

CURRENT SITUATION OF CORRUPTION INVESTIGATION IN THE JAPANESE PUBLIC PROSECUTORS' OFFICE —CHALLENGES AND MEASURES TO OVERCOME THEM—

Shinichiro Iwashita^{*}

I. INTRODUCTION

A. Authorities which Investigate Corruption Cases

Although Japan has no specialized commission or agency which is responsible for investigating corruption cases, there are two authorities that have responsibility for investigating them: police officials¹ and public prosecutors². If a police official launches a criminal investigation, the official must refer the case to public prosecutors along with the documents and evidence. Upon receiving the case, the public prosecutor begins his or her own investigation. The public prosecutor can request the police to conduct further investigation and to collect more evidence crucial to proving the offender's guilt; the prosecutor can also directly interrogate suspects and interview key witnesses to determine whether to indict the suspect or not. Moreover, the public prosecutor is able to launch a criminal investigation based on the prosecution's discretionary investigative power, without having to rely on any assistance from police officials. Thus, public prosecutors have two ways to investigate corruption cases: independently or through collaboration with police officials.

Currently, most corruption cases (over 99%) are initially investigated by the police, and a very small number of cases (less than 1%) are investigated by public prosecutors independently. The cases public prosecutors investigate independently tend to be limited to the major corruption cases involving politicians, high-ranking officers, and complicated economic crimes.

B. The Special Investigation Department (SID) for Corruption Cases in the Public Prosecutors' Office

In large public prosecutors' offices, public prosecutors are divided into several departments and share the work. The investigative department is in charge of investigating and deciding whether or not to indict suspects referred from the police, and the trial department is in charge of conducting trials (proving guilt of the accused). Moreover there is the Special Investigation Department (SID), which investigates major corruption cases and complicated economic cases. Public prosecutors in this department investigate cases independently (they do not deal with the cases initially investigated by the police; those cases are dealt with by the prosecutors in the investigating departments). In Japan, the district public prosecutors' offices in Tokyo, Osaka and Nagoya have SIDs, and the SID of the Tokyo District Public Prosecutors' Office is the biggest.³

^{*} UNAFEI Professor and Public Prosecutor in Japan.

¹ The Criminal Procedure Code (CPC) stipulates police officials as the primary investigative authorities and obligates them to investigate any crime; it says police officials shall investigate criminal cases when they deem that an offense was committed.

² The CPC also gives the power of investigating all criminal cases to public prosecutors, but it leaves that power to the prosecutor's discretion; it says that public prosecutor may investigate criminal cases when he/she deems it necessary.

³ The SID of the Tokyo District Public Prosecutors' Office has around 30 public prosecutors and around 80 assistant investigators.

These three SIDs, especially the SID of the Tokyo District Public Prosecutors' Office, play a great role in the investigation of corruption cases committed by politicians and high-ranking officers.

II. INVESTIGATIVE METHODS FOR CORRUPTION CASES

Corruption cases, typically bribery, are ordinarily committed in secret among a very limited number of parties. No individual victims exist and neutral witnesses are few. In addition, fingerprints, footprints and DNA are rarely discovered at the scenes of corruption crimes. This means that corruption cases are some of the most difficult criminal cases for investigative authorities to obtain effective evidence. Although it can be said that special investigative techniques, such as electronic surveillance, wiretapping, eavesdropping, undercover/sting operations, and plea bargaining or immunity, are very effective, Japan has not adopted such special investigative methods for corruption cases. With such severe limitations on investigation, the factors mentioned below are crucial to successful prosecution of corruption cases.

A. Intensive Collection and Analysis of Objective Evidence

1. Tracing the Flow of Funds

In the investigation of corruption cases, identifying and proving the flow of illicit funds is crucial. For example, in bribery cases, tracing the flow of money—namely from the source of the bribe to the receipt of the bribe as well as the concealment or use of the bribe by the bribe-taker—is indispensable to prove the facts of the case objectively. Also, tracing the flow of money enables investigators to confiscate the bribe as criminal proceeds from the offender.

However, this is very difficult for investigators to do, because the flow of illicit funds is always concealed and the criminal proceeds are often laundered by moving the money in legal transactions from bank to bank, which hinders investigators from tracing money.

To overcome such challenges, thorough and careful financial investigation is very important. In Japan, the SIDs have many trained assistant investigators who assist prosecutors, and they are trained to get bank records quickly⁴ and also know where and what kind of records are kept in each financial institution. All transaction information written in the bank records gathered is integrated into a “transaction table” (which is one tabular form), and investigators use the table to trace and identify the flows of money connected with bribery. Finally, investigators find the secret source of the bribe or discover pseudonymous bank accounts which are likely to be highly connected with bribery.

2. Search and Seizure

Needless to say, thorough search and seizure is fundamental to achieve thorough gathering of objective evidence. The following are the key factors to succeed in search and seizure.

(i) Simultaneous seizure

In usual cases, it is necessary to execute search and seizure at several places to collect related evidence, such as the houses and offices of bribe-giver and bribe-taker, and so forth. In such cases, simultaneous execution of search and seizure is the best practice, because the more time it takes, the more the risk of concealment and destruction of important evidence increases. To realize effective simultaneous seizure, it is crucial for investigators to make a plan of execution carefully.⁵

⁴ In Japan, it is not necessary to obtain a court order to request bank records from financial institutions.

⁵ For example, where and how many places should be searched, what kind of evidence should be seized at each place, how many public prosecutors and assistant investigators are necessary to complete the search and seizure, and so on.

(ii) Arranging an effective search team led by a good team leader

In order to effectively execute a search at many sites at the same time, it is important to establish a good search team that can communicate well. Also, a good leader should be assigned who can give prompt and appropriate direction to the team.

(iii) Gathering efficient personnel for the search team

Sometimes, there may not be enough investigators available to conduct the search and seizure because there are so many places necessary to search. To cope with such situations, it is effective to build a system which enables cooperation with investigators from other divisions in order to assist with the search and seizure. In Japanese public prosecutors' offices, when the SIDs need further prosecutors and assistant investigators to conduct simultaneous searches and seizures, many public prosecutors and assistant investigators in other departments or other district public prosecutors are transferred to the SIDs for limited periods to enable the SIDs to achieve simultaneous searches and seizures under the direction of the Chief Prosecutor.

(iv) Sharing information within the team

It is indispensable for the search team to share necessary information⁶ among the team members. In the SIDs, advance briefing is usually held before the search. In most cases, the public prosecutor in charge firstly explains the case and what material evidence should be seized, and after that each search team has its own meeting led by the team leader in preparation for their search.

(v) Analysis of seized evidence

Analysis of the seized evidence must begin immediately after finishing the search and seizure. Thorough and swift analysis of seized evidence is fundamental to a successful investigation. To analyse evidence swiftly and efficiently, it must be done systematically. Therefore, establishing special units for analysing evidence is very effective. In the SIDs, after search and seizure, prosecutors and assistant investigators are divided into several groups and are assigned items of seized evidence to analyse by the prosecutor in charge. Such assignment is usually based on the location of the evidence or an issue or person to which evidence is supposed to have a connection.

It is also important to share the results of the analysis of evidence. The SIDs always make a database which is called "The list of articles of evidence". The information of evidence is concentrated into this database and each public prosecutor and assistant investigator inputs information as the result of analysis of evidence, such as the number, name and quantity of the evidence, where it was discovered, the specific contents of the evidence, the name and address of the possessor, the name of the officer in charge of the analysis, and so forth. Public prosecutors and assistant investigators who are engaged in investigating the case are able to access this data from their official PCs at any time.

3. Digital Forensics

Recently, with the progress of Information Technology (IT), important evidence that used to be recorded on paper is now being stored on computers as electronic data. It is necessary to seize and analyse the data in computers thoroughly for successful investigation.

⁶ Objects to be found and seized, role-sharing of investigators, chain of command and communication among the members, logistical matters, such as time and place for gathering, transportation of personnel, vehicles for conveying seized evidence and arrangement of locksmiths, and so forth.

(i) Current problem

Successful seizure and analysis of electronic data requires the proper equipment, knowledge and skill in the field of digital forensics.⁷ Moreover, investigative authorities have to keep up to date with IT which is advancing day by day. However, in Japan, most prosecutors do not have sufficient technological knowledge or skills; they are legal professionals but not computer or IT experts. Most assistant investigators are in a similar situation. Moreover, budgets limit the ability of public prosecutors' offices to maintain up-to-date technology, because technology is developing rapidly at high cost.

(ii) Measures in response

Public prosecutors' offices are under pressure not only to recruit efficient investigators who have good technical knowledge and computer skills but also to educate assistant investigators in digital forensics. The SID of the Tokyo District Public Prosecutors' Office has a "Digital Forensic Section (DFS)" which has computers for forensics and five or six efficient assistant investigators who are devoted to the analysis of digital forensic evidence. They are selected from the pool of assistant investigators that work in prosecutors' offices all over Japan, and from those who have developed the greatest knowledge and skill in the field of digital forensics.

Moreover, in Japan, there are some private companies which specialize in digital forensics in criminal cases.⁸ Public prosecutors' offices work closely with them in conducting digital forensics investigations and educating prosecutors and assistant investigators. In the SIDs, the DFS basically analyses the digital evidence by itself; however, there is some digital evidence which requires greater skill and forensic technology to analyse than that possessed by the prosecutors' office. In that case, the SID asks the companies to analyse the evidence. Also, training in digital forensics for assistant investigators is conducted with the support of these private companies. In this sense, not limited to the digital forensics field, cooperation with the private sector often strengthens the investigative ability of the authorities.

B. Interrogation of Suspects

1. Importance of the Interrogation of Suspects

Usually, there are no eyewitnesses or other items of physical evidence that are found during the investigation of corruption cases because of the secretive nature of the crime. Even if we collected much physical evidence, it is necessary to explain what it means, but there are also many cases in which the only persons who know the facts are the offenders themselves. Therefore, obtaining confessions from suspects is vital. It is not too much to say that the best and strongest evidence which proves the corruption offence is the confession of the offenders.

(i) Current problem

In Japan, confessions of suspects given during interrogation by police officers or public prosecutors must be done without threat, assault or any other unlawful means in order to be admissible as evidence at trial.⁹ As defence attorneys are not permitted to be present at the interrogation of suspects, disputes often arise at the trial between public prosecutors and defence attorneys about whether the confession given during the interrogation was done

⁷ For example, during a seizure operation, investigators are faced with the problem of how to seize data, including deleted data; in some cases the computer must be seized, but in others it is enough to copy the data. In the analysis stage, we have to analyse not only the data which remains on the hard disk but also the data which has been deleted. Deleted data can often be obtained by means of data restoration technology.

⁸ They have the high confidence of the investigative authorities because they are highly specialized and maintain confidentiality in their work.

⁹ If a suspect is compelled to confess by threat or assault by an interrogator, the confession is inadmissible as evidence at trial regardless of whether the confession is true or not.

without any unlawful means.¹⁰ It used to be sometimes difficult for prosecutors to prove that the confession was given without any unlawful influences because no neutral witness was present during the interrogation.

(ii) Measures in response and further challenges

The SIDs introduced the system of video recorded interrogation of suspects in 2011.¹¹ Currently, in cases where defence attorneys argue that prosecutors acted unlawfully during interrogation, prosecutors can easily prove that their conduct was lawful by submitting the video to the court.

On the other hand, video recording presents new challenges. By introducing a video recording system, suspects are reluctant to confess on camera. Moreover, before introducing the video recording system, no one knew how each prosecutor interrogated suspects. But now prosecutors are able to learn how other colleagues interrogate suspects by watching the videos. It exposes the fact that there is so much difference among prosecutors about the way of interrogating suspects; while there are many proficient prosecutors, there are also poor prosecutors who are poor at interrogating suspects.

One of the reasons why such differences exist is that there was no specific training system or manual about the method of interrogation in Japan; that is, it was said that the skill of interrogation was learned through on-the-job training (or personal experience) of each prosecutor. Prosecutors' offices are beginning to seek good interrogation methods and training systems to enhance the ability of prosecutors to conduct effective interrogation of suspects even under video recording.¹²

C. International Cooperation — Mutual Legal Assistance (MLA)

Globalization has made corruption crimes more and more sophisticated and cross-border in nature. Corruption offenders tend to hide the assets obtained through crime in overseas bank accounts which highly protect customers' information from public officials; sometimes the concealment of the assets is accompanied by money laundering. Hence, to investigate corruption crime, the importance of international cooperation, especially Mutual Legal Assistance is rapidly increasing.

(i) Framework of MLA in Japan

Japan can render MLA without an MLA Treaty (MLAT) or MLA Agreement (MLAA) as long as there is a guarantee of reciprocity. If there is no MLAT or MLAA, the request has to go through diplomatic channels. On the other hand, if there is an MLAT or MLAA, the request can be sent directly between central authorities of each country. In Japan, the Ministry of Justice (MOJ) and the National Police Agency (NPA) can both send requests as central authorities, but the MOJ is the only central authority authorized to receive requests.^{13, 14}

¹⁰ Defence attorneys often insist at the trial that the confession of the accused given during the interrogation is not admissible as evidence because it was given under assault or threat by the prosecutors.

¹¹ Video recording interrogation by prosecutor, itself, begun from 2006, which is firstly limited to serious crimes, such as murder, arson and so forth. After that, the cases investigated by the SID were to be subject to video recording interrogation beginning in 2011.

¹² Some advanced countries have the methods of interviewing or interrogating suspects, such as the PEACE Model in the United Kingdom and the REID Technique in the United States, respectively.

¹³ If there is an MLAT or MLAA, Japan's treaty partners are to send their requests to the MOJ, but they may receive Japanese requests from either the MOJ or the NPA.

¹⁴ UNAFEI held the Sixth Regional Seminar On Good Governance for Southeast Asian Countries from 12-14 December 2012 on the theme of "International Cooperation: Mutual Legal Assistance and Extradition". In this seminar,

(ii) Capacity building of prosecutors in the field of MLA

In Japan, public prosecutors usually do not have any knowledge or experience in the MLA field. Therefore it is very important to establish a training system for prosecutors to enhance the use of MLA; the on-the-job training system is working well.

The MOJ has an International Division in the Criminal Affairs Bureau, which is in charge of MLA matters, where there is a Director, Deputy Director and four to five prosecutors. The prosecutors of the International Division are selected from those who have around seven to ten years' experience as a prosecutor in each district public prosecutors' office (It is not required for them to have knowledge of MLA), and they can acquire sufficient knowledge and experience on international cooperation and mutual legal assistance through their work for two to three years. After that, most of them go back to the District Public Prosecutor's Offices, and they are expected to play important roles in the field of international cooperation.

(iii) Utilization of informal channels in MLA

It is said that MLA, regardless of whether conducted using an MLAT or MLAA, takes a long time to get the necessary assistance because of complications of formal procedure. To avoid this, the MOJ in Japan has been strongly recommending its foreign counterparts to engage in informal consultation before sending a formal request, even if the request is non-treaty based.

Utilization of informal channels is an effective measure in MLA to get necessary information quickly because it enables the flexible exchange of information. Constant effort for establishing informal channels among foreign countries is very important to expedite MLA.

In Japan, some prosecutors work not only at the International Division of the MOJ, but they are also dispatched as first secretaries to embassies of Japan, such as in the USA, UK, France, Germany, Korea, China, and so forth. They work for around three years in the legal section of the embassy, and are in charge of MLA matters between Japan and the country that they have been dispatched to. They are able to not only gain expertise about MLA of Japan and the country they were dispatched to, but also make contact with important government officials. The networks they make are working well as informal channels in MLA.

(iv) MLA in the field of investigation of corruption cases

It is crucial for investigative authorities of corruption cases to allocate investigators who have enough knowledge and experience in MLA to expedite MLA in their investigations. The SID of the Tokyo District Public Prosecutors' Office has a prosecutor who not only has great knowledge and experience in MLA but also a wide network functioning as informal channels. In situations where Japan requests MLA from foreign countries in the process of investigation of corruption cases committed by politicians and high-ranking officers, he or she rapidly takes necessary measures in cooperation with the International Division of the MOJ's Criminal Affairs Bureau, making the most of informal channels.

III. CONCLUSION

To tackle corruption offenders who use various methods to tamper with evidence, the collection and analysis of objective evidence and effective interrogation of suspects are both crucial to discovering the truth. As it were, these measures are like a pair of wheels that

Mr. Masamichi Kamimura, Director of the International Division of Ministry of the Criminal Affairs Bureau of the Justice, presented on MLA and extradition in Japan. <http://www.unafei.or.jp/english/pdf/PDF_GG6_Seminar/04-1_SP1.pdf>.

when properly working together produce the desired result. Moreover, to cope with the globalization of corruption cases, the importance of international cooperation is increasing more and more. UNAFEI hopes that this seminar establishes informal channels to facilitate international cooperation in the future.