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The "Bomb Case": Impunity and Reforms

The so-called "bomb case" is probably the biggest judicial setback in more than a decade's existence of the Public Ministry. Notwithstanding the jurisdictional recourses that are going to be filed to try to annul the sentence, there is full awareness that the case has not been properly handled. Fortunately, the discussion at the Congress concerning the bill for strengthening the Public Ministry has been very propitious.

On Friday June 1st, the oral proceeding of the so-called "bomb case" came to an end with the verdict announcement by the Third Court of Santiago, who decided to acquit the 6 defendants still on trial, accused by the *Fiscalía Sur* of terrorist crimes. The court also stated, with regard to the crime's nature, that we were not dealing with terrorist crimes but with minor injuries, damages and fires, and the prosecutor had not been able to prove the participation of the defendants in the bombings, classifying the investigation as partial. The reading of the sentence was fixed on August 2nd and no precautionary measures were dictated.

Beyond the fact that this case, which has extended for many years, has been characterized by extra-legal issues rather than a strictly juridical-criminal debate, it has made evident many of the failures that still exist within the criminal system: prosecutors who in difficult causes are unable to articulate a solid case before the judges, the lack of a real coordination between prosecutors and both police forces in the criminal investigation, and the potential presence of "guarantist" approaches in the judges' sentences in the light of the acquittal's justifications.

All in all, what is yet more serious is that the analysis of the case's different actors is not focusing on what is really an overall concern for the citizens: the impunity aftertaste. In democracy it is unacceptable that extremist groups use terror to cause panic among the population, seeking to advance in their agenda, and that public debate gives no explanation thereof.

Impunity Sequence

Although this investigation started at the beginning of 2006, only on January 2009 the National Prosecutor appointed Prosecutor Xavier Armendáriz, to lead the investigation.[1] Afterwards, on May 22nd, 2009, a key issue for the investigation occurred[2]: the death of the young anarchist Mauricio Morales associated to squat houses ("Okupa" in Spanish), in an explosion caused by a bomb he carried, close to the *Escuela de Gendarmería* (Prison Guard School). His death and the following official search in his "okupa" house, entailed many signals of future relationships among the defendants and bomb rests that allowed identifying other bombing acts with similar characteristics. Thus, in June, former Undersecretary of Interior Patricio Rosende filed a complaint by the Antiterrorist Law against Cristian Gajardo, accused of putting an explosive device in March of the same year.

With the government change, and after the explosion of a bomb some blocks away from the President's house, it became a matter of priority again and, in view of the pressure from the public opinion due to the lack of results, in June 2010 the new prosecutor in charge of the investigation, Alejandro Peña, was appointed.

On August 14th, 2010, the so-called "Salamandra Operation" took place, where 15 domiciles were searched and 14 new suspects were arrested (in addition to Fuente Aliaga, who was already in prison for frustrated homicide), seemingly responsible for at least 23 explosive attack, 8 of them remaining in preventive prison for charges of illicit association or bomb placing.

Later on, and after almost 8 months of investigation, in April 2011 Prosecutor Peña presented before the Eighth Court of Guarantee (*Octavo Juzgado de Garantía*), an accusatory report of 610 pages against the 14 defendants of the case, where he asked for the highest penalty (life imprisonment) against two leaders of the band, for the offense of illicit association and invoking the Antiterrorist Law. For the remaining twelve anarchists, the Public Ministry requested penalties from 10 to 15 years.

In April 2011, Prosecutor Alejandro Peña resigned from the Public Ministry and incorporated to the Ministry of Interior and Public Security as a consultant, and the investigation was left in charge of prosecutors Francisco Rojas and Victor Núñez, who continued with

the investigation until the oral proceeding (both belonging to the Metropolitana Sur prosecutor's office, whose new Regional Prosecutor Raúl Guzmán took office in June).

In May of the same year, the preparatory hearing of the oral proceeding started at the Eighth Court of Guarantee and on May 5th, 2011, the last 2 defendants who were still in preventive detention got out of jail, remaining in home detention. A month later, the Guarantee Judge Luis Avilés (Eighth Court of Guarantee), discarded more than 4,000 evidences filed by the prosecutor's office in the preparatory hearing of the oral proceeding.

On October 4th, 2011, 13 defendants were dismissed of proceedings, after the Court of Appeal of Santiago ratified the exclusion of the evidence discarded in the oral proceeding's preparation. Thus, 7 were freed from all responsibility and the Public Ministry only maintained charges against 4 of them for assumingly putting explosive devices, and two for terrorist financing.

The oral proceeding against the 6 defendants started on November 28th, 2011, at the Third Criminal Court. On the other hand, the Prosecutor's Office declared that it will present more then 2,000 evidences, 476 witnesses and 152 experts.

On May 11th, 2012, the Ministry of Interior and Public Security, acting as complainant, and the Public Ministry filed a charge against some of the case's judges for impartiality, which was refused days later by the Court of Appeal of Santiago.

Finally, last June 1st and after more than 6 months, the oral proceeding ended at the Third Oral Court of Santiago, with the acquittal of the 6 defendants who were released, except one who continues with his former sentence.

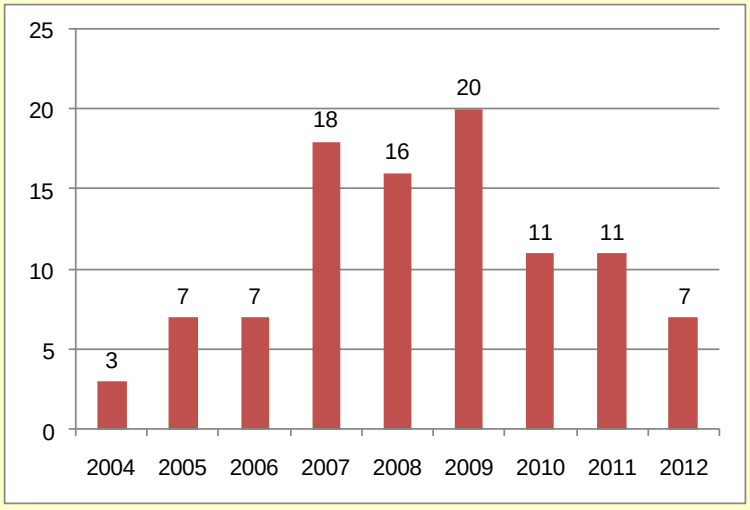
Chart 1

TOTAL NUMBER OF BOMBS SINCE 2004 BY YEAR

Source: El Mercurio, Section C, Sunday, June 3rd, 2012.

Chart 2

TOTAL NUMBER OF BOMBS SINCE 2004 BY INSTITUTION



Source: El Mercurio, Section C, Sunday, June 3rd, 2012.

In this context, since 2004 to date, more than 100 bombs have been recorded in Santiago, impacting emblematic places such as banks, churches and public buildings[3] (Charts 1 and 2).

Lessons and Challenges in Criminal Pursuit

It is no doubt the biggest setback for the Public Ministry since the new criminal system was introduced in 2000, and the National Prosecutor has confessed it publicly. Beyond the announcement of a possible recourse to annul the trial – and start another one -, the case leaves a series of lessons and challenges for the Public Ministry's task development, which has been stressed by a deficient investigation.

The case shows the need for the Public Ministry to increase coordination with both police forces; in several cases, it has been repeatedly signaled that they have to rely on joint action protocols and be extremely careful with the first procedures in basic issues such as the crime scene, evidence taking, and description of the place, among others. This must also go along with greater expertise – with the unsolved institutional challenge of not only improving but also keeping the best talents and existing human capital – and the technological resources to face high-complexity investigations.

In this perspective, the bill on strengthening the Public Ministry is currently being discussed at the Congress (Bulletin Nr 8265-07), which seeks to add US$30 million to the institution mainly for hiring new prosecutors and administrative personnel. They are important resources if we consider that the 2012 budget exceeds the US$233 million.

This will be a great opportunity for the Executive and the Congress to bring out these issues which are usually related to the analysis – of which the Public Ministry is so reluctant, protecting itself under its constitutional autonomy - of goals, process indicators and outcomes, that is, responsibility and accountability mechanisms regarding the existing and new resources. If the Congress does not seriously consider this analysis, there will hardly be another opportunity – together with the annual discussion of the Budget Law – to reach, respecting the Public Ministry's autonomy, nationwide agreements regarding the corrections required by this institution. This debate should be public and facing Chileans.

Judicial Guarantism?

Although the reading of the sentence was fixed for August 2nd, among the court's justifications to sustain the acquittal resolution we find the following: it was a biased investigation – due a sort of harassment against the residents of the "okupa" houses -; irregularities in the confession of 2008 by one of the defendants at the moment –where it is even stated that part of his statement was dictated by the prosecutor -; the existence of incomplete edges that were not subject to analysis by prosecutors or the police; late seizure of the assumed explosive traces that related one of the defendants to the attacks; unfinished procedures and errors in the individualization of some of the places where the explosive devices exploded. Furthermore the court also stated, with regard to the crime's nature, that we were not dealing with terrorist crimes but with minor injuries, damages and fires.

The standards we have to control, as a society, the judges' acting will be associated to the grounds and reasoning given in the sentence. Nevertheless, it is not hard to venture that a key issue of the future debate – and which is already creating certain level of controversy on the media – will be the arguments set forth to discard a terrorist offense.

And it is precisely here where "Guarantism" may emerge, through the use of formalisms – either concerning the lawsuit, of purely discretional analysis of the elements of applicable criminal types, etc – which prefer to ascribe – it has occurred in the past – to criminal and sociological doctrines that are critical of the use of criminal law, and particularly of imprisonment when dealing with criminal acts, among other reasons, because offenders are actually victims of the society, the model, etc.[4]; these considerations prevail upon the existing law.

Together with the injustice in the specific case and the impunity sensation that it may produce, the judicial public policy question is associated to the consequences thereof. And this is the trouble: if a judge makes a merely discretional decision, based on formalisms, ideology or extra-legal considerations – disguised by juridical argumentation – it has no specific consequence for him. This fact is not taken into account when qualifying him and deciding on its permanence in the judicial system. In other words, it is necessary to make progress towards an institutional system where judges assume the responsibility of their decisions and are accountable for their acts.

The dilemma of this predicament is that it involves a potential conflict with the value of judicial independence. The judge who is not independent lacks a basic quality for being impartial. Therefore, it is necessary to build an institutional system that combines autonomy and responsibility. Along these lines, the equation seems to be to completely ensure autonomy to resolve in specific cases, without admitting a questioning of the sentences, except in the pertinent jurisdictional bodies, but to simultaneously build evaluation mechanisms based on objective indicators, which after a certain period allow assessing the judge's performance.[5]

Conclusions

The so-called "bomb case" is probably the biggest judicial setback in more than a decade's existence of the Public Ministry. Notwithstanding the jurisdictional recourses that are going to be filed to try to annul the sentence, there is full awareness that the case has not been properly handled. Fortunately, the discussion at the Congress concerning the bill for strengthening the Public Ministry has been very propitious.

Nevertheless, the most important thing is that in a democratic country it is unacceptable that extremist groups use violence to impose terror among the population to advance in their ideas in the society. Therefore, we must consider that, unfortunately, the great looser in this case is our country, because the focus is not centered in the search for the responsible ones who still enjoy impunity.

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In brief…

CONSEQUENCES OF THE BOMB CASE:

- Last Friday, the "bomb case" ended with the verdict that acquitted the 6 defendants accused by the Prosecutor's Office of terrorist offense.
- It is the biggest setback of the Public Ministry in the last decade. Therefore, the current discussion at the Congress concerning the Strengthening Plan of the Public Ministry is an excellent opportunity to reach agreements on the corrections required by the institution.
- The case leaves a series of lessons and challenges for the Public Ministry's task development, especially concerning a greater coordination with both police forces, which implies joint-action protocols, the importance of the first procedures and the need for greater expertise and technological resources in high-complexity investigations.
- Finally, the judges' work and their "Guarantism" should be analyzed, especially in view of the need that they assume the responsibility for their decisions and are accountable for their acts.

[1] Data collected from press clippings.

[2] Previous to these facts, there is a key issue for the development of the investigation, occurred the 31st December, 2008, when Gustavo Fuentes Aliaga, alias "El Grillo", a young anarchist, tried to murder his girlfriend Candelaria Cortés-Monroy, who was later also accused for the bombings. At that moment, Fuentes Aliaga was arrested, and gave valuable information and declared his participation and that of other future defendants in 4 explosive attacks. Despite his later retraction, this information was essential for the investigation that the former Prosecutor Peña carried out to configure his accusation of terrorist illicit association.

[3] Data collected from press clippings.

[4] See for example Roberto Gargarella. "*De la injusticia penal a la justicia social*", Siglo del Hombre Editores, 2008. According to his back cover, the book deals with the following type of questions: What types of citizens end up behind bars? How does the State act, through the punitive system, in societies marked by a strong inequality? Are we running the risk that the State apparatus is used to keep an unjustified state of things which systematically benefits some and adversely affects others?

[5] See "*Jueces y garantismo. Necesidad de rendición de cuentas*", Public Issues Nr 828, Libertad & Desarrollo, July 13th, 2007. Available in www.lyd.org