Studia Prawnicze. Rozprawy i Materiały 2022, nr 1 (30) • Studies in Law: Research Papers 2022, No. 1 (30)
ISSN 1689-8052 • e-ISSN 2451-0807

DOI: 10.48269/2451-0807-sp-2022-1-011

Rosemary Souto Maior de Almeida
MA, University of Minho, Portugal
rosemarysoutomaior@gmail.com

Müller Aureliano da Silva
MA, UniAmérica University Center/Brasil
https://orcid.org/0000-0002-8298-7405
mileraureliano14@hotmail.com

The mandatory presence of the Public Prosecutor's Office at the hearing of the criminal investigation in face of the new law of the anticrime package and the need for revision of brazilian jurisprudence – prohibition of ex officio production of evidence by the magistrate

Introduction

This paper is based on techniques for improving the provision of jurisdiction in the Brazilian criminal justice system. It is inserted in the scenario of the legislator's express affirmation of the accusatorial system of criminal procedure, in detriment of the inquisitorial system, both defined by ample doctrine.

In view of the proposed theme, the study is limited to investigating possible implications on the actions of the members of the Public Prosecutor's Office, an organ exclusively legitimized to promote public criminal action, as a result of the ratification of its exclusivity in evidential action and the prohibition of the magistrates to interfere in the functions that would be proper of the dominus litis, by force of constitutional imposition.

The work starts from a doctrinal discussion that is based on the theoretical concepts consolidated in Criminal Sciences with respect to the possibility and the limitation of evidential activity on the part of the judges. In this sense, it seeks to establish a dialogue between the basic doctrinal works on the main institutes that form the basis of the Democratic Criminal Process and the new reality of criminal prosecution in Brazilian forensic life.

In this sense, we intend to verify whether the physical or virtual presence of the representative of the Public Prosecutor's Office at the time of the evidentiary hearing would make it impossible to hold the hearing or whether, as has been widely accepted in jurisprudence, the judge would be allowed to supplement the examination as a way of compensating for the absence of the holder of the criminal action.

To this end, the deductive method was used, starting with the investigation of general and principled concepts of the General Theory of Law and of Criminal Sciences in order to, based on the premises discovered, glimpse the Law applicable to the specific question. In this sense, the study begins with a review of the dialogue of sources of Law.

It glimpses whether, due to the fact that there is ample consolidated jurisprudence in the sense of denying nullities in the absence of the Prosecutor in the investigation, the application of the new legislative understanding, from which the mandatory presence of the prosecutor is inferred, would be hindered. Next, the fundamental bases of criminal procedure are studied, especially the historical systems of prosecution and the concepts that outline the production of evidence in the Brazilian legal system, with a view to glimpsing possible errors and epistemic inconsistencies in the performance of evidence by magistrates.

With the entry into effect of Law 13.964/19, several significant changes have been made in several branches of Brazilian law, notably Criminal Law, Criminal Procedure and Execution. In this regard, there was an addition to article 3A of the Code of Criminal Procedure, prohibiting the judge from producing evidence on his own initiative, confirming once again that Brazil has adopted the accusatorial system in criminal proceedings, by stating that

> Art. 3-A. The criminal procedure will have an accusatorial structure, being forbidden the judge's initiative in the investigation phase and the substitution of the accusation body's evidential performance.[1]

In this scenario, it is noteworthy the filling of the gap that previously existed corroborating the accusatorial system in Brazilian criminal procedure. If before, only the Federal Constitution, by attributing to the Public Prosecutor's Office the exclusive right to bring a public criminal action, outlined the contours of a criminal procedure with emphasis on the dominus litis activity, now we have the unequivocal expression of the adoption of the accusatorial system.

---

[1] Brasil. Code of Criminal Procedure, Decree Law No. 3.689, October 3, 1941,http://www.planalto.gov.br/CCIVIL/Decreto-Lei/Del3689.htm [accessed: 13 July 2022].

The accusatorial system and the allocation of the production of evidence

The debate on the historical systems of criminal prosecution finds its main defining trait in the ownership of the management of evidence. If, on the one hand, the management of evidence finds its scope in the convincing of an impartial third party, to whom falls the role of saying the Law before the concrete case, on the other hand, the production of elements does not have the role of convincing others, assuming the function of confirming premises.

In this sense, the so-called accusatory system is defined by the strict separation of the roles attributed to the judge and to the party that is responsible for promoting the accusation. According to this system, the judge is relegated to a passive posture, similar to that of a spectator who, only at the end and after observing all sides of the case, would issue a decision according to the information he has gathered. Therefore, the role of the "judge-justice" is prevented, who, despite the existence of a legitimate accuser, interferes in the production of evidence, ordering official measures, questioning witnesses and parties etc.

It is the strict separation of functions between accuser and magistrate that, in the words of Aury Lopes Júnior (2019),[2] "creates the conditions of possibility for impartiality to be effective. Only in the accusatory-democratic process, in which the judge is kept away from the sphere of activity of the parties, can we have the figure of the impartial judge, founding of the procedural structure itself."

The inquisitive procedural system, in turn, has for word of its essence the agglutination of the functions of judge and accuser in a single individual. The magistrate is given the task of inquiring into the information, data and testimonies and, after that, deciding on the evidence produced by him. According to Moreira and Camargo (2014):

> When the judge has around his figure the functions of investigating, accusing and judging, one will be, necessarily, facing the Inquisitive System. In these cases, there is no free conviction in sentencing, because the judge who has carried out the investigation and formulated the accusation already has an intimate conviction, and, by acting in this way, is very likely to convict the accused. The separation of functions arises not only by the Public Prosecutor's Office, whether it is in charge of the accusation or acting as custus legis (the State is not interested in conviction in all cases), but also by the judicial police, which takes care of investigations and compliance with procedures, and by the defense, which safeguards the interests of the defendant, all of them formed from the idea of the accusatorial system.[3]

---

2 A. Lopes JR, *Fundamentos do processo penal: introdução crítica*, 5ª ed., São Paulo: Saraiva Educação, 2019.

3 E. Ribeiro Moreira, M. Lacombe Camargo, "Sistemas Processuais Penais à Luz da Constituição", *Revista de Direito Constitucional e Internacional*, 2016, n.º 97, https://dspace.almg.gov.br/retrieve/110806/Eduardo%20Ribeiro%20Moreira.pdf [accessed: 21 June 2021]

It can be said that the main differentiating feature of the accusatorial system for the inquisitorial system is in the production of evidence where, called the inquisitorial system, the functions of the magistrate and the prosecutor were agglutinated and the same individual who sought proof, investigated and collected evidence was the one who assessed them in order to, in the end, make a decision on the material he collected.

In the accusatorial model, the process acquires the true face of an actum trium personarum in which two parties fight among themselves in order to convince a third party of the veracity of its hypothesis. This third person, equidistant in relation to the others, is the magistrate, here no longer seen as the protagonist, but as the one who – only at the end – will come to give the sentence. The change acquires better contours as we observe the entire content of the new article 3-A of the Code of Criminal Procedure.

According to the provision, the judge's initiative in the investigation phase and the substitution of the prosecution body's evidential role are prohibited. Regarding the second prohibition, the substitution of the prosecution body's evidential role, the language used by the legislator seems confusing. However, what is intended to be said is that the Public Prosecutor's Office, constitutionally legitimized as the prosecuting body, is consecrated to the evidential activity. To this body, as the prosecutor of criminal prosecution, is given the entire evidential burden, the entire onus of proof. In this scenario, a problem arises with the main means of proof in Brazilian Criminal Procedure: the evidentiary hearing.

As it is known, the Public Prosecutor's Office is an essential body for the effective provision of justice, acting in a double manner, that is, it acts not only as Prosecuting Organ in Public Criminal Actions, but also as an organ that oversees the legal order in any action it takes, including public ones. Thus, considering the enactment of the Law that establishes the Anticrime Package, it is understood that the Brazilian Courts can no longer maintain the understanding that the presence of the Representative of the Public Prosecutor's Office at the hearings of criminal instructions is dispensable in view of the prohibitive legal command of ex officio action, by the Magistrate, in the production of evidence in Criminal Procedure as well, under penalty of undermining the accusatorial system. Such legislative reform has only corroborated the compliance, once more, of the accusatorial system in Brazilian Criminal Procedure, bringing more concrete prohibitive elements, i.e., prohibiting, with the enactment of infra-constitutional rule, the actuation of office by the Judges in Criminal Procedure. Thus, this article seeks a systematic and deductive study of the institutes that govern the Brazilian Criminal Procedure, as

well as the need, in view of the promulgation of a new infra-constitutional rule, to review before the Brazilian Courts as to the understanding of the need of participation of the members of the Public Prosecution Service in the instruction hearings, in view of the express prohibition of the evidentiary role of the Magistrate and, also, as a way to avoid a vague Criminal Procedure full of nullities.

Formal sources of law

The Brazilian courts have a unanimous opinion that the participation of the Public Prosecutor's Office is not compulsory in criminal investigation hearings, on the grounds that the principles of procedural speed and the guarantee of a reasonable length of proceedings should prevail, as can be seen in the position taken by the Superior Court of Justice in Recurso em Mandado de Segurança no. 65205,[4] among many other judgments handed down by the Court.

As the Law is the primary source of Law, the Courts should remold their understandings to apply the text provided by Law, adjusting the already settled jurisprudence with regard to the non-mandatory presence of the Public Prosecutor in the hearings of criminal investigation.

The illustrious professor Luiz Flavio Gomes[5] brings a short study on the sources of law, deducing that the immediate formal sources (of cognition or exteriorization of the law) are the Constitution and the Laws, among others, and, in turn, the mediate formal sources, which are those of a supplementary nature, and should only be applied in the case of non-existence of a specific rule on the matter. Thus, doctrine, jurisprudence, customs, among others, can be included.

Thus, the Law is a unique, exclusive and immediate formal source when it comes to incriminating Penal Law, leaving no margin of doubt that case law understandings, as well as customs or various other mediate sources of law, can only be used when there is an express omission in the legal system, all this bringing the essence of the Incriminating Law, which brings expansion and creation of jus puniendi.

As there are no longer any gaps in the law regarding the need for the participation of Public Prosecutor's Office members in the hearings of criminal instructions, since the new law in force (Law no. 13.964/19) has inserted art. 3-A in the Brazilian Code of Criminal Procedure to prohibit the judge

---

4 STJ – RMS: 65205 AL 2020/0320851-9, Relator: Ministro Reynaldo Soares Da Fonseca, 2.02.2021.

5 G. Luiz Flávio, "Fontes do Direito Penal", Migalhas de Peso, 10.09.2007, https://www.migalhas.com.br/depeso/44990/fontes-do-direito-penal--necessaria-revisao-desse-assunto--parte-1 [accessed: 21 June 2021].

from producing evidence on his own initiative in the scope of criminal proceedings, there is a need – I repeat – for a reorientation of the understanding, both on the part of jurisprudence and on the part of scholars, as to the need for the immediate application of the effects of the aforementioned rule, in order to seek its effectiveness in the context of criminal proceedings, under penalty of violating the legislation, the accusatorial system, as well as the very primacy of the immediate formal sources of law, an institution so studied in several countries with classical and modern scholars.

Final considerations

It is clear, therefore, that in order to improve the quality of the judicial process and for the sake of a democratic criminal procedure, it is imperative to reaffirm the accusatorial structure of criminal prosecution, as established in the Federal Constitution.

In this sense, with the new wording of Article 3-A of the Code of Criminal Procedure, the differentiating feature of the accusatorial system for the inquisitorial system, i.e., the initiative to produce evidence, was very well outlined in the instrumental legislation, resolving any doubts about which system of prosecution adopted in the country.

However, it was seen that the innovation in the infra-constitutional legislation goes against the well-established jurisprudence of Brazilian courts. It is customary to find that the absence of the holder of the public action in the hearings of instruction and trial is considered by the courts at most as a mere irregularity, not generating nullities or irreparable flaws in the procedure.

In this way, the paper reaches the conclusion that gives it subject matter: the courts' jurisprudence must be reviewed in order to adapt it to the new reality. Since, in fact, the law in the strict sense is the primary source of law, it should prevail to the detriment of even the most consolidated jurisprudence.

In Brazil, an eventual reformulation of the understanding by the Courts can only be seen when appeals are filed to change the understanding, a matter that may take some time due to the bureaucratization that criminal proceedings sometimes require, as well as the current adaptation that the Courts are experiencing due to the COVID-19 Pandemic.

Only in this way, notably with the reformulation of the jurisprudential and doctrinal understanding, will it be possible to speak of truly impartial judges, a fair trial, and a process as actum trium personarum, in which the Prosecutor-State exercises the right of action, the citizen defends himself against the accusations, and the Judge-State, distant from both, says the Law at the end.

Bibliography

Badaró G.H. Righi Ivahy, *Processo penal*, 4th ed., São Paulo: RT, 2016.

Brazil. Code of Criminal Procedure, Decree Law No. 3.689, October 3, 1941, http://www.planalto.gov.br/CCIVIL/Decreto-Lei/Del3689.htm [accessed: 13 July 2022].

Gomes Filho A. Magalhães, "Evidence", [in:] M.T. Rocha de Assis Moura (coord.), *Reforms in criminal procedure: the new Laws of 2008 and reform projects*, São Paulo: RT, 2008, pp. 246–297.

Lopes JR, A., *Fundamentos do processo penal: introdução crítica*, 5th ed., São Paulo: Saraiva Educação, 2019.

Luiz Flávio G., "Sources of criminal law", Migalhas de Peso, 10.09.2007, https://www.migalhas.com.br/depeso/44990/fontes-do-direito-penal--necessaria-revisao-desse-assunto--parte-1 [accessed: 21 June 2021].

Moreira E. Ribeiro, Camargo M. Lacombe, "Sistemas Processuais Penais à Luz da Constituição", *Revista de Direito Constitucional e Internacional*, 2016, n.º 97, https://dspace.almg.gov.br/retrieve/110806/Eduardo%20Ribeiro%20Moreira.pdf [accessed: 21 June 2021].

STJ – RMS: 65205 AL 2020/0320851-9, Rapporteur: Minister Reynaldo Soares Da Fonseca, 2.02.2021.

Zilli M., "The admissibility of the accusation and the Ariadne's thread", *Boletim do Instituto Brasileiro de Ciências Criminais*, 2015, n.º 267, pp. 4–6.

Abstract

The mandatory presence of the Public Prosecutor's Office at the hearing of the criminal investigation in face of the new law of the anticrime package and the need for revision of brazilian jurisprudence – prohibition of ex officio production of evidence by the magistrate

Brazil has been going through a great change in its Legislative scenario, bringing several incorporations in the fields of law where the validity of Law n. Law no. 13,964/19 brought changes to the Penal Code, Code of Criminal Procedure and Criminal Execution Law. The Brazilian Criminal Procedure is governed by the Accusatory System and, through this article, we sought to better analyze an application of the aforementioned Law as a way to ratify the system adopted in the Brazilian criminal procedure, the accusatory, as well as to bring the view of the need for readjustment, by the Brazilian courts, with regard to the production of evidence by the Magistrate without the participation of the representative of the Public Ministry in the criminal instruction hearings, thus corroborating the understanding that the participation of the Members of the Public Ministry in the hearings is essential. This systematic study sought a brief improvement in the systems that govern criminal proceedings, as well as focusing on the application of the sources of Law within criminal proceedings, with the Law being the immediate

source and, as such, it should take precedence over the sources secondary, such as jurisprudence, for example, make it clear that the Public Prosecutor's Office is an essential body to the provision of jurisdiction, acting in a plicit manner, that is, acting not only as an Accuser in Criminal Actions, but also as an inspector of the body of law in any action that intervenes, including public.

Key words: criminal procedure, accusatory system, evidence production