting for the evidence to be given by the police, rather he must personally direct the investigation, pointing out what could be a necessary proof to solve a case (New C.P.C. art. 62).

All of this ratifies the necessity—already mentioned—that the relations between the prosecutor and the police must be excellent and respectful, because this is the only way in which both could be efficient and worthy of mention.

The use of resources must be rational and oriented towards fighting the acts that actually injure the society. Also alternative solutions must be sought like imposing fines, community work or certain obligations for those who disturb the social peace, but who do not really commit offenses that require strong punishment by the state.

Undoubtedly, the new legislation poses new challenges. We know that all changes may present difficulties, but we have the hope that they will be surpassed. Also, we know that we will adapt to this new form of crime fighting successfully, since we are convinced that all human beings deserve a better place to live.

The new code will greatly strengthen the Public Ministry, and consequently, the Attorney General of Costa Rica, who is responsible for establishing criminal policy. Up to now, this office has taken an active role in criminal policy.

The fact that the Costa Rican Public Ministry is dependent of the Supreme Court of Justice has prevented a true development of the procedure to be followed in regard to criminal prosecution in the

heart of the entity in charge of it. There is much criticism about this dependence on the Judiciary Power. Many jurists have pointed out the necessity of giving a constitutional power to the Public Ministry, and, at the same time, its own budget and freedom to delineate the rules to be followed in the country against the daily increasing criminality, as it is in place in many parts of the world.

However, the present reform to which I refer above has not given the Public Ministry such independence. Nonetheless, we think that in the near future the imminent need of cutting the ties between the prosecution and the Supreme Court of Justice will come. It is probable that the next legal battle in our country will be about this aspect.

It is important to point out that the 1998 Code will provide the Public Ministry with certain powers previously not available. Nowadays, penal action is obligatory. This fact implies that there is no possibility of negotiation with the accused, and obviously, the investigation becomes difficult because it is impossible to count on the testimony of some persons who know criminal activity from the inside. The only exception to this rule found today is as to drug matters, in which it is possible to plea bargain when a subject who committed a certain kind of offence decides to give information in exchange for less severe treatment by the prosecutor.

Starting on January 1, 1998, it will be possible to make certain negotiations in other types of offences, not only in matters related to drugs. This will facilitate our work in the sense that the prosecution will have a tool with which to screen some important cases.

However, these negotiations are allowed as to all offenses. The law specifically delineates when such negotions are permissible. Nonetheless, we consider this a great advancement in regard to the administration of justice.

Any proceedings that lead to a penal prosecution will be subject to the supervision of a judge, called a "Guarantees Judge", whose role is to ensure that an individual's fundamental rights are respected. Similarly, some acts can only be performed by the prosecutor with the prior authorization of the Guarantees Judge, for example, the official entry into a house.

This is due to the fact that our judicial system is fairly protective of an individual's rights, and our Political Constitution clearly establishes that certain rights can only be altered by the intervention of a judge of the Republic.

Another example of constitutional protection is the obligation imposed on the State to prove, beyond a reasonable doubt, the guilt of the accused. The "Innocence Principle" prevents the inversion of the burden of the proof. However, as a consequence, certain types of complex investigations are difficult, like those related to money laundering, a prevalent crime nowadays.

Private property is very zealously protected in our juridical system, and thus, a judge's intervention is necessary to deprive somebody of his property.

Also, the deprivation of freedom is a very restricted field, which can be ordered only by a state judge. The Public Ministry may only detain an accused for the limited period of 24 hours, in addition to detention at the investigation stage. Additionally a judge's order is necessary to keep the accused in prison.

As can be seen, prosecutorial activity is not so flexible, and it is under the permanent control of the judicial authorities. However, I believe that much progress has been with the new legislation. I also believe that, after making some necessary adjustments during the first applications of the new procedure, the results will be seen next year.

IV. RELATIONSHIP WITH THE POLICE

A coordinated effort and good relations between prosecutors and police officers will allow success both in investigations and, in particular, in fighting crime. Both constitute the long arm of the law and how it is materialized.

Costa Rica has a judicial police force that also depends on the Judicial Power, but has administrative independence. Under the present system, it is very common for the police officers to have direct relations with judges, of whom they request different orders. Moreover, whom the police tends to occasionally inform first a judge, about an offense and thereby relegates the prosecutor.

However, once the new law takes effect, the police must first inform the prosecutor of all criminal acts, who will then set the guidelines to be followed in an investigation (N.C.P.C art. 283). Some police officers are worried about this, because suddenly Public Ministry officials would be assuming roles that have not had before and for which they may not be ready.

To address these concerns, prosecutors have been working very hard to inform the police that they will continue with its administrative role, and that the directions of prosecutors are just for cases under investigation. Moreover, it is necessary to strengthen the human relations between both groups in order for each to perform their duties under the best conditions of good fellowship and mutual cooperation.

V. RELATIONSHIP WITH THE VICTIM

Finally, it seems appropriate to make a few comments in regard to the victim, who has been practically disregarded within the criminal justice system.

Nowadays, when a victim or any other person reports a crime, he may be requested on one or several occasions to provide testimony during the investigation. As the notion of private revenge becomes unacceptable, and the concept that the state is the only entity authorized to punish takes root, information to the victim is omitted. The victim is only called again to render testimony during the trial and has no right to dissent from what is happening. This seemingly unfair treatment has given rise to commentary that the victim has been re-victimized by the criminal justice system.

In modern times, "victimology" tries to give the victim back his rights, reminding him that they had never been lost. Victimology presumes that the victim deposits his rights into the prosecutor's hands, and that the latter is obligated to preserve such rights, by informing the victim and considering all aspects that the victim wants to give testimony about, because, after all, he is the one who knows up to what point the offence has affected him.

VI. CONCLUSION

Nobody can deny that prosecutors in Costa Rica face an important challenge not only because the techniques developed by criminals are more sophisticated each day, but also because the new procedure code represents an opportunity to achieve the fair and efficient application of the law.

It is desirable that the changes introduced in the legislation produce an efficient and high quality criminal justice system, where the right to defense can be plainly exerted by any of the parties, and where it is not forgotten that the state's punitive power is restricted and delegated by the citizenry. Also, it must be used to strengthen democracy and to improve coexistence. However, it must never be used as an instrument of domination.