HUMAN RIGHTS AND PROSECUTORS – WHY AND HOW?

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In an address during the XXth Annual Conference of the Canadian Federal Prosecution Service in June 2000 then Deputy Minister of Justice and Deputy Attorney General of Canada, Morris Rosenberg, said:

> *"Carrying out the duties of a prosecutor is difficult. It requires solid professional judgement and legal competence, a large dose of practical life experience and the capacity to work in an atmosphere of great stress. Not everyone can do this. Moreover, there is no recipe that guarantees the right answer in every case, and in many cases reasonable persons may differ. A prosecutor who expects certainty and absolute truth is in the wrong business. The exercise of prosecutorial discretion is not an exact science. The more numerous and complex the issues, the greater the margin for error."*

He also referred to the prosecutor's heavy obligation to conduct himself or herself with dignity and fairness; and to take into account what the public interest demands. None of this will come as a surprise to this audience.

Much earlier, in the Canadian Supreme Court case of *Boucher v The Queen* (1954) 110 CCC 263 at p 270, Rand J said of the role of the prosecution:

> *"It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly. The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of judicial proceedings."*

For at least the last 50 years prosecutors have been increasingly required to incorporate into the execution of their difficult duties the observance and protection of

the human rights of all involved in the criminal justice process and to do that in the application of the just rule of law.

The UN Universal Declaration of Human Rights of 1948 (UDHR) requires it. The UN International Covenant on Civil and Political Rights of 1966 (ICCPR) details it.

The International Association of Prosecutors (IAP) Standards (to which I referred yesterday) give it immediate legitimacy and force. In addition, the IAP has published the *Human Rights Manual for Prosecutors*, the second edition of which will soon be available.

The UN Vienna Declaration and Programme of Action of 1993 (also referred to yesterday) noted that:

> *"The administration of justice, including law enforcement and prosecutorial agencies and, specially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realisation of human rights and indispensable to the process of democracy and sustainable development."*

In 1994, following on the Vienna conference, the UN General Assembly prepared a Plan of Action for the UN Decade for Human Rights Education (1995-2004) calling for special attention to be given to:

> *"the training of police, prison officials, lawyers, judges … and other groups which are in a particular position to effect the realisation of human rights."*

OBSTACLES?

There are still prosecutors, no doubt, who see human rights as obstacles in the way of doing their job; perhaps not obstacles in the way of pursuing any particular agenda (like white supremacy in the old South Africa), but obstacles in the way of securing the conviction of those who are said to be "obviously" guilty.

How convenient it would be – for a prosecutor intent on "winning" (being an infallible prosecutor, of course) – to be able directly or indirectly to ignore the rule of law and the human rights of those involved and:

- to investigate or direct the investigation of crime without restriction: to be able to go anywhere and search anything, to watch and listen to all and sundry by surveillance devices and telephone intercepts, to question and detain anybody, to seize property, to intercept mail;
- to detain suspects at will and be able to deny them bail (or conditional release of any kind) without judicial intervention;
- to interrogate suspects without restriction and to require them to answer;
- to prevent a suspect's access to legal advice;
- to undermine and destroy those who dissent against the social order, to target and remove "troublemakers";

- to have juveniles dealt with in adult courts;
- to bow to political or media or other inappropriate pressures in deciding whether to proceed;
- to delay trials until conditions were right for the prosecution;
- to excite the media to spread prejudicial pre-trial publicity about the accused person;
- to conduct trials in private, away from the gaze of those connected with the accused and from public commentators;
- to have the judiciary constantly on one's side through improper practices;
- to refuse to cooperate with and to obstruct the defence at every turn and to disclose nothing about the case in advance;
- to require an accused person to provide and pay for his or her own interpreter, where translation is necessary;
- to be able to prove the prosecution case by easy shortcuts – indeed, to require the defence to disprove matters or even to prove innocence;
- to be able to rely on illegally and improperly obtained evidence;
- to be able to have inferences of guilt drawn from the silence of the accused;
- to have the accused shackled in court, at whim;
- to have available and serving the needs of the prosecution the severest possible punishments, even by way of extrajudicial killings.

What prevents a system with these features or any of them from operating with impunity? – human rights protected by the rule of law, reflected in provisions such as Articles 9, 10, 14, 17 and 19 of the ICCPR. These are mighty obstacles to abuse by the criminal legal system and should be reflected in the domestic law of every country. Without these sorts of guarantees a country cannot claim to be a true democracy under the rule of law. It is possible to have law and order without human rights; but it is not possible to have human rights without law and order – and the just rule of law.

GIVING EFFECT

Human rights provisions have a practical effect on the way in which criminal trials are conducted. The principles expressed must be given effect by substantive and procedural laws – and by the willingness of prosecutors, above all, to see them enforced.

Human rights are not soft and fuzzy things that we can pull around us on a cold night to keep us warm and safe. They are not something observed only by left-leaning fringe dwellers. Nor are they optional add-ons to a criminal justice system or the practice of law – something that we embrace only if we feel like it. Human rights are fundamental. We prosecutors have no reason to fear them – they belong to us as well.

The pursuit of human rights is about as hard as any political exercise can be. People die doing it – occasionally even a prosecutor. But prosecutors are generally tough and can protect human rights just by adhering to the basic principles. They can also do it without compromising their cases. It should never be forgotten that prosecutors are "ministers of justice".

The following propositions, amongst others, emerge from the principles that have been expressed.

1. Prosecutors when they enforce the criminal law must do so fairly. The ultimate aim of the criminal prosecution process is a fair trial – fair to the accused as well as to the community whom prosecutors represent. Fairness is not something that can be precisely measured. It is a goal to be achieved in all legal systems – whether the purpose of a criminal trial may properly be regarded as a search for the truth (as the civil law system in its pure form, it is said, sets out to do) or as a contest between opposing cases (as the common law system in its pure form may be characterised).

2. Prosecutors, by reason of their place and role in the criminal justice system, are in a particularly powerful position to protect human rights. In common law systems some have little, if any, supervisory role over police; but they may affect the course of proceedings and the conduct of others by, for example, the attitude they take to the use of evidence that may have been illegally or improperly obtained and in the advice they give to police about further inquiries. (The Fijian case of *Ballu Khan* provides an interesting study.) Those who are more closely involved in investigations may have a more direct effect. In civil law systems prosecutors may supervise the investigation from the outset, ensuring by the exercise of quasi-judicial powers that the rights of the suspect (and any victim and anyone else involved) are fully protected.

Fairness to the accused may be broadly monitored, even if not measured: largely by the extent to which a jurisdiction complies with Article 14 of the ICCPR through its constitution and procedural (including evidentiary) laws and practices. Many criminal justice systems now guarantee at least the following rights for suspects and accused persons:

- the right not to be subject to arbitrary arrest, detention, search or seizure;
- the right to know the nature of the charge and the evidence;
- the right to counsel;
- the presumption of innocence;
- the standard of proof beyond reasonable doubt;
- the right to a public trial by an independent court;
- the right to test the prosecution evidence (eg by cross-examination);
- the right to give and call evidence; and
- the right to appeal.

In some circumstances (for example, in relation to transnational or organised crime and terrorism) the rights of the accused are commonly eroded, even in the most advanced and stable democracies. If a community feels particularly threatened by some form of illegal conduct, rights may be more readily compromised, either in the name of expediency or in the name of revenge (but usually out of fear). Needless to say, those trends are to be resisted.

Specifically in relation to individual victims of crime, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), which applies to all legal systems, includes the minimum rights:

- to be treated with respect and recognition;
- to be referred to adequate support services;
- to receive information about the progress of the case;
- to be present and to be involved in the decision-making process;
- to counsel and professional advice;
- to protection of physical safety and privacy; and
- to compensation, from both the offender and the state.

Not many jurisdictions could confidently claim to guarantee all those rights. Failure to enforce them does not have consequences for the criminal process itself, unlike failure to enforce the rights of the accused – for example, evidence is not excluded as a consequence of breach, or an acquittal directed.

But what of the rights of the community, the collective victims, represented in all systems by the prosecutor? For example, what if a victim is unwilling to testify in a public court (perhaps because of the sensitive personal nature of the evidence)? Or the victim is unwilling to testify because a private settlement or accommodation has been reached with the offender? What if the offender is fined, but the victim is not awarded compensation? What if the victim disagrees with a decision by the prosecutor (perhaps to discontinue a charge)? The prosecutor may in some cases be obliged to disregard the individual victim's wishes. These are some of the sort of practical issues confronted by prosecutors as they attempt to accommodate the rights of others.

In all systems the agents of the community in the seeking of criminal justice – the police and prosecutors – must be held accountable to the community at large for their conduct in the course of investigating and prosecuting the accused and seeking redress for the victimisation that has occurred. Human rights must be respected all along the line and the rule of law applied and prosecutors must be able to demonstrate that has been done.

There may indeed be another *de facto* party to proceedings in modern times: the media. It claims to serve the community but will often have other partisan interests and obligations, to particular personalities, to a political party, to owners, to advertisers. What obligations does a prosecutor have towards the media and the rights it may assert? Points 4 and 12 on the rule of law to which I referred yesterday are relevant here.

Allied to the media are politicians. How should political pressure be dealt with?

AN EXAMPLE – SOUTH AFRICA

We all need to be alert to the erosion of rights and be proactive in preventing it. Eight years ago Justice Arthur Chaskalson, National Director of the Legal Resources Centres in South Africa and inaugural President of the new Constitutional Court of that country, addressed a Public Interest Advocacy (PIAC) dinner in Sydney. He said:

"… (C)ourts are the institutions to which people in democratic societies turn for the protection of their rights and no one has greater responsibility for promoting and protecting human rights than judges and lawyers. If that protection is lacking, if institutions fail, the consequences can be catastrophic.
… Although South Africa was ruled by a minority regime the same course could (also) be followed … by majority governments, where the opposition is weak and the courts and the legal profession are either not powerful enough nor vigilant enough to resist incursions upon freedom.
… (F)irst incursions into the protection of human rights are often the most dangerous, for they begin a process of erosion which is difficult to stop once it has begun
… (T)he erosion of the power and independence of courts, and the lack of vigilance by lawyers, judges, and organs of civil society, permit those who should be held accountable for their conduct, to go free."

A FINAL EXAMPLE – HUMAN RIGHTS ON DUTY

In 2004 the IAP held its 9th Annual Conference in Seoul, Republic of Korea. The conference theme was "Different Systems, Common Goals" and it provided an opportunity for prosecutors from 91 countries (including the Republic of the Fiji Islands) to discuss the different ways in which we carry out our prosecution functions and some of the features and problems we encounter as we do it. As well as providing the comforting support for each other that results from sharing complaints and tales of woe, there was the chance for practical suggestions from one place to be gathered and taken home to be applied in another place, in the hope that overall improvements in our systems would result.

One of the recurring discussions during the conference week was on the question of the independence of the prosecutor and the other side of the same coin – the accountability of the prosecutor. (Stephen Pallaras QC spoke about this yesterday.)

At the beginning of the Seoul conference, as President of the IAP then, I presented some awards to various prosecutors who were deserving of international recognition by reason of the special service they had rendered or the exceptional hardships they had faced and resisted. One of those awards was to a team of prosecutors and investigators from the Central Investigation Department of the Korean Public Prosecutors' Office. The case for which they earned the award involved a political slush fund financed by businesses for the benefit of certain politicians and parties during a presidential election campaign (with the prospect, of course, of future corrupt financial advantage to those businesses if "their" candidates were elected). A fund of over USD 70 M had been accumulated illegally with the intention of its being used to influence the outcome of elections. The remarkable result of the work of the prosecutors was that 74 politicians (including 27 serving Members of Parliament) were implicated in the case and were prosecuted successfully.

But there were serious consequences for the prosecutors that had to be overcome. During the investigation the business community, which drew some media interest initially, protested that the investigation was hampering their business activities. The

political establishment tried to use its combined influence to have the investigation stopped. Whenever a large amount of funds was discovered the political parties claimed that the investigation was biased and politically motivated. The campaign of interference was very strong, well resourced and very public.

Interestingly, the general community strongly developed a different view. Korea has had a true democracy only since 1988 – before that there was autocratic rule of various forms – so comparatively recently won democratic rights and freedoms are still precious to the hearts and minds of 47 million Koreans. The public, keen to foster and maintain a clean and transparent society, strongly supported the investigation and prosecution. Ordinary citizens even formed a fan club for the Prosecutor General Mr Song, Kwang-soo and the prosecutor in charge of the matter Mr Ahn, Dai-hee. Responding to this community pressure, the media swung behind the investigation and one of the leading newspapers even selected Mr Ahn as its Man of the Year in 2003.

There are some lessons to be learned from this story, lessons for all of us.