Reasonable Congruence between Charges Pressed and those Proved at Trial in Criminal Procedure Matters in Colombia According to the Adversarial System Characteristics[1]

Principio de congruencia entre los cargos formulados y los probados en juicio en materia procesal penal en materia procesal penal en Colombia frente a las características del sistema acusatorio

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Artículo

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Abstract

The congruence principle in criminal proceedings is the factual and legal correlation between the conviction and the charge. In terms of the current Colombian Code of Criminal Procedure, this correlation must occur between the counts contained in the indictment and those in the conviction and between the crimes for which a sentence is requested and those in the conviction. The problem identified in the analysis of the congruence principle in the Colombian criminal procedure lies in the possible lack of adequacy between the legislation establishing this principle and the characteristics of the adopted adversarial criminal procedural system. Through basic legal research, the characteristics of the Colombian adversarial criminal procedural system and the Supreme Court of Justice are discussed and compared with countries such as Argentina, Chile, Mexico, Puerto Rico, the United States, Germany, and Spain, identifying that the Spanish system applies to Colombia.

Keywords: criminal law, criminal procedure, trial, indictment, sentence.

Resumen

El principio de congruencia en el proceso penal es la correlación fáctica y jurídica entre la sentencia y la acusación. En términos del actual Código de Procedimiento Penal colombiano, esta correlación debe darse entre los hechos contenidos en la acusación y los hechos de la sentencia, y entre los delitos por los cuales se solicita la condena y los contenidos en la sentencia. El problema identificado en el análisis del principio de congruencia en el proceso penal colombiano radica en la posible falta de adecuación entre la legislación que establece este principio y las características del sistema procesal penal acusatorio adoptado en el país-. Es por esto que, a través de una investigación básica jurídica, se analizan las características del sistema procesal penal acusatorio colombiano y de la Corte Suprema de Justicia, comparado con países como Argentina, Chile, México, Puerto Rico, Estados Unidos, Alemania y España, y se identifica que el sistema español es óptimo para su aplicación en Colombia.

Palabras clave: derecho penal, procedimiento penal, juicio, acusación, sanción penal.

Introduction

According to the current Colombian Code of Criminal Procedure, there must be a correlation between the counts in the indictment and those in the conviction and between the crimes for which a sentence is sought and those in the conviction (Art. 448, Law 906/2004).

The description provided by the rule is clear; however, as the law is interpretative, this article provides different interpretations, especially about what is meant by the moment a conviction is requested. For some, as we will discuss, it is understood that the conviction must include all the crimes and all the circumstances, specific and general, that appear in the indictment, even if the prosecution has not included them in its closing arguments. For others, as is the

case here, only the crimes and circumstances, specific or generic, for which the prosecution requested a conviction in its closing argument must be included.

Regarding the factual aspect, the legally relevant facts that support the conviction are undoubtedly the same as those on which the indictment is built, which in turn support the indictment; otherwise, the convicted person's right of defense would be affected.

Concerning the indictment, we distinguish two moments: one related to the presentation of the indictment, the fundamental piece initiating the oral, public, and adversarial proceedings, and the other associated with the final procedural moment, in which, after presenting the evidence in such proceedings, the prosecution indicates the crimes for which it is requesting a conviction.

This position is based on the principles and characteristics of the criminal procedural system adopted by Colombia: adversarial, to the extent that this is based on the adversary procedure, under which the judge cannot proceed ex officio to prosecute since he requires an indictment to act, and on the principle of oral proceedings, a fundamental stage for presenting the evidence on which the judge will base his decision. These aspects, in turn, will be fundamental to moving from the material truth to the formal truth.

These principles and characteristics mean that the trial judge must announce the judgment and pass sentence on the crimes for which the prosecution is seeking a conviction in its closing argument.

As far as the prosecution is concerned, it may request a conviction for lesser crimes than those outlined in the indictment, and the trial judge will have to rule on these. On the other hand, the prosecution cannot then, under penalty of affecting the right of defense of the defendant (Art. 8, Law 906/2004), request in the closing argument a conviction for a crime other than that contemplated in the indictment. If he does so, the trial judge must acquit the defendant.

The judge must refrain from ruling ex officio on crimes not included in the indictment and the closing arguments since to do so would interfere with the prosecution's adversary procedure, affect judicial impartiality, violate the accused's right of defense, and contravene the characteristics of the adversarial system, which does not accept such intervention by the judge.

For this informal pronouncement of the examining magistrate, the argument of the search for the actual truth is not valid either since such a search is typical of an inquisitorial system, not of an adversarial one.

Principles and Characteristics Governing the Inquisitorial and Adversarial Systems of Criminal Procedure

As a starting point, it is necessary to note that there have traditionally been two major systems of criminal procedure: adversarial and inquisitorial (Armenta Deu, 2019, p. 35).

The adversarial system requires that the legal proceedings be divided into three distinct roles: the prosecution, the accused, and an impartial court that conducts the trial. Meanwhile, the inquisitorial system merges the functions of prosecuting and judging into a single entity.

The combination of elements of both systems is called the reformed inquisitorial system or the mixed or formal adversarial system (Armenta Deu, 2019, p. 35). Thus, the adversarial system is based

> on the division of powers exercised during trial. On the one hand, the prosecution, who criminally prosecutes and exercises to legal process. On the other hand, the accused, who can resist the accusation, exercising the right to defend himself, and finally, the court, which has the power to decide. (Maier, 2004, p. 444)

This procedural system is based on a series of characteristics and principles. Regarding the essential characteristics of this system:

> "a) the judge cannot proceed ex officio at the time of prosecuting; he needs an indictment to act; b) the prosecution investigates, determines the fact and the subject, provides the evidence on which he will be prosecuted and, consequently, marks the limits of prosecution of the judge (congruence); c) the trial is informed by the principles of duality, contradiction, and equality; d) the evidence is of free assessment and tends to determine the formal truth; e) single proceedings and popular justice prevail. (Armenta Deu, 2019, p. 35)

The principles that govern this procedural system, according to Armenta Deu (2019), are the following:

> a) principle of equality between the parties; b) principle of hearing or contradiction, which is summarized in the phrase "no one can be convicted without being heard and defeated in trial"; c) adversary principle, which is summarized in two important ideas: "There is no trial without accusation" and "the prosecution cannot judge, with which the deconcentration of functions and the need for a body other than the one that judges to accuse is materialized." (p. 46)

According to Armenta Deu (2019), the inquisitorial system has the following characteristics:

> (a) the State proceeds ex officio at the time of the criminal prosecution, without the need for a private individual to request it; (b) it is the same body that performs the dual function of prosecuting and judging; (c) the judge himself investigates; (d) the trial is neither of parties nor contradictory, thus weakening the possibilities of defense, when not eliminating

> them; e) the evidence tends to determine the material truth and its assessment is established by law, in a regulated manner; f) the court of appeals is established, the popular courts disappear, and the function of judging is specialized; g) the person is considered as an object of investigation, not a subject of rights. (Armenta, 2019, p. 36)

It is important to note that in Colombia, the Codes of Criminal Procedure in force before the 1991 Constitution, including Law 94/1938, Decree 409/1971, and Decree 50/1987, had an inquisitorial nature. This was evidenced in their main attribute of granting a single official the responsibility of performing both the role of prosecutor and judge, among other characteristics (art. 467, Decree 50/1987).

Colombia: Toward an Adversarial System

Once World War II ended and as a result of the promulgation of the Declarations of Human Rights (1948) and the international treaties in force on the subject (European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950; International Covenant on Civil and Political Rights. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 1988; Law 319/1996; Protocol to the International Covenant on Civil and Political Rights, 1999; Vienna Convention on the Law of Treaties, 1969), there is a change in how the role of the State is understood, the limits of its intervention in 'people's lives and, particularly, how legal and judicial rights are protected and respected (Boaventura De Sousa, 1999).

As Marchisio (2002) points out, this situation caused Latin American countries to implement a series of changes in their legal systems to distance themselves from the inquisitorial system in procedural law in the last decades of the century (p. 21).

Thus, in its eagerness to leave behind the inquisitorial system, Colombia began a gradual constitutional reform toward the adversarial system. First, it advanced the constitutional reform of 1991, from which the Political Constitution was born, and with it, the Attorney General's Office (art. 250, Political Constitution, 1991), the body in charge of investigating and accusing (Armenta Deu, 2019, p. 50). This gave way to the adversary procedure with Legislative Act 03/2002, a regulation that specifically gave way to the principle of oral proceedings (Legislative Act 03/2002; art. 250), replacing the principle of permanence of evidence, and defined the criminal procedural system as adversarial (art. 4, Legislative Act 03/2002). The following axiom is quoted: "Where there is no prosecutor there is no judge" (Roxin, 2014, p. 86).

Based on Legislative Act 03/2002, the Congress of the Republic issued Law 906/2004, Decree 2636/2004, and Decree 2637/2004. Thus, the Political Constitution of 1991 and Legislative Act 03/2002 achieved two objectives: to maintain the separation of powers

between the prosecution and the judge and, with them, the validity of the adversary procedure and to introduce the principle of oral proceedings.

By clearly differentiating the responsibilities of presenting accusations and passing judgments and by conducting public, oral, adversarial, and concentrated proceedings, they not only created a new legal adversarial system but also reinforced the concept of a State based on law, democracy, and social justice, among other elements, in terms of guaranteeing a fair and equitable trial.

These principles and guarantees are in line with the advances made in this area by both the International Covenant on Civil and Political Rights and the American Convention on Human Rights, which establish that in criminal matters, there must be an indictment and oral and impartial proceedings (Art. 14.1, Law 74/1968; Art. 8, Law 16/1972).

Indictment and closing arguments

The starting point of the principle of congruence in Colombia is defined by Art. 448, Law 906/2004 Congruence: "The accused may not be found guilty for counts not stated in the indictment, nor for crimes for which conviction has not been requested."

This indicates that in order to find a person guilty of a crime, the existence of the crime, proof of the defendant's responsibility, the non-existence of grounds for the absence of responsibility and the absence of grounds for extinguishing the criminal action are required, distinguishing the factual and legal, and two procedural moments: the presentation of the indictment, and the oral trial hearing, with the presentation of the closing argument, by the prosecuting entity.

Having made this clarification, the indictment is analyzed, which operates in two moments: i) as a document required from the prosecution to initiate the oral proceedings (Art. 250, Legislative Act 03/2002) and ii) as a pleading through which the prosecution requests the trial judge to convict the defendant (Art. 443, Law 906/2004).

The thesis supported in this document concerning the legal aspect is that the trial judge, in the announcement of the judgment (Art. 445, Law 906/2004) and the sentence (Art. 447, Law 906/2004), should pronounce only and exclusively on the crimes for which the prosecution asks for a conviction in the closing argument (Art. 443, Law 906/2004).

Regarding the factual basis supporting the sentence (Art. 162, Law 906/2004), it must be the same as that supporting the indictment (Art. 337, Law 906/2004) and, in turn, that which supports (Art. 288 Law 906/2004). There is no discussion. Dealing with this factual

framework entails affecting the right of defense of the accused (Art. 8) and due process (Art. 29, Political Constitution 1991).

Now, why is the legislator right when he specifies that the accused cannot be found guilty for crimes the conviction has not been requested, a request that is made in the closing argument, not in the indictment?, because the indictment is the instrument required to initiate the oral, public, adversarial proceedings, with the immediacy with all the evidence, and with all the necessary guarantees of due process (Art. 336, Law 906/2004), The closing argument is the final moment in which the parties, based on what has been proven in the oral proceedings, support their theory of the case, which, in the case of the prosecution, is that the accused be convicted and in the case of the defense that the accused be acquitted (Art. 381, Law 906/2004).

With the indictment, the Prosecutor 'General's Office activates the adversary procedure. Which occurs during the trial stage, activates the adversarial function of the judge, who must announce, once this procedural moment is over, the judgment in a subsequent hearing and pass the respective sentence.

Likewise, it should be noted that, from the evidentiary point of view, the indictment is based on evidence due to the principle of oral proceedings. In contrast, the closing arguments are based on evidence for the judge to pass sentence.

Additionally, between the presentation of the indictment and the presentation of the closing arguments by the prosecutor, the following procedural moments elapse:

The arraignment is a legal phase after the Prosecutor 'General's Office presents its indictment. The examining magistrate plays an important role. During this hearing, several issues are addressed: i) the indictment is ordered to be shared with the other parties involved in the case; ii) the 'Prosecutor's Office, the Public Ministry, and the defense are allowed to express orally whether there are grounds for lack of jurisdiction, impediments, recusals, or nullities, if any. They may also make observations on the indictment if it does not meet the formal requirements established by law. If problems are identified, the prosecutor is allowed to clarify, supplement, or correct the indictment immediately; iii) the prosecutor is given the floor to present the indictment formally; iv) the capacity of the victims in the case is determined; and v) if necessary, comprehensive protection measures are taken for victims and witnesses (Art. 336, Law 906/2004).

The preliminary hearing is a legal stage that follows the arraignment, in which the judge takes an active role. In this hearing, the following matters are addressed and determined: (i) comments by the parties on the evidence discovery process, especially those made outside

the venue of the arraignment; (ii) discovery of evidence by the defense; (iii) statement of the evidence that the prosecution and the defense plan to present at the public trial; (iv) statement by the parties on the possibility of reaching evidentiary agreements; (v) if the accused so decides, acceptance of charges may take place; (vi) requests for evidence by the parties (Prosecutor 'General's Office and defense) and, in exceptional cases, by the Public Ministry; (vii) determination of the admissibility, rejection or exclusion of evidence; and (viii) decision on the order in which the evidence will be presented during the trial. This is an important phase of the trial where critical details for the subsequent trial are established, such as the evidence to be presented and the agreements between the parties (Art. 335, Law 906/2004).

Finally, in the trial, in which the judge plays an important role, the following actions take place: i) the Prosecutor 'General's Office and the defense present their opening statements; ii) the presentation of evidence takes place; iii) the Prosecutor 'General's Office, the defense, the legal representative of the victims (if any), and the Public 'Prosecutor's Office offer their closing arguments; and iv) the 'judge's decision or verdict is communicated (Art. 366, Law 906/2004).

Because of these procedural actions that occur between the presentation of the indictment and the presentation of the closing arguments, as well as the difference between evidence and proof, the trial judge, at the time of announcing the judgment and, subsequently, at the time of pronouncing the respective sentence, must pronounce only and exclusively about the evidence, must pronounce only and exclusively on the crimes and the specific and generic circumstances for which the prosecutor asks for a conviction in the closing argument, not for the crimes or the specific or generic circumstances listed in the indictment, and even less, although this is not disputed for crimes not appearing in the indictment or the closing argument.

In this way, we can point out that the trial judge, in sentencing, cannot depart from the legal framework outlined by the prosecution in the closing argument, which must adhere to the legal framework outlined in the indictment.

However, to guarantee the principle of *in dubio pro reo* (Art. 7, Law 906/2004) and the presumption of innocence of the accused (Art. 14, International Covenant on Civil and Political Rights, 1966), the prosecution may, in the closing argument, request a conviction for a lesser offense compared to the one contemplated in the indictment, in which case the trial judge must rule on this offense (Art. 8, Law 906/2004).

Position of the Criminal Cassation Chamber of the Supreme Court of Colombia

In establishing that congruence is rigid in its factual dimension and flexible in its legal dimension, it considers that: i) the legal position may be modified during the trial by the prosecution or by the judge without violating the right of defense (SCJ, SP4792-2018); and ii) the judge may deviate from the legal qualification formulated by the prosecution and may convict for a different crime (SCJ, SP209-2023).

For the latter, the judge considers that the following conditions must be met: i) the modification is oriented towards punishable conduct of a lesser crime, and since the identity of the legal property of the new conduct is not a presupposition of the principle of congruence, the typical modification may be made within the entire Criminal Code (SCJ, rad. 45589/2016, as reiterated in SCJ SP2390-2017); ii) the new criminalization respects the factual core of the indictment; and iii) the rights of the parties involved are not affected (SCJ, AP5715-2014).

For those crimes not charged by the prosecutor in the indictment, it has been established that the judges may decree the partial nullity of the proceedings from the arraignment. Even so, if the prosecutor so wishes, he can make the respective corrections (SCJ, SP235-2023).

In this regard, it is important to point out that such concern of the judiciary is valid concerning the defense of the principle of legality; however, resorting to such a concepts gives rise to the following situations: i) the judge invades the adversary orbit of the prosecutor; ii) the judge affects his impartiality; iii) the right of contradiction of the accused is affected, who is surprised with such determination; and iv) it is strictly clear that there is no such situation as a ground for nullity.

There is a legal vacuum in the code of criminal procedure, because although the criminal procedural statute empowers the parties to discover, during the taking of evidence at the oral trial, a material element of proof or significant evidence not discovered at the respective procedural opportunity, it does not establish a procedural moment during the oral trial for the prosecutor, after the incorporation of such material element of proof or physical evidence, and when there is a need, if any, to reformulate the legal charges, to do so and thus guarantee the right of defense of the accused re-issue the indictment, to do so and thus guarantee the right of defense of the accused.

Although such a situation would not prevent the ’judge from observing the indictment’s legal qualification, it would at least solve the prosecutor’s problem, especially in cases in which, in the closing argument, he must ask for a conviction for a more severe crime than the one mentioned in the indictment.

Comparative Law

In reviewing this issue within the framework of comparative law, the following is analyzed:

Argentina

Regarding the separation of functions between the prosecutor and the judge, Article 9 of the Federal Criminal Procedure Code (Law 27063/2014) establishes that there must be a separation of functions between these two bodies. The Public 'Prosecutor's Office "cannot perform strictly jurisdictional acts and judges cannot perform acts of investigation or that imply the promotion of the criminal prosecution" (Law 27063/2014). This aspect is emphasized because the analysis points out that one is the adversary function and the other the adjudicatory function, and neither may interfere with the other.

Likewise, the prohibition imposed on judges to "carry out acts of investigation or that imply the promotion of the criminal prosecution" is to declare the nullity of the proceedings so that everything is returned to the arraignment and the prosecution corrects the charges.

Regarding the principle of congruence, known as the correlation between indictment and sentence the conviction cannot refer to facts or circumstances that do not appear in the indictment. Regarding the legal aspect, the judge cannot give the fact a legal qualification different from the one given by the prosecution unless it is for the benefit of the accused and provided that the matter has been the subject of debate. Likewise, the judges may not impose a more severe penalty than that requested by the prosecution, and if the prosecution requests acquittal, they will proceed accordingly (Art. 273, Law 27063/2014).

The Colombian criminal procedural system since the law provides for peremptory acquittal. This procedural system allows the prosecutor and the defense, once the evidence is completed in the oral proceedings, to request a peremptory acquittal from the trial judge. It does not mean, as established in the Argentine procedural law, that the judge must acquit the defendant since he may, in his opinion, convict him (Art. 442; Law 906/2004).

Chile

In the case of Chile, although there is a functional separation between the prosecution and the judge and the judge may not convict for facts or circumstances that do not appear in the indictment, the judge has broad powers to "give the fact a legal qualification different from that in the indictment or appreciate the concurrence of aggravating circumstances that modify criminal liability not included in it, provided that he has warned the participants during the hearing" (Art. 341, Law 19696/2000).

In these aspects, this procedural model is not to our liking since the judge invades the prosecutor's adversary procedure.

Mexico

In Mexico, there is a principle known as the congruence of the sentence. The law states that the sentence may not exceed the facts proven in the trial but says nothing more. It does not refer to the legal aspect; therefore, it is understood that the prosecution establishes it in the accusation (Art. 407, National Code of Criminal Procedure, 2014).

Interestingly, unlike the Chilean case, it does not empower the judge to invade the adversary procedure.

Puerto Rico and the United States

As explained by Chiesa Aponte (1992), the procedural systems of Puerto Rico and the United States have inconsistencies between the allegations and the evidence (p. 123). ased on this concept, the court may allow amendments to the indictment before the accused's conviction or acquittal when there is inconsistency between the allegations and the evidence.

This inconsistency between the allegations and the evidence, according to Chiesa Aponte (1992), is not grounds for the acquittal of the accused but may have the effect of restarting the trial and even dismissing the proceedings, depending on the scope or degree of the inconsistency. For this purpose, three situations must be distinguished, namely:

The inconsistency is not such that the evidence establishes the commission of a crime other than the one charged not included, and the rights of the accused are not prejudiced.

In this case, the court must allow the amendment and proceed with the trial without further consequence.

This category includes the situation in which the evidence establishes the commission of a lesser offense included in the indictment, which cannot prejudice the defense. Thus, Chiesa Aponte (1992) explains that the defendant is exposed to prosecution for the crime charged and for any other lesser crime. For example, the defendant charged with the crime of first-degree murder (greater offense) is exposed to prosecution for second-degree murder and manslaughter (lesser offense).

The critical element in this category is that, in the court's judgment, the inconsistency does not affect the defendant's right of defense.

The inconsistency, although not such that the evidence establishes the commission of a crime other than the one charged not included in this one, prejudices the substantial rights of the accused.

In this category, “the inconsistency between the allegations and the evidence causes prejudice to the accused, not because the evidence establishes a crime other than the one charged, but because it significantly hinders the preparation of his defense” (Chiesa Aponte, 1992, p. 123).

Chiesa Aponte (1992) points out that there is no reason to acquit the defendant, but if the defendant does not object, the court must postpone the trial to be held before another jury or before the same court or judge if it is a case by a court of law (p. 123).

The inconsistency is of such a degree that it establishes a crime other than the one charged, not included in this one or establishes a crime outside the court’s competence (greater offense).
In this case, the following situations arise:

If the court, applying the rules established for this purpose, annuls the trial and decrees the case to be closed, there would be no impediment for a new trial since there would be no double jeopardy.

If the court erroneously considers that the evidence established a crime other than the one charged in the indictment, and, based on it, terminates the trial and acquits, a new trial could not be held since there would be double jeopardy.

After reviewing these three categories, the case law of the Criminal Cassation Chamber of the Colombian Supreme Court of Justice (SCJ) is consistent with them, confirming that it is duly interpreting the principle of congruence. They are applying these rules by declaring the nullity of the proceeding so that the indictment is brought correctly.

Germany
Regarding the limits of the sentence, Roxin (2014) indicates that the court can only judge on the fact circumscribed by the opening order (p. 415). There may be a case in which, during the oral proceedings, the accused confesses to having participated in one or more other crimes. The law does not require an immediate trial for those facts since the prosecution must issue a new indictment.

Likewise, this country introduces an interesting concept, such as the “supplementary indictment to broaden the object of the trial, through which the prosecutor, during the oral proceedings, can extend the accusation to other acts committed by the accused” (Roxin, 2014, p. 415).

This author states that this institution is of interest to the accused, who, in case there is a clear state of affairs, will try to avoid several trials and seek that all the guilt be proven at once.

Finally, he refers to the powers of the judge in the legal assessment of the facts of the accusation. In such conditions, he asserts that the court is bound to the fact described in the indictment but is entirely free—as in Colombia—concerning legal issues: The court is not bound to the legal assessment of the indictment. Roxin (2014) specifies that "the accused must be warned about the modification of the legal point of view so that he has sufficient opportunity to defend himself. In this way, the court has the right and the duty to do so" (, p. 415).

Spain

In the Spanish model, Armenta Deu (2019) argues that in criminal procedural matters, the limits to the principle of congruence derive from the validity of the adversary procedure—an aspect that he fully shares—and, in part, from the principle of contradiction (p. 332).

Based on the adversary procedure, the factual aspect attributed to a given subject "must remain the same throughout the trial, with the clarification that the modalities of the event, the circumstances, the type of crime, and the degree of commission may be modified" (Armenta Deu, 2019, p. 332).

Concerning the principle of contradiction, this author warns that possible modifications that do not affect the trial's object must be submitted to the parties' contradiction in any case.

In Colombia, Law 906/2004 (Art. 344, final paragraph) is apparent in allowing the contradiction of evidence that arises during the oral proceedings that has not been previously discovered. Still, the procedural code as a whole does not say anything about the contradiction that must occur during the trial against the evidentiary situations that this evidence generates and that affect the legal aspect.

In contrast to the Spanish model, the accusation and the object of the trial are definitively established with the closing arguments (Royal Decree, 1882), together with the defense brief (Art. 737), the first element to be taken into account when determining whether or not the sentence is congruent. According to the author, the other element will be the final sentence (Armenta Deu, 2019, p. 332).

‘’The law on criminal prosecution adds another element, which has been called 'thesis,' according to which it allows the court to propose to the parties a legal qualification that it deems convenient about the facts that are subject to the trial (Royal Decree, 1882; Art. 733).

Although with this rule, the court ends up invading the orbit of the prosecution, which, in our opinion, ends up affecting the adversary procedure of the prosecution and therefore the principle of impartiality of the judge, we consider that, as the judge, to a greater or lesser

extent, always wants to affect the adversary procedure, such a procedure imposes limits on the judge and creates safeguards to protect the right of contradiction.

Such a solution, seen from the point of view of Colombian criminal procedural law, is positive and guarantees the right of defense of the accused, who, in these situations in which the judge considers that the legal qualification should be different from the one announced by the prosecution, allows him to know and pronounce on the new legal qualification with which he will be sentenced before the respective sentence is passed.

Conclusions

Although the adversarial system refers to the adversary procedure, oral proceedings, and the right of defense, the principle of legality is clearly prominent in this system. Judges mainly demand this principle, which leads to them invading the adversary procedure of which the prosecution is the holder, either by legal mandate or by case-law development.

For its part, the right of defense, a guarantee of the accused in this system, ultimately yields to the intervention of the judges in this concern to defend legality. In the end, this defense of legality is the search for the absolute truth instead of the procedural truth, which makes it more than evident that the inquisitorial system is still in force in the adversarial system.

The proposal (considered simple) seeks to maintain the separation between the adversary procedure and the principle of oral proceedings, respecting, above all, the cross-cutting right to defend the accused.

In such conditions, the factual nucleus, which, as indicated by the Criminal Cassation Chamber of the SCJ, must remain rigid, must remain so. However, the factual nucleus on which the judge must rule is not established in the indictment but in the closing argument. Now, in order to arrive at this closing argument, a procedural space must be opened in which, in addition to the parties being able to controvert the material or physical evidence that must be discovered during the evidentiary practice of the oral proceedings, the prosecutor must re-issued the indictment and the defense must know and controvert these charges.

Since the judiciary demands intervention in the legal basis of the accusation, another space could be opened, as the Spanish system does, for the judge to intervene in the qualification, guarantee the right of defense, and then pass judgment. This formula is not considered acceptable because the trial judge will ultimately invade the prosecution’s accusation and lose his impartiality. However, he will guarantee that the defense will know this restatement of charges and defend itself against them.

This formula leads to the peaceful acceptance of the judge's intervention in the legal aspect of the accusation. It also seeks to prevent the response from being null in some instances, as this ultimately affects the principles of expedition and efficiency of the justice system.

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