

THE INVESTIGATIVE ROLE OF THE TECHNICAL DEFENSE IN THE ACCUSATORY CRIMINAL PROCESS

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ABSTRACT

In Panama, during the mixed inquisitorial criminal process, the direction of the investigation and the exercise of the criminal action was the power of the social representation, that is, the Public Prosecutor's Office, which carried out the acts of investigation to prove its theory of the case. With the enactment of the new oral, adversarial and guarantor-based criminal procedure system, the technical defense attorney acquires a leading role in the investigative role, based on the freedom of investigation and presentation of evidence, which requires the adoption of competencies that facilitate the effective exercise of the defense in the investigative phase.

Keywords: Competencies, effective defense, ethics, investigation, legality, probation.

PROBLEM

The problem of the present research suggests the existence of new challenges for the criminal lawyer, with the entry into force of the new adversarial and guaranteeing criminal process, regarding the development of the necessary skills to technically analyze the acts of criminal investigation ordered by the state representation, the ability to request the Public Prosecutor's Office, with due grounds, those he considers necessary to obtain evidence for the benefit of the interests he represents, as well as the freedom to obtain means of evidence of a particular nature to be presented at trial, provided they comply with the legal requirements for their admissibility.

CONTEXTUALIZATION

The work of the technical defense in the new Panamanian penal system constitutes a fundamental piece for the realization of the principles and guarantees that by conventional and legal mandate protect the persons linked to the commission of a criminal offense.

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Therefore, it is of great interest the active role of the criminal lawyer during the investigation stage of the crime, however, for its execution, it requires modern competences and aptitudes of scientific and dynamic nature that facilitate the effective exercise of the defense.

Currently, the criminal defense attorney faces challenges due to the direction of the investigation by the state representation and the structural and budgetary dependence of the auxiliary investigative agencies on said entity, which makes the defense activity more complex.

The foregoing raises the need to address the importance of the new investigative role of the technical defense in the Panamanian accusatory criminal process, in order to generate strategies that allow the criminal lawyer to project his investigative and procedural actions within the framework of legality and to promote his interest in guaranteeing an effective defense.

BACKGROUND

In Panama, while the mixed inquisitorial criminal process was in force, the investigative work and the contribution of evidence was the responsibility of the auxiliary and coadjutant agencies of the Public Prosecutor's Office, which controlled the direction of the investigation.

In this sense, the Judicial Technical Police (PTJ), created by Law No. 16 of July 9, 1991, consisted of a technical and scientific body, under the dependence, direction, surveillance and control of the Attorney General's Office, with the mission of assisting the Judicial Branch of Panama and the Public Prosecutor's Office in the investigation of crimes and the discovery of their authors and participants. It was also in charge of the criminalistics department, the forensic services departments and the forensic science laboratory.

However, on December 27, 2007, Law No. 69 came into force in the Republic of Panama, creating the Judicial Investigation Directorate in the National Police and assigning the Criminalistics services to the Institute of Legal Medicine and Forensic Sciences, which in 2006 underwent changes in its organizational structure. It is in this scenario that Law No. 63 of August 28, 2008 enters into force, which progressively implements the accusatory criminal process in the Republic of Panama and promotes a paradigm shift in the prosecution of criminal action, allowing the investigation work and the contribution of evidence to be developed by other participants in the process, among them, the defense attorney.

Although Article 68 of the Panamanian Code of Criminal Procedure establishes that the Public Prosecutor's Office is responsible for the direction of the investigation of the crimes, practicing

or ordering the execution of the useful diligences to determine the existence of the crime and the responsible parties, in accordance with the provisions of the Code of Criminal Procedure and the Organic Law of the Public Prosecutor's Office, Article 376 of the same law provides that the punishable facts and their circumstances may be accredited by any permitted means of evidence, except for the limitations of the law, in accordance with the obligation that the Code also imposes on the defense attorney to reveal, discover or deliver his evidence for the oral trial at the indictment hearing.

If it is a scientific evidence, any of the parties may request the practice of it to a private or public expert, however, in the second case, if the expertise falls on any of the expert services offered by the Institute of Legal Medicine and Forensic Sciences, such request must be made through the Public Prosecutor's Office, in attention to the exercise of the criminal action.

To this we must add that Law No. 50 of December 13, 2006, which reorganizes the Institute of Legal Medicine and Forensic Sciences, assigns the services of this entity to the Public Prosecutor's Office and, in its Article 2, provides among its functions that its services must be requested by the competent authorities.

The study from this article focused on analyzing the challenges faced by the defense attorney in the new accusatory criminal process and that facilitate the effective exercise of the role of the defense in the investigative phase, with the following specific objectives:

- Identify the competencies of the technical defender to ensure successful performance in the exercise of their functions.
- To describe the roles of the defense attorney during the investigation phase of the accusatory criminal system.

The following questions were raised:

- What competencies should the criminal lawyer assume in order to exercise an effective defense in view of the recent reforms to the Panamanian criminal procedure?
- What are the scientific tools required by the criminal lawyer to exercise an effective defense in the investigation stage?

JUSTIFICATION

In Panama it is a topic of interest in the legal forum the new investigative role that the adversarial and adversarial criminal process imposes on the defense attorney to guarantee the efficiency and effectiveness of his work, this, in attention to the evidentiary freedom and the

application of the techniques of scientific investigation for the development of his theories of the case, This is a new issue, given the lack of experience in this area by criminal lawyers and the short time that the accusatory criminal process has been in force throughout the Republic, which requires the development and improvement of methods of investigation and obtaining evidence through the application of a scientific approach.

HYPOTHESIS

Therefore, the hypothesis of the problem is that *“the effectiveness of the criminal lawyer’s defense practice depends on the competencies and scientific tools adopted in the investigation phase”*.

THEORETICAL ASPECTS

1. General aspects

The procedural equality between the parties in our new adversarial criminal system allows the technical defense to play a more than leading role, since it is responsible for dealing with the scientific direction of the investigation carried out by the prosecutor’s office, so that one of its main roles is focused on evidentiary expectations, to ensure the effective exercise of the defense of the person under investigation.

Well, in this context, the activity of the Public Prosecutor’s Office excites the intervention of the defense. And the fact is that, having overcome the old criminal procedural regimes, the accusatory criminal process recognizes rights and guarantees to the defendant, which allow him on an equal footing, to prove his innocence, however, this recognition is materialized precisely in the figure of the defender, who now assumes a great responsibility.

2. Regulation of the right to defense

2.1 In the conventional sphere

The right to defense has been internationally recognized since the Declaration of the Rights of Man and of the Citizen of 1789 and has been developed internationally by multiple international human rights treaties that bind our country.

The International Covenant on Civil and Political Rights, approved on December 16, 1966, in its article 14, numeral 2º, literal d, states as rights of the accused:

“To be present at the trial and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right to have it; and,

whenever the interests of justice so require, to have legal assistance assigned to him, free of charge, if he does not have sufficient means to pay for it “¹.

Likewise, the American Convention on Human Rights, known as the Pact of San Jose, in its article 8 on Judicial Guarantees, numeral 2, warns that, during the process, every person has the right, in full equality, to be assisted by a defender provided by the State, paid or unpaid according to domestic legislation, if the accused does not defend himself or appoint a defender within the time limit established by law.

Article 6(3)(c) of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that all persons accused of a crime have the right to defend themselves or to be assisted by counsel of their own choosing and, if they do not have the means to pay for it, to be assisted free of charge by a public defender, when the interests of justice so require.

2.2. Panamanian legislation

Our Political Constitution also enshrines the right to defense in two articles of the National Constitution, Article No. 40 and Article No. 20. 20, however, although the process of reform to the criminal justice system that has been taking place in most Latin American countries arrived somewhat late in Panama, with the new Criminal Procedure Code, adopted by Law 63 of August 28, 2008, a new modern adversarial, oral and accusatory criminal system was established, which establishes, in its Article 10, the principles of the defense with an inalienable and inviolable character.

“Article 10. Right to defense. The defense of persons or their rights is inviolable and inalienable, unless the accused is a lawyer and decides to assume his defense. Every person has the right to appoint a suitable defender of his choice, from the first act of investigation until the culmination of the process, with whom he may maintain immediate communication in a free and private manner. If he does not do so, the State will assign him a public defender. The same procedure shall be followed in cases of abandonment, revocation, death, resignation or excuse of the defender “².

From the simple reading of this article we can establish that the principle of defense is structured in the following postulates:

1. The right to designate a suitable defense counsel of the accused or investigated person’s free choice.

1 International Covenant on Civil and Political Rights, General Assembly of the United Nations. 1966.

2 Law 63 of August 28, 2008, which adopts the Code of Criminal Procedure of the Republic of Panama.

2. The right to maintain private and free communication with the defense counsel.
3. The obligation of the State to provide defense services in the absence of a private defense attorney. To this end, by means of Agreement 239 of November 19, 1993, the General Business Chamber of the Supreme Court of Justice created the Public Defense Institute.

The Code of Criminal Procedure in Book I, Title III, Chapter IV regulates the exercise of the technical defense, emphasizing that it is inalienable and inviolable. Consequently, every person has the right to appoint a lawyer to represent him/her from the moment he/she is identified in any act of investigation or procedural act as a possible perpetrator or participant, with the same rights as the accused, even if this qualification is not used.

However, if the accused person declares that he/she is unable to appoint a defense counsel, he/she will be appointed by the Prosecutor of the case, the Judge or the competent Court, as the case may be, and the appointment will be made by the public defender. From this designation, the defender must adopt effective competences that allow the strengthening of the principles and guarantees that the Law establishes for the person under investigation.

3. Ethics of the defender

Professional ethics comprises the morals and obligations of man in the context of the exercise of his profession. The observance of professional ethics is of particular importance when it comes to lawyering, since the advocate lives daily with sensitive circumstances that revolve around conflicts. The lawyer must, therefore, be educated as to the lines he/she may cross and those he/she must maintain. Although the professional ethics of a lawyer begins with loyalty to his client, it extends to respect for his colleagues and the society in which he operates.

The regulations governing the practice of law in Panama are based on constitutional precepts as we have already mentioned. In this context, Law No. 9 of 1984, which Regulates the Practice of Law, was created. This norm decreed in its first articles the general guidelines for the practice of the profession: *“The profession in our country is reserved exclusively for Panamanians. In addition to this, whoever wishes to practice the profession must have a degree from a local university, or otherwise, validate his foreign degree with the University of Panama”*.

Law No. 9 also addresses the issue of misconduct on the part of the subjects it regulates, granting special powers to the National Bar Association for this matter through the creation of the Honor Tribunal. In its Article No. 21, the regulation establishes that *“the National Bar Association shall create a Court of Honor for the investigation of ethical misconduct by complaint of the*

interested party, or of the official of the Judicial Branch, of the Public Prosecutor's Office or of the Public Administration, who knows of the case in relation to which the misconduct was committed".

The Code of Ethics and Professional Responsibility of the Lawyer of 2011, in Article No. 37, typifies several faults in which a lawyer may incur. This is consistent with Article 105 of the Panamanian Code of Criminal Procedure, which punishes the inexcusable abandonment of the defense or the representation of conflicting interests among more than one assisted person, which shall constitute a serious offense and may be submitted to the corresponding disciplinary jurisdiction, without prejudice to criminal liability. Additionally, medical certificates of incapacity, issued to justify absences on the day of the hearing, shall be subject to subsequent verification.

4. The investigation phase and the evidentiary freedom of the technical defense counsel

As mentioned above, the accusatory criminal process has established that the burden of proof is on the Public Prosecutor's Office, supported by its auxiliary agencies. In contrast, it is essential to address the new role of the defense in carrying out the investigative procedures that generate evidence, since, in an adversarial procedure, it is presumed that the contestants are on equal legal and technical terms.

The criminal investigation is the technical instrument by which the person in charge of the investigation, the investigator, can discover the necessary and sufficient facts to be able to follow the crimes and their perpetrators effectively and in accordance with the law³. The acts of investigation are, then, all the diligences carried out during the investigation phase, by the assistants and experts, aimed at the verification of the punishable act and the identification of the possible perpetrators and participants.

Although this work is primarily the responsibility of the Public Prosecutor's Office, the defense, taking into account the freedom and equality to present evidence, may do the same. In an accusatory criminal proceeding, which is carried out between the parties, it is not acceptable for the defense to limit itself to waiting for the Public Prosecutor's Office or prosecutor to justify and prove its theory of the case without presenting strategic actions of investigation, negotiation, formulation of the theory of the case for rebuttal and proof if necessary. In essence, the defense attorney is a party who, according to the needs of each particular case, must decide what is most strategic and convenient for the interests of his defendant and prepare to act accordingly⁴.

3 Hidalgo M., Jose D. The investigation phase in the Mexican accusatory criminal process. Mexico. Ed. Porrúa. 2009, p.17.

4 Montes C., Ana and Jimenez M., Fernando. Oral Trial Techniques in the Colombian Criminal System. General manual for legal operators. Colombia. 2005, p.15.

As we know, the criminal investigation involves two stages. The preliminary stage, which includes from the criminal notice to the indictment, and the preparatory stage, which starts from the indictment to the expiration of the investigation period.

For the development of the acts of investigation during the aforementioned stage, the defense must build a methodological program of investigation, since what is sought is the discovery and collection of any element to be introduced as evidence, which facilitates the demonstration of its theory of the case, complying with the scientific, legal and constitutional procedures that govern the investigative activity.

Let's remember that the theory of the case constitutes the approach made by the lawyer to the court about the reality of the facts from his perspective of effective defense, that is to say, the facts of the case giving them an interest focused on how they happened and how he demonstrates the non criminal responsibility of his client and for this he must have a methodological program of investigation, with concrete, clear, measurable and possible objectives in order to obtain cognitive means to prove the innocence of the defendant, as well as the discovery of the truth.

The methodological program must contemplate:

- The factual aspect (facts, circumstances of manner, time and place).
- The legal aspect (possible crimes committed, applicable procedural norms).
- Elements of conviction (evidence).

Among the investigative roles that the defense attorney must assume in order to carry out the methodological program are the following:

- To travel to the scene of the crime and carry out an inspection to establish a preliminary hypothesis.
- Contrast the facts reported to determine whether or not they constitute a crime.
- Carry out activities aimed at demonstrating the roots of the persons, determining witnesses, as well as locating and identifying persons (census).
- Use private experts or field investigators to technically collect evidence omitted by the investigative agencies at the scene of the crime, evidence collected by third parties, and evidence that appears later.
- Conduct interviews with investigators and experts with scientific knowledge to serve as accreditation witnesses for the introduction of the elements of conviction collected.
- Verify compliance with the chain of custody procedure.
- Verify, with the assistance of private experts, compliance with the principles and

procedures of criminal investigation carried out by the experts of the Institute of Legal Medicine and Forensic Sciences.

The purpose of these acts is:

- Confirm or disprove the initial version of the judicial investigators and the theory of the case of the investigating entity.
- To confirm or disprove the version of witnesses in order to achieve their appreciation or discredit before the trial court.
- Confirm or disprove confusing versions of the investigated.
- Find new versions of the facts.
- To get advice in the formulation of a hypothesis susceptible of evaluation by means of the design of the methodological program.
- Consult information in public and private entities of national and local order that manage databases and files, useful to prove or disprove investigative hypotheses of the accusing entity.

Previously we also explained that the forensic technical service is limited to the Institute of Legal Medicine and Forensic Sciences (IMELF). In this sense, what can the defense do when it learns of the existence of evidence performed by the scientific body, which will not be adduced as evidence by the Public Prosecutor's Office because it does not favor its theory of the case? It is possible that the investigating entity does not offer some evidentiary diligences practiced in the investigation stage, because it does not benefit the theory of the case that it will try to sustain in trial. Nevertheless, by virtue of the principle of objectivity and transparency, such elements must be included in the investigation file, and it is up to the defense, during the investigation period, to carry out the respective scientific and technical analysis, in order to make sure that they will serve as an instrument to prove its theory of the case. In addition, for its introduction at trial, it must use the technique of disclosure of evidence in accordance with article 346 of the Code of Criminal Procedure.

MATERIALS AND METHODS

This study is a qualitative research with an exploratory scope, since it addresses a problem for which there are no previous studies in Panama. It is also descriptive because it identifies the competencies of the technical defender to guarantee a successful performance and describes the roles that he/she can assume during the investigation phase in the adversarial criminal justice system. Our population includes technical defenders before the entry into force of the new accusatory criminal system. In addition, in this study the independent variable is: *“the effectiveness of the*

criminal defense attorney's defense practice". The dependent variable is the competencies and scientific tools adopted in the research phase.

As a measurement instrument we applied, through virtual mechanisms, a survey to ten (10) practicing criminal lawyers. The instrument consists of a preliminary section in which we thank them for their time and a brief instruction describing the purpose of the survey. It consisted of a questionnaire made up of two (2) open-ended questions, namely:

- What, in your opinion, should be the competencies of the technical ombudsman to guarantee a successful performance in the exercise of his functions?
- What roles should the defense attorney play during the investigation phase of the accusatory criminal justice system to guarantee an effective defense?

The procedure used for the achievement of this research was developed in three (3) stages. The first consisted of the collection and analysis of information for the formulation of the problem, the objectives, the research hypothesis and the development of the theoretical framework, applying the analytical method. The second stage was the selection of the sample, data collection and qualitative information, applying the simple or descriptive statistical method, which is based on the analysis of data through simple or representative measures.

For data processing, we performed an interpretative analysis of the bibliographic sources consulted, as well as of the answers provided by the recipients of the survey. Finally, we used the deductive method to draw conclusions.

RESULTS

From the first question asked to the legal professionals, consisting of the competencies of the technical defender to guarantee a successful performance in the exercise of their functions, the jurists considered the following:

- Accept the changes and challenges imposed by the new adversarial criminal system.
- The defender must have an active attitude, adopt defensive strategies, using all the resources granted by the new regulations.
- Loyal, honest and realistic.
- Guarantor of the human rights of those he represents.

Regarding the second question, the attorneys considered that the roles that the defense attorney should play during the investigation phase in the adversarial criminal system in order to guarantee an effective defense are:

- Conduct field investigations.
- Reviewing the investigation file on a regular basis to verify the investigative acts carried out by the Public Prosecutor's Office.
- The Public Prosecutor's Office.
- Verify the results of the expert opinions provided by the Institute of Legal Medicine and Forensic Sciences.
- Consult with private experts on the results of the investigative acts carried out by the Public Prosecutor's Office.
- Conduct witness interviews.
- To carry out its own acts of investigation.
- Request the Public Prosecutor's Office to carry out acts of investigation oriented to the theory of the defendant's case.

CONCLUSION

The development of investigative competencies by the defense attorney in the new criminal process is of great importance to strengthen the principles and guarantees that the adversarial model confers on the person under investigation.

The adoption of scientific and dynamic skills are necessary to technically analyze the acts of criminal investigation ordered by the accusing entity, who leads the investigation, facilitates the technical understanding of the acts deployed by it, aimed at demonstrating the criminal responsibility of the person being defended and allows the defense to request, with the scientific basis, the practice of evidence for the benefit of the interests it represents, as well as the freedom to obtain means of evidence of a particular nature to be presented at trial, provided they meet the legal requirements for admissibility.

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