A SHORT HISTORY OF PRELIMINARY INVESTIGATION*

ESSAY

Leila M. De Lima[**]
Geronimo L. Sy[***]

The Origins of Preliminary Investigation, Its Nature and Function

The history of preliminary investigation can be traced back to the *sumario* instituted during the Spanish regime through the Provisional Law on Criminal Procedure.[1] Essentially, it was a summary oral trial by a justice of the peace or *gobernadorcillo* that was similar to indictment in the Anglo-American legal tradition.

During the 18th century in Spain, the *sumario* was initially a fact-finding inquiry carried out by the magistrate and his assistants to clarify the facts surrounding the commission of a crime. However, the proceedings took on an accusatorial nature with the rise of the practice of magistrates collecting evidence that incriminated the suspect and formed the basis of the prosecution's arguments.[2]

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** Secretary, Department of Justice; Chairperson, Commission on Human Rights (2008-2010); Partner, De Lima Law Firm (1998-2008). Professor of Law in Election Law, Business Organizations, Persons and Family Relations, Transportation Law, and Statutory Construction, San Beda College of Law (1986-1994, 2006-2007). Awardee, Gawad Justice Felix Angelo Bautista, in recognition of services and achievements in the field of Criminal Justice (2011); Awardee, Raul S. Roco Award for Public Service Excellence (2009). LL.B., Class Salutatorian, San Beda College of Law (1985); B.A. History and Political Science, De La Salle University. Eighth place, 1985 Bar Examinations.

*** Assistant Secretary for Administration, Planning, Management and Internal Audit Service, Department of Justice; Chief Information Officer and Chair, Criminal Code Committee; Head, Office for Competition and Office of Cyber Crime; State Prosecutor (2001-2008); Doctor of Public Administration (Candidate), National College of Public Administration & Governance, University of the Philippines; Master in Public Management, University of the Philippines (2004); J.D., Ateneo de Manila University School of Law (1995); B.S. Management Engineering, Ateneo de Manila University (1991).

[1] Collector of Customs v. Villaluz, G.R. No. L34038, 71 SCRA 356, June 18, 1976.

[2] CUTTER, THE LEGAL CULTURE OF NORTHERN NEW SPAIN 39 (1995).

The subsequent evolution of this process in the Philippine Islands resulting in the preliminary investigation of today is a classic study on how gradual and abrupt changes in procedure have brought about the systemic and problematic issues in the investigation and prosecution of crimes.

In 1900, the United States military governor adopted a set of rules of criminal procedure through General Order No. 58, which effectively abolished the *sumario*. Section 13 outlined the precursor of preliminary investigations:

> When a complaint or information alleging the commission of a crime is laid before a magistrate, he must examine on oath, the informant or prosecutor and the witnesses produced, and take their depositions in writing, causing them to be subscribed by the parties making them. If the magistrate be satisfied from the investigation that the crime complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it, he must issue an order for his arrest.[3]

The "magistrate" referred to was a judge of the Courts of First Instance.

On June 11, 1901, Act No. 136 formalized the existing courts of justices of the peace established by military orders since 1898.[4] In criminal cases, the justice of the peace exercised original jurisdiction for the trial of all misdemeanors and offenses committed within the municipality, in all cases where the sentence did not, by law, exceed six months' imprisonment or a fine of USD 100.[5]

On Aug. 10, 1901, Act No. 194 amended General Order No. 58 by vesting justices of the peace with the authority to conduct preliminary investigations and issue orders for the arrest of an accused. It also empowered the municipal presidents (now municipal mayors) to conduct preliminary investigations in the absence or inability of judges of the peace or their auxiliaries.[6] Act No. 1627, enacted on Mar. 30, 1907, reiterated the jurisdiction of the justice of the peace in conducting preliminary investigations of all crimes and offenses alleged to have been committed within his municipality and cognizable by Courts of First Instance.[7]

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[3] Gen. Order No. 58 (1900), § 13.
[4] Act No. 136 (1901).
[5] § 68.
[6] Act No. 194 (1901).
[7] Act No. 1627 (1907).

At the outset, preliminary investigation was judicial in nature and undertaken for the purpose of determining whether a warrant of arrest should be issued against an accused based on the standard of reasonable ground.

When the Philippine Bill of 1902 was adopted, the "reasonable ground" standard became the requirement of "probable cause" under Section 5:

> [N]o warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.[8]

This provision was subsequently enshrined in the Constitution. The determination of probable cause was for the sole purpose of determining the propriety of the issuance of a warrant of arrest against an accused. Section 3 of the Philippine Autonomy Act of 1916 or the Jones Law adopted the same requirement as in the Philippine Bill of 1902.

The rule was further formulated in Article III, Section 1(3) of the 1935 Constitution:

> [N]o warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.[9]

and expanded in Article IV, Section 3 of the 1973 Constitution:

> [N]o search warrant or warrant of arrest shall issue except upon probable cause to be determined by the judge, *or such other responsible officer as maybe authorized by law*, after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized.[10]

Today, Section 2 of the Bill of Rights in the 1987 Constitution states:

> [N]o search warrant or warrant of arrest shall issue except upon probable cause to be determined *personally* by the judge after examination under oath or affirmation of the complainant and the

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[8] Philippine Organic Act of 1902, § 5.

[9] CONST. (1935) art. III, § 1(3).

[10] CONST. (1973) art. IV, § 3. (Italics supplied.)

> witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[11]

It is clear from its short history that a preliminary investigation is judicial in nature, conducted by magistrates or judges or justices of peace. It was only in their absence that executive officers such as mayors took their place. This was necessitated by geographical and practical considerations including the territorial coverage of courts, as confirmed in *Salta v. Court of Appeals*,[12] where the Supreme Court explained that, while judicial in nature, a preliminary investigation was an executive function that was assigned to the justice of the peace or municipal courts and to courts of first instance because of the necessity and practical considerations that constrained the government, such as not having enough fiscals and prosecutors to investigate crimes in all municipalities all over the country.[13]

The Promulgation of the 1940 and 1964 Rules of Court

The first Rules of Court in the Philippines can be traced back to 1918 with the Supreme Court's issuance of the Rules of Court of the Supreme Court of the Philippine Islands, the Courts of First Instance, and Rules for the Examination of Candidates for Admission to the Practice of Law. It was not until the promulgation of the Rules of Court in 1940 that the Rules on Criminal Procedure were included.

In the 1940 Rules, the authority to conduct preliminary investigations was extended to city fiscals, aside from the justices of the peace, municipal judges, judges of the Courts of First Instance, and in their absence, the municipal mayor.[14] The municipal mayor would make the preliminary investigation when it cannot be delayed without prejudice to the interest of justice.[15] The mayor would then make a report to the justice of the peace or to the auxiliary justice immediately upon their return.[16] The mayor was also authorized in such cases to order the arrest of the defendant and to grant the accused bail.[17]

The 1940 Rules defined preliminary investigation as:

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[11] CONST. art. III, § 2. (Italics supplied.)
[12] G.R. No. 41395, 143 SCRA 228, July 31, 1986.
[13] *Id.* at 235.
[14] RULES OF COURT (1940), Rule 108, § 2.
[15] Rule 108, § 3.
[16] *Id.*
[17] *Id.*

> [A] previous inquiry or examination made before the arrest of the defendant by the judge or officer authorized to conduct the same, with whom a complaint or information has been filed imputing the commission of an offense cognizable by the Court of First Instance, for the purpose of determining whether there is reasonable ground to believe that an offense has been committed and the defendant is probably guilty thereof, so as to issue a warrant of arrest and to hold him for trial.[18]

The inclusion of city fiscals did not change the judicial procedure into an executive one. Simply, if the judge was satisfied that probable cause existed, the warrant of arrest was to be issued. However, if a city fiscal conducted the preliminary investigation, the findings were forwarded to a judge who was to issue the warrant of arrest if he agreed with the findings of a probable cause. This was in compliance with the constitutional requirement that an order for the arrest of an accused can only be made by judicial authorities.

Interestingly, it can be noted that the preliminary investigation conducted by a city fiscal under the 1940 Rules served the same gate-keeping function of the prosecutors today.

The Supreme Court explained in *Sayo v. Chief of Police*[19]:

> The complaint must be made or filed with the city fiscal of Manila who, personally or through one of his assistants, makes the investigation, not for the purpose of ordering the arrest of the accused, but of filing with the proper court the necessary information against the accused if the result of the investigation so warrants, and obtaining from the court a warrant of arrest or commitment of the accused.[20]

However, the 1940 Rules provided for another procedure referred to as the "preliminary investigation proper," as distinguished from the preliminary investigation in Section 1, which is conducted before the arrest.[21] This second step occurred *after* the arrest, when the defendant was delivered to the court to inform him of the complaint or information that had been filed against him and the substance of the testimony and evidence against him, and to give him the opportunity to present witnesses or evidence in his favor.[22]

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[18] § 1.
[19] 80 Phil. 859 (1948).
[20] *Id.* at 869.
[21] § 11.
[22] *Id.*

During this "second stage" procedure, the objective was to give the judge an opportunity to determine whether the case against the accused should proceed to a trial on the merits, considering the counter-evidence presented in the determination of probable cause. Section 12 also provided that at any time during this stage, the accused, if he so requests, is allowed to have the services of an attorney. However, the accused cannot, as a matter of right, compel the complainant and his witness to repeat in his presence what they had said at the preliminary investigation before the issuance of the order of the arrest.[23]

The Supreme Court said in *People v. Sabio, Sr.*[24]:

> It has been held that in the preliminary investigation proper, the Justice of the Peace may discharge the defendant if he finds no probable cause to hold the defendant for trial. But if he finds a probable cause, it is his duty to bind over the defendant to the Court of First Instance for trial on the merits.[25]

The "preliminary investigation proper" in Section 11, like the preliminary investigation referred to in Section 1 of the same rules, remained to be a judicial function based on the officers authorized to conduct such procedures.

The 1964 Rules of Court renamed the first stage "preliminary investigation" in Rule 108, Section 1 of the 1940 Rules as "preliminary examination" to differentiate it from the second stage, which is the preliminary investigation proper.[26] Despite the change in nomenclature, it was the same "initial inquiry to determine whether there [was] a reasonable ground to believe that an offense [had] been committed and that the accused [was] probably guilty thereof, so that a warrant of arrest [might] be issued against him."[27] The authority to conduct preliminary examinations was extended to provincial fiscals, apart from city fiscals, justices of the peace, municipal judges, judges of the Courts of First Instance and, in their absence, municipal mayors.[28]

During the preliminary examination, only the testimony of the complainant and other witnesses were required to be taken under oath by the examining officer; on the basis of such testimony, a warrant of arrest would be

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[23] § 12. Dequito v. Arellano, 81 Phil. 128 (1948).
[24] G.R. No. 45490, 86 SCRA 568, Nov. 20, 1978.
[25] *Id.* at 581.
[26] RULES OF COURT (1964), Rule 112, § 1.
[27] *Id.*
[28] § 2.

issued by the judge. As in the 1940 Rules, whenever the preliminary examination was conducted by a fiscal, his findings were forwarded to a judge for the issuance of a warrant of arrest.[29]

Likewise, the 1964 Rules retained the procedure on "preliminary investigation proper" of the 1940 Rules, where an arrested accused was given the opportunity to present evidence on his behalf before proceeding to a trial on the merits.[30]

Legislation of Criminal Procedure

On September 8, 1967, Republic Act ("R.A.") No. 5180 was passed, prescribing a uniform system of preliminary investigation by provincial and city fiscals and their assistants, and by state attorneys or their assistants in view of the varying procedures. It required the conduct of preliminary investigation before the filing of a criminal information in court, but did not cover preliminary investigations conducted by city or municipal judges and Court of First Instance judges.[31]

The passage of R.A. No. 5180 began the gradual shift of the preliminary investigation process from a judicial procedure to an executive one. It laid down the following procedure:

1. The investigating officer shall receive the affidavits of the complainant and his witnesses, sworn to before him, together with other evidence supporting the allegation.

2. The respondent shall be summoned and directed to file a counter-affidavit, likewise sworn to before him, in response to the complaint, and adduce evidence on his behalf.

3. During the preliminary investigation hearings, the respondent has a right to be heard and to cross-examine the complainant and the complainant's witnesses that the respondent may present.

4. If probable cause is found after examining all affidavits on the record, the investigating prosecutor shall file the necessary

[29] § 6.
[30] § 10.
[31] Rep. Act No. 5180 (1967), § 1.

> information accusing the respondent of the crime. Otherwise, the case shall be dismissed.[32]

The procedure became summary in nature. Even before trial, the determination of the investigating officer during the preliminary investigation could result in the dismissal of the case. It also made the shift from an inquisitorial to an adversarial procedure. Instead of being an inquiry into the facts of the crime, the process resembled that of a trial since parties were required to file affidavits and present witnesses and other evidence.

Preliminary investigation became not another step but a prerequisite to the filing of an information before the Courts of First Instance. The exception was when the investigation was conducted by a judge of first instance, city or municipal judge or other officer in accordance with law and the Rules of Court.

R.A. No. 5180 crystallized the procedure by which fiscals conducted a preparatory inquiry before referral to a judge for the issuance of a warrant of arrest. The law magnified the preparatory role of the city and provincial fiscals in the preliminary investigation process and made the determination of probable cause by fiscals a major step in the criminal justice process before a judge could issue a warrant of arrest.

On December 6, 1972, Pres. Dec. No. 77 amended R.A. No. 5180 because allowing respondents to confront and cross-examine witnesses was "time-consuming and not conducive to the expeditious administration of justice."[33] Investigating prosecutors were directed to make the initial preliminary examination and, at the outset, determine if there was probable cause against the respondent. If there was, then the respondent would be summoned to file a counter-affidavit and present other evidence in his favor.[34]

In sum, the significance of R.A. No. 5180 is that it institutionalized a process within the larger preliminary investigation procedure—one that was performed by fiscals and not by judges.

In 1981, Batas Pambansa ("B.P.") Blg. 129 reorganized the judiciary and reconstituted the Courts of First Instance into Regional Trial Courts, and Municipal or Justice of the Peace Courts into Municipal, Metropolitan and Municipal Circuit Trial Courts. First-level courts were given the authority to conduct preliminary investigations for cases under the jurisdiction of the

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[32] *Id.*

[33] Pres. Dec. No. 77 (1972), Whereas Clauses ¶ 2.

[34] Rep. Act No. 5180 (1967), § 1(b), amended by Pres. Dec. No. 77 (1972).

Regional Trial Courts.[35] The authority of judges of the Regional Trial Courts to conduct preliminary investigations—an authority which judges of the Courts of First Instance had even prior to 1901[36]—was removed.

Under B.P. Blg. 129, the procedure on the sequential conduct of preliminary investigation was reversed. If an investigating judge found probable cause against a respondent, he was to forward the records of the case to the provincial or city fiscal for the filing of an information in court.[37] The judge would not directly file the case in court after he had concluded the preliminary investigation. In effect, the preparatory procedure previously undertaken only by the city and provincial fiscals was extended and made applicable to judges.

While the authority to issue warrants of arrests ultimately remained with judges and not fiscals, the investigating judge was made to confer with the provincial or city fiscal who would file the information. What was formerly a preparatory process conducted by fiscals became an entirely separate process conducted by both fiscals and judges, whose objective now was to determine the propriety of filing charges and not of the issuance of warrants of arrest. At this point, two distinct procedures developed in preliminary investigations: first, the "preliminary investigation" procedure, which served the initial function of determining whether charges should be filed; and second, the subsequent procedure of determining whether a warrant of arrest should be issued against an accused, which was originally the sole purpose of preliminary investigation.

The 1985 and 2000 Rules of Criminal Procedure

The actual divergence of these two procedures was formalized in the 1985 Rules on Criminal Procedure, in which preliminary investigation was redefined to make it a procedure distinct and separate from the procedure to determine the propriety of the issuance of a warrant of arrest.[38] Section 1, Rule 112 states:

> Preliminary investigation is an inquiry or proceeding for the purpose of determining whether there is sufficient ground to engender a well founded belief that a crime cognizable by the Regional Trial Court has been committed and that the respondent is probably guilty thereof, and should be held for trial.[39]

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[35] Batas Blg. 129 (1980), § 37.
[36] Act No. 194 (1901), § 1.
[37] Batas Blg. 129 (1980), § 37.
[38] RULES OF CRIM. PROC. (1985), Rule 112, § 1.
[39] *Id.*

By deleting any reference to an "arrest," which was the original aim of a preliminary investigation since its inception, the 1985 Rules reformulated the purpose of a preliminary investigation. It became a process conducted to determine the sufficiency of the evidence against an accused. The procedure for issuing a warrant of arrest, which remained to be a judicial function, became a proceeding separate from and independent of preliminary investigation. The judicial nature of preliminary investigation was transformed into an executive function. Even if judges of first level courts still conducted preliminary investigations, it was no longer a judicial function; nevertheless, strangely, with the mandate to determine probable cause, it still retained its judicial character.

The 1985 Rules did away with the "preliminary investigation proper" of the 1940 and 1964 Rules previously conducted by judges before whom an arrested accused was delivered. This function was transplanted to the very first step of the criminal proceedings—the determination of probable cause conducted by the fiscal leading to the filing of the information. Preliminary investigation became a proceeding distinct from and independent of the one conducted to determine the propriety of the issuance of a warrant of arrest. It was to be done at the very beginning of the criminal proceedings instead of being conducted after the arrest of the accused.

In every sense, the gate-keeping function of preliminary investigations we have today was first instituted in 1985 and carried forward to the 2000 Rules.

On August 30, 2005, the Supreme Court, perhaps recognizing the absurdity of having a quasi-judicial procedure—one that had an executive function but a judicial nature—amended the rules on preliminary investigation by removing from the municipal court judges the authority to conduct preliminary investigations for cases involving crimes punishable by imprisonment of at least four years, two months and one day.[40] The evolution of the preliminary investigation, from a judicial proceeding conducted by a magistrate for the issuance of a warrant of arrest to an executive exercise conducted by prosecutors to determine probable cause, was completed.

At present, preliminary investigations are the exclusive province of national, regional, provincial and city prosecutors and their assistants, as well as prosecution officers in the Office of the Ombudsman, to the exclusion of judicial officers. Nevertheless, the procedure remained judicial, or at least quasi-judicial, in nature.

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[40] Re: Amendment of Rules 112 and 114 of the Revised Rules On Criminal Procedure by Removing the Conduct of Preliminary Investigation from Judges of the First Level Courts Resolution, A.M. No. 05-8-26-SC, Aug. 30, 2005.

The 2000 Revised Rules of Criminal Procedure define preliminary investigation as "an inquiry or proceeding to determine whether there is sufficient ground to engender a well-founded belief that a crime has been committed and the respondent is probably guilty thereof, and should be held for trial."[41]

Preliminary investigation has evolved into an executive function[42] conducted by public prosecutors to determine probable cause. Its stated purpose was a "gate-keeping" function in which complaints and their supporting evidence are initially examined to determine if there is sufficient ground to proceed to a full-blown criminal trial. The expectation is that, by undergoing preliminary investigation, hasty, malicious and oppressive prosecution will be averted, innocent individuals will be spared the anxiety and expense of a public trial, and the State will be protected from conducting useless and expensive trials.[43]

The Case for Reform

Because the preliminary investigation began as a judicial process conducted by a judge to determine reasonable ground and probable cause to issue a warrant of arrest, the present preliminary investigation effectively disallows the cooperation of the police and prosecutors in case build-up and investigation—stages which are crucial to the successful prosecution and conviction of criminals. The collaborative efforts are effectively firewalled with the resultant buck-passing between the police and prosecutors, contrary to international best practices. Instead of guiding and directing the police to gather permissible evidence and to ensure the preservation of the chain of custody, prosecutors are expected to act with the cold neutrality of a judge in ascertaining whether the evidence is sufficient to indict the respondents. Prosecutors as key law enforcers steep in law and jurisprudence are taken out of the investigation process.

The added separate layer of preliminary investigation unduly delays the whole criminal justice proceedings with the "mini-trial" nature of preliminary investigation and the internal and judicial appeals from an adverse resolution of the prosecutor.

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[41] REV. RULES OF CRIM. PROC. (2000), Rule 112, § 1.

[42] Marcelo v. Villardon, G.R. No. 173081, 638 SCRA 557, Dec. 15, 2010.

[43] Uy v. Office of the Ombudsman, G.R. No. 156399, 556 SCRA 73, June 27, 2008.

Conceptually, the mandate of prosecutors to conduct a preliminary investigation prior to the filing of an information or complaint results in the confusion within the justice system on the proper role of prosecutors as executive officers vis-à-vis the function of the courts at the initial stages of criminal procedure.

A particular pernicious result is the two levels for the determination of probable cause—an executive determination made during preliminary investigation by the prosecutor to determine whether or not a criminal case must be filed in court, followed by a judicial determination of probable cause made by the judge to ascertain whether a warrant of arrest should be issued against the accused.[44]

There is a conundrum in characterizing whether a preliminary investigation is a judicial or executive function. While historically judicial in nature, preliminary investigation has been regarded as an executive function[45] and not a judicial or even a quasi-judicial one, since the prosecutors merely perform inquisitorial rather than adjudicatory or rule-making functions.[46] Yet, some cases still consider it a judicial proceeding involving an opportunity to be heard, the production and weighing of evidence, and the rendering of a decision by prosecutors performing quasi-judicial functions.[47] The compromise of treating it as quasi-judicial in nature deepens the ambiguity and does not help executive officers or judges in the discharge of their functions.

These issues on preliminary investigation translated to problems in law enforcement. Even if caught *in flagrante delicto* or when the evidence is overwhelming, the statutory right to preliminary investigation guarantees delay in the pursuit of justice. The two-tiered nature of the preliminary investigation is considered a principal reason for the delay in the investigation of crimes, the arduousness of criminal procedure and trial, the clogging of criminal dockets, and the maintenance of very low conviction rates. Conflicting rulings on the role of judges in the determination of probable cause, and the artificial procedural barrier between the police and prosecutors—imposed to build a strong case—are sources of weakness in the rule of law, and serve to perpetuate a culture of impunity.

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[44] WILLARD RIANO, CRIMINAL PROCEDURE (THE BAR LECTURE SERIES) 152-53 (2011 ed.).

[45] Metropolitan Bank & Trust Company v. Tonda, G.R. No. 134436, 338 SCRA 255, Aug. 16 2000.

[46] Bautista v. Court of Appeals, G.R. No. 143375, 360 SCRA 618, July 6, 2001.

[47] *See, e.g.* Sales v. Sandiganbayan, G.R. No. 143802, 369 SCRA 293, Nov. 16, 2001.

Lastly, the design of the present procedure effectively ties the hands of prosecutors as officers of the court and of law. They are precluded from taking a pro-active role in investigating potential cases, conspiracies and grand schemes unless and until a complaint is filed. This leaves a huge gap in the enforcement of the law against organized crime or syndicates, where an active justice system needs to be on constant watch.

Removing the preliminary investigation by the repeal of R.A. No. 5180 and redesigning the Rules of Court will dispense with a major stumbling block in the investigation of crimes. The purpose of preliminary investigation is to determine who committed the crime, to put them under the jurisdiction of the courts and to present evidence to show their guilt. The present system clearly does not work.

Ideally and properly, the investigating officer should be able to consult and request for legal advice from the prosecutor to ensure that the case files fulfill the material and formal requirements in law. The prosecutor may or will invoke judicial authorities to sanction the conduct of investigative processes, including applying for warrants, authorizing wiretaps, and detaining the accused—all of which inevitably intrude into private spheres. The prosecutor who participates from the very beginning of the investigation of the crime would be in the position to know the details of its commission and, having a hand in the case build-up, would be able to ensure the conviction of the accused, with proper observance of due process.

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