

The Model of the Spanish Public Prosecutors Service: Evolution from the Dictatorship to Present Day

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I. THE LONG NIGHT OF THE DICTATORSHIP. 40 YEARS UNDER FASCIST RULE.

a) The abolition of the democratic institutions of the Second Republic.

The Spanish Civil War (1938-1939) led to the establishment of a totalitarian regime in our country. This regime was one of fascist character that responded, without fail, in keeping with its own totalitarian political nature, establishing itself on the extermination of its political adversaries and on the destruction of the democratic institutions of the Spanish Second Republic. The Regime abolished by law all political rights as well as many of the individuals that constituted the essence of the State of Democratic right (Rule of Law) This is not the place to expand upon considerations about the nature of Franco's Dictatorship; however, it is an appropriate forum to speak without prejudice about the recovery movement or the "Historic Memory" that is alive in our country today, and has only been possible for about 30 years after the approval of the 1978 Constitution, which brought forth the continuation of our democratic tradition. These preliminary considerations are effected by the pain that comes from contemplating how in my country thousands of democratic citizens were repressed for defending democratic legality and their corpses still rest in anonymous graves in the gutters of our highways and in hidden places in the mountains; as well as the large part of the Spanish intellectuals who began the walk to exile, leaving behind open wounds with consequences that are still evident today.

The Dictatorship (1939-1975) was erected on the ashes of the democratic institutions and on its own extermination of a part of the population. In regards to the Public Prosecutors Service, the Dictatorship destroyed an absolutely novel model that took its influence from the most prestigious constitutions of the times: the German Constitution of the Weimar Republic, the Mexican Constitution, and the Austrian Constitution. Much later, this Public Prosecutors Service would have notable influence on the design of the Italian Constitution of 1947. In concrete Art. 104 of the 1931 Spanish Constitution signaled that the objective of the Public Prosecutors Service would be to look after the strict fulfillment of the laws and the social interest, constituting one body with the same guarantees as the Judiciary.

b) The union of power and the division of duties.

The dictatorial State established its design on the principle of the "union of power and division of duties," in which the Judiciary, as one of its duties, was relegated to be a manifestation of unequivocal power. However, there is not exactly an established Judiciary, nor a separation of powers, or possibilities for the control of an omnipresent Executive Power in all of the public and private facets of the citizens' lives, many

of whom were judged for the crime of rebellion for having opposed precisely those rebellious sectors of the Army and Spanish society that looked for and succeeded in subverting the constitutional order.

c) The Public Prosecutors Service as the strong arm of the Executive Power.

The previous discussion, is made evident through another document presented in the encounter between the Spanish Judge and the present president of Medel, Miguel Carmona, when during the creation of the “Judicial School” in 1944 the Minister of Justice referred to the proposition of, “creating a militia (army) of the right that identified with the principles of the National Movement” (the only party). Other examples are the creation of Special Courts such as the “Court of Public Order” that during the 60’s sent thousands of people in opposition to the political regime to prison, especially the union members, as well as the creation of Military Courts’ that had ample capacity to act. In 1975 the Dictatorship executed its last death sentences despite universal clamor. The perversion of the judicial system and the threat of the death sentence persisted until the death of Franco.

d) Ruling of 1926, LOE 1967, Ruling of 1967.

The Regime recuperated the conception of the Public Prosecutors Service that was found in the Statute of the Public Prosecutors Service as an organ that represented the Government before the Judiciary, maintaining this conception through the Law of July 15, 1954, and later through the “Organic Law of the State of January 1, 1967,” which tried to reinforce the constitutional architecture of the regime, defending it as an, “*organ of communication between the Government and the Justice Courts...with the mission of promoting the action of justice in defense of the public interests named by law...and procuring before these the satisfaction of social interest*”. Just by reading this definition, one can verify that it is a purely rhetorical declaration empty of content in the context of a dictatorial State where the idea of justice and that of social interest are defined exclusively through the Fundamental Principles of the Regime and the only existing party.

II. THE AGONY OF THE DICTATORSHIP, THE FIRST 70 YEARS, THE FIGHT FOR LIBERTY, “DEMOCRATIC JUSTICE,” an association of delinquents.

a) The opposition to Franco’s Regime.

From the end of the 60’s, the degradation of the Regime was evident, if nothing else but for the mere biological fact of the age of the dictator. In Spain a response movement began at all possible levels: university students, clandestine workers’ unions that tried to take advantage of the legal gaps of the regime or to infiltrate its structures, and intellectuals risking their position. The Regime tried to contain this democratic

response through force: police brutality, the academic marginalization of the intellectuals, the application of isolation techniques or interior exile, etc... In the Justice arena, these years produced the first clandestine and democratic movements that attempted to group all of the professionals (Judges, Public Prosecutors, Judicial Secretaries) implicated in the fight for fundamental rights.

b) The associated movement of Democratic Justice.

The movement mentioned is articulated through the platform of "Democratic Justice," whose fight was a deciding factor in the consolidation of the democratic conception of Judiciary profoundly compromised with the idea of the Justice Administration as an institution that protects fundamental rights and public liberties, and also has a strong service vocation for social interests. It addressed, in short, the collaboration with the essential idea of democracy that the people would once again be the possessors of their own sovereignty, as well as in the judicial arena. The influence of Democratic Justice, its values, and its roll as an historic instrument of change would endure until today: as much in the Association "Judges for Democracy" as in my association "Progressive Prosecutors Union," still today, more than 30 years later, they openly reclaim that they are the heirs of that experience, in which some of the most important people in the Judicial and Public Prosecution career were involved, with serious compromises to their own individual interests. In spite of the reprisals, it was a successful movement, that broke the compact marble image of the Dictatorship the was seen as obligated to attend to the spectacle of contemplating how many of the Judicial Authorities that should have served in supporting the regime, in reality worked for a democratic way out.

c) Delinquents in the apparatus of the Dictatorship.

In this manner, we are still moved each time that we hear some of our co-workers who were protagonists of this movement say that in reality they were "an association of delinquents," an illegal association of qualified delinquents that had the character of Judicial Authority. Moreover, some of those co-workers, Judges and Public Prosecutors, decided to participate in leftist democratic parties. This is not the appropriate place to speak about the many types of maneuvers attempted by the Regime in order to put an end to the situation, but they are easily imaginable: expedient discipline, compulsory transfers, monitoring by the regime's political police. But the popular response movement extended through all of the areas of public life, including a small sector of the Army. The triumph of the "Carnation Revolution" in neighboring Portugal in 1976 offered encouragement to the fight for independent Judiciary, and for the re-establishment of a democratic state comparable to the rest of the countries in Western Europe.

d) The democratic transition.

The previous antecedents set the bases for the subsequent debate about the model of the Spanish Public Prosecutors Service, in coherence with the simultaneous debate about the model of Judiciary in the strict sense. Through the passage of the “1977 Law for Political Reform,” Spain celebrated the first general democratic election in 40 years, in which the Constituent Parliament that would write the new constitution was elected. In this point, like so many others, they would arrive at a solution through consensus or compromise, that as it usually happens in these cases, permitted a very positive interpretation of the potential of this model. In this context some notes should be made about the Spanish political transition, the transition generally exalted as well as responded through the model of “consensus” in which many political forces had to secede in essential points of their programmatic discourse. The Spanish Transition obeyed a model of “reform” and not one of a democratic rupture or break. This explains the necessity to secure a line of continuity between the legality of the dictatorship and the new democratic legality. This would have a primary influence in the status of the subjects referred to as protagonists of the democratic change: there was no purification whatsoever of the structures that had served the Dictatorship loyally: the same judges and public prosecutors that contributed to the maintenance of the dictatorship were considered suitable, with nothing more than being subjects of the legal democracy. In the repressive arena of Forces, Security Bodies of the State, and the Army it would also take a long time to democratically subvert this inheritance imposed by the necessity of consensus.

III. THE 1978 SPANISH CONSTITUTION AND ITS DEVELOPMENT.

a) **Art. 124 CE** ¹.

- 1) *“The Public Prosecution Service (without prejudice of the functions amended in other organs) has its mission to promote the action of justice to defend legality, citizen’s rights and the legally protected public interest, acting ex officio or at request of the interested parties, likewise to ensure the independence of the Courts and to strive in Court for the satisfaction of the interest of society.*
- 2) *The Public Prosecutors Service will execute its duties through its own organs conforming with the principles of unity of action and hierarchal dependency and with subjection, in all cases to legality and impartiality.*
- 3) *The Law will regulate the Organic Statute of the Public Prosecutors Service.*
- 4) *The Attorney General of Spain shall be named by the King on a proposal from the Government, after first having heard the General Council of Judiciary.*

This constitutional definition is the fruit of the parliamentary debate, in which the initial rough draft of the definition of the Public Prosecutors Service as an organ in relation to the Government with the

¹ The official translation of the Spanish Ministry of Justice is always offered when it is possible.

Administration of Justice was suppressed. The parliamentary debate calls attention to the fact that a correspondence between the ideological position of the distinct political parties does not exist, as well as that of the different legal nature attributable to the Public Prosecutors Service, and the inexistence of a coherent line in the positions of each one of the parties. They rejected the amendments of the leftist groups that attempted to expressly proclaim the guarantees of immobility of the Public Prosecutors, the statutory identity in respect to the people who make up the Judiciary, and the independence of the Executive Power. Later, during the processing of the 1981 Bill of the "*Organic Statute of the Public Prosecution Service*" some political groups, such as the Communist Party tried to authorize the Public Prosecutors Service as a Magistrate (Judge), independent of the rest of the powers of the State, and integrated into the Judiciary.

b) The judicial nature of the Spanish Public Prosecutors Service interpreted through the light of three possible thesis: lack of coordination within the Executive Power, as part of the Judiciary, parliamentary Public Prosecutor.

The legal nature of the Public Prosecutors Service in Spain can be interpreted through all of the thesis that are historically maintained in the roll of the Public Prosecutor in the traditional scheme of the separation of powers of the Democratic State:

- 1) *Lack of coordination within the Executive Power* this is attributed to the direction of criminal politics, proceeding the Government in the discretionary appointment of the majority of relevant positions in the Public Prosecutors Service, beginning with the State Attorney General himself, and the possibility to articulate channels so that the Executive can coax the Public Prosecutors Service to act.
- 2) *Lack of coordination in the Judiciary*. Here, the 1981 Organic Statute affirms in Art. 2 that, "*The Public Prosecution Service, an integral part of the Judiciary albeit the wielder of functional autonomy...*". This defends the conception of the Public Prosecutors Service, as Judgeship of Protection and as Judgeship Petitioner or applicant, with comparable guarantees to those of judges.
- 3) *The Public Prosecutors Service as a Parliamentary Organ*. This thesis can be considered as minor, due to the inconsistency between the normative and legal constitution, although it has been defended by the Progressive Prosecutors Union and in part appears to inspire the reform that is being processed, under this formula it establishes parliamentary mechanisms of action that dilute the shadow of possible influence of Executive Power in the Public Prosecutors Service.

Despite such disparity of criteria, we can affirm in any case that the Spanish Public Prosecutors Service is an organ of the State, of constitutional rank, and with a singular legal-political position, not being strictly dependent on the powers of the State or disconnected from them. Of course, it is not a fourth power of the State, one can not speak

of the powers of the State that aren't already directly or indirectly popularly legitimated. This is the nature of the "hinge organ" situated in a permanent and inevitable form in the center of the political, partisan, and press worthy constitutional debate.

c) The 30.12.1981 Organic Statute of the Public Prosecution Service generic valuation: functional autonomy, relations with the Executive through Art. 8; appointment of the State Attorney General, unification of the functional state and sanctioning state, with Judges and Magistrates, Public Prosecutors' Council, clauses of conscience.

In the previously indicated context the product was the approval and entrance in vigor of the "Organic Statute of the Public Prosecution Service" through the Law of 31.12.1981. The Statute was well received to the point at which some later reforms were criticized for not respecting the initial spirit of the law. Because there is no other way, the Organic Statute, that developed from Art. 124 of the Spanish Constitution, maintains a deliberately ambiguous formula, but offers important advances that we should explain in a more detailed manner:

- a) It affirms that the Public Prosecutors Service is integrated into the Judiciary with functional autonomy. (art. 2).
- b) It established the possibility that the Government may want the State Attorney General to promote actions pertinent to the order and defense of public interest, by conduit of the Ministry of Justice or directly by the President of the Government, but subject to the request of the opinion that proceeds or does not proceed from the State Attorney, privy to an audience of the Board of Supreme Court Division Prosecutors.
- c) It authorizes a timid capacity of pre-trial autonomous investigation that should cease as soon as a judicial investigation about the same theme exists.
- d) It defines the principles of action of the Public Prosecutors Service: legality, impartiality (understood as objectivity and independence), unity of action, and hierarchal dependence.
- e) It constitutes the Public Prosecutors' Council, as an organ of representation in conjunction with the career, with duties not linked to the advising of the State Attorney General and with the duties as an organ of audience in regards to appointments. There are 12 members, nine of them are elected by all of the prosecutors in a democratic form and three are not elected: the Lieutenant Prosecutor at the Supreme Court, the Chief Inspecting Prosecutor, and the Attorney General of Spain.
- f) It establishes safeguard mechanisms for the individual action of public prosecutors in front of the orders of superiors that they consider unsuitable. Equally it assures that the public prosecutors "are free to word addresses how ever the Prosecutor feels most conducive for the sake of justice."
- g) It reproduces the appointment system of the State Attorney that is established in the Constitution.
- h) It establishes the unification in rank, salary, and honors with judges and magistrates that are members of the Judiciary.

- i) It authorizes “the right of professional association with legal personality and full capacity to pursue their purposes.”
- j) It designs a disciplinary regimen of faults and sanctions homogeneous in general terms to that established for the members of the Judiciary.
- k) The Organic Act On Judiciary shall be applied on a supplementary basis in many aspects of the regulation of the Public Prosecutors Service.

IV. THE LAST REFORMS:

a) Law 15/2003 May 24, a lost opportunity. A step back.

Some partial reforms attempted to approximate the structure of the Public Prosecutors Service to the successes of the new forms of delinquency, creating the “Special Public Prosecution Office for the Prevention and Repression of Illegal Drug Trafficking” in 1988 and the “Special Public Prosecution Office for the Repression of Economic Crimes related with Corruption” in 1995. Nevertheless, the most important reform was made with the Law of May 26, 2003, the object of a heated parliamentary discussion, and one of intense censorship and criticism by the Union of Progressive Public Prosecutors based in the following points ²:

- a) It reinforces the incidence of the Executive Power in the structure and function of the Public Prosecutors Service in tension with the constitutional provisions.
- b) It lost the possibility to postpone the mandate of the Attorney General, reinforcing the power of the Attorney General with a correlative limitation of the autonomy of the rest of the members of the Public Prosecutors Service.
- c) It reinforces the principle of hierarchy.
- d) It did not modify the regulation of the Public Prosecutors’ Council.
- e) It did not establish mechanisms to regulate the relations between the Chief Prosecutors at the High Courts of Justice and the executive powers and legislative powers of the Autonomous Communities.
- f) Above all, it limited to unbearable extremes and reduced the autonomous investigation capacity of the Public Prosecutors Service, submitting a due date of 6 months with the possibility of authorized extension by the Attorney General, and obligating the Public Prosecutor to notify the suspect of the existence of the investigation, having to receive the declaration with a lawyer so that the can have knowledge of the practiced proceedings. In other words, it negates the Public Prosecutors Service from what the Police can do itself.

b) Bill of 2007: from disillusion to hope.

In 2004, the Government of the Socialist Party won the general elections, and placed the State Attorney General in charge of a rough draft of the bill to modify the Organic Statute centered in the same essential points. The rough draft was written by a commission of public

² Progressive Prosecutors Union (UPF). XVII Annual Meeting, 2003

prosecutors elected by the State Attorney General, who represented within themselves all of the existing sensitivities in the Public Prosecutors Service, although there was no formal intervention of the Association of Public Prosecutors. The rough draft of the Commission was relatively well received and moved to the Ministry of Justice in order to draw up the corresponding bill for this aforementioned Ministry.

Nevertheless, as we had the occasion to expound upon this in the past Meeting of MEDEL celebrated in Alvor (Portugal) this past February, the Bill written by the Ministry introduced changes and substantial cuts, having announced themselves to be against the same two associations of the majority of public prosecutors, and having been received with many objections by the Public Prosecutors' Council. The Bill appeared to abandon the idea of expanding the functional autonomy of the Public Prosecutors Service and its investigatory capacity, thus it endowed a status of greater independence to the State Attorney General, without introducing obvious improvements in the internal and territorial organization that respond to, on many occasions, the successes planted by the Progressive Prosecutors Union, who formally manifest their disappointment and disagreement with the intentions of a progressive Government ³.

Nevertheless, the aforementioned politics at times take routes that are difficult to explain: the February 2007 appointment as the Justice Minister a public prosecutor from the Supreme Court, member of the Progressive Prosecutors Union (UPF), led to the possibility to introduce important changes in the Bill that was already being processed in parliament. In this way, the text approved by the Congress of Representatives on May 9 had introduced improvements such as the amplification of the due date for autonomous investigation by the Public Prosecutors Service up until 12 months, the recognition of the legal personality of the Public Prosecutors Service, its character as a relevant constitutional organ, the fixation of a due date of 4 non-renewable years for the position of State Attorney General, autonomy in the budgetary management, and others. The parliamentary processing has not yet concluded, the Bill should be approved by the Senate, but in the first valuation we can affirm that hope has returned to the Organic Statute in respect to the state of the opinion of the public prosecutors and that it permits the same older and better conditions of functional autonomy in the fulfillment of its duties.

c) Perspectives about the future: The Public Prosecutor as director of criminal investigation.

In order to close this packed synthesis, we should make evident that the actual state of the regulation of the Public Prosecutors Service in Spain

³ INFORME DE LA UPF (PROGRESSIVE PROSECUTORS UNION) SOBRE EL PROYECTO DE LEY. Permanent Secretariat, Octubre de 2006.

can qualify itself as provisional, given the governmental promise to modify the penal process in Spain as well as giving the direction of criminal investigation to the Public Prosecutors Service. It is clear that the Organic Statute that will be approved in the legislature will need to be modified substantially in this new reality, that has never before been experienced in our country, which still has a Judge of Instruction that eliminates the roll of the Spanish Public Prosecutors Service from the institution that it has in the majority of European countries. Nevertheless, the rough drafts of the bill gave concrete form to the new regulation of the Public Prosecutors Service and the advanced state of the legislature that ends in March of 2008, a date in which they should celebrate new general elections, everything that can be affirmed about this matter is mere speculation...of whose results we will give account, in this case, in successive meetings.

MEDEL. Meeting in Belgrade (Serbia)
May 31, and June 1 and 2 of 2007.

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