

GROUP 2

COOPERATION BETWEEN THE POLICE AND PROSECUTORS

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I. INTRODUCTION

At the 120th UNAFEI International Senior Seminar, the participants from fifteen countries¹ discussed a topic of “Cooperation between the Police and Prosecutors” in their consideration of “Effective Administration of the Police and the Prosecution in Criminal Justice”. The purpose of the discussion was to suggest possible directions with which the police and prosecutors can work together to improve effectiveness in the investigation and the prosecution while maintaining accountability of the criminal justice system.

This report is the result of the above-mentioned discussion and was also facilitated by valuable contributions from the participants and the visiting experts.² As to the definition of basic terms used in the report, reference was made to the report of the 107th International Training Course of UNAFEI.³ Reference was also made to various resource materials, which were available to all of the participants.

II. BACKGROUND

A. Establishment of the Rule of Law

In the course of the discussion, the common roles of the police and prosecutors in criminal justice system was recognized and confirmed by the participants as follows:

The purpose of the criminal justice system is to realize the rule of law, which is one of the most fundamental conditions for the sustainable development of societies. For this purpose, justice has to be given to those who have broken the law while protecting due process of law. Accordingly, the police are empowered to conduct investigations to give justice to suspects, whereas prosecutors are empowered to check the investigation conducted by the police and to dispose the case for the prosecution, following the due process of law. In other words, prosecutors are vested with the responsibility of checking the police investigation against due process of law.

B. Consideration of Effectiveness

As was stipulated in the theme of the Seminar, participants’ attention was drawn to the importance of effectiveness. Effectiveness is indeed relevant to the issue of the cooperation between the police and prosecutors because of their ever-increasing workload especially in terms of the circumstances as follows:

1. Growing Challenges from Crime in Terms of Complexity and Multitude

Increasing complexity, diversity and multitude of crime in this modern society has been giving more and more challenges to criminal justice authorities, especially to the police and prosecutors.

For example, it was reported that, even in Germany where prosecutors have vested responsibility to take the lead in all investigation proceedings, the multitude of both criminal offences committed and of investigatory acts needed in

¹ Brazil, Chili, El Salvador, India, Indonesia, Japan, Kenya, Malaysia, Nepal, Pakistan, Papua New Genie, St. Christopher Nevis, Tanzania, Thailand, and Uganda

² Mr. Kim from the Judicial Research and Training Institute of Korea, Mr. Boeuf from the Crown Prosecution Service London, Mr. Siegismund from the Justice Ministry of Germany, Dr. Kittayarak from the Ministry of Justice of Thailand, Professor Castberg from the University of Hawaii, and Dr. Suddle from Police Balochistan Quetta of Pakistan.

³ Reports of the Course, 107th International Training Course

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connection therewith make it actually impossible for the public prosecution office to fulfill this obligation. It is well imaginable that, at least in Germany, investigations of prosecutors can be conducted almost entirely from their desk, with more intensive use of the telephone. This way of performing the work is frequently found in practice in Germany, because the enormous workload seldom allows prosecutors time for external investigatory acts.

On the other hand, such circumstances require the police to improve their capability in scientific analysis, information and data processing, international cooperation and so forth, which results in, at least to some extent, prosecutors' dependency on the specialized knowledge of the police. The police are also expected to react flexibly and expeditiously to the modern forms of crime, which calls for more discretion of the police in the criminal proceedings.

2. Increasing Responsibility in Terms of De-regulation

Currently, some countries including Japan are in the process of transition from societies of preconditioned ambiguous governmental regulations into societies of de-regulation with clearly stipulated rules and strict individual responsibility especially in the area of business activities. In such a society of de-regulation, law enforcement authorities should be expected to take more responsibilities in giving justice to those who violate the rules. Given the circumstances as such, urgent attention should be paid to the effectiveness of the process of investigation and prosecution.

III. ROLE OF PROSECUTORS IN INVESTIGATIONS

Apart from their responsibility to dispose criminal cases for prosecution, prosecutors in every country play some important roles in criminal investigation despite the differences in basic legal principles. In some countries, prosecutors have an overall responsibility over investigation, while in others they have a limited role in carrying out investigation.

In Germany, prosecutors are by law responsible for leading investigations by themselves and the police are only an investigatory body of the public prosecution office, whereas in reality it is the police who are actually leading investigations in most cases. Prosecutors are vested with similar responsibility in Korea. In Japan, prosecutors are also empowered to carry out investigations, but at the same time, the Code of Criminal Procedure states that the primary responsibility of investigation lies with the police. On the contrary, in other countries with common law traditions such as Kenya, Pakistan, Papua New Guinea, Tanzania and the United Kingdom, prosecutors play no role in investigation as such, but do exercise their advisory or supervisory authority to guide the police investigation in such ways as advising or instructing the police to carry out their investigation to certain direction.

A. Giving Guidance/Instructions to Police Investigators

One of the most important and common roles of prosecutors is to check police investigations against due process of law, while keeping the effectiveness of police investigation. In order to meet the rule of law standards, promote acceptance of court decisions by the accused and strengthen public confidence in the police's right to conduct searches and seizures in private premises, the investigation work of the police should be, at least in principle, critically monitored. Prosecutors' authorities in supervising and giving advice/instructions to police investigators can be viewed in this regard. The extent of such authorities varies from country to country, from non-binding advice to complete control over police investigation.

However, it should be noted that, in countries where prosecutors exercise complete control over police investigations, prosecutors tend to be directly responsible for police investigations themselves, rather than just checking police investigations, resulting in the loss of sense of responsibility among the police investigators.

In this context, it is also worth noting that, in the countries with common law tradition, there is a concern over the prosecutors' involvement in police investigation at the early stage of an enquiry, even though it is at the same time no doubt considered useful in improving good working relationships with the police. It was reported that, in the investigation of a murder in Wales in the United Kingdom, a prosecutor became engaged in the enquiry at an early stage advising on what powers the police had and how they might execute these powers. At the trial when cross-examined about a course of investigative action taken, one of the police officers responded to the effect that he had acted on the advice of the prosecutor. In due course the prosecutor concerned found himself in the unfamiliar position of being in the witness box being examined and cross-examined vigorously on his role in the investigation. Therefore, consideration should be given to the proper degree to which the division between the responsibilities for investigation can be kept apart from the responsibility for independent conduct of the prosecution. It was also reported that, because of the similar concern, prosecutors in the United States seldom interview witnesses directly especially in the case the witness is at the same time the accused.

It was suggested that, at least in those countries with common law tradition, while prosecutors need to be sensitized to the operational and strategic plans of police; they should not assume the “policing” role in general and restrict themselves to screening the police information in a more legal manner.

B. Supplementing Police Investigations

In the countries where prosecutors are empowered to conduct investigations, prosecutors, if needed so as to ensure convictions in court, can supplement police investigations. In some countries, prosecutors are empowered to instruct police officials to assist their investigations. In this context, some participants pointed out that a conflict could occur between such an instruction to the police officer from prosecutors and the organizational chain of command of the police.

C. Conducting their Own Investigations

In the countries where prosecutors are empowered to conduct investigations, prosecutors can initiate their own investigations. In many cases, prosecutors conduct their own investigations in such areas that prosecutors have competitive advantage over the police. Those areas include large-scale economic crime, political corruption cases, and so forth.

For example, in Hanover Germany, the public prosecution office set up a pilot investigation unit where investigation relating to property assets is conducted separately from other investigations. This unit has the sole task of tracing criminally tainted assets and of freezing them for the benefit of the state or of the victims of the offences concerned. The classical functions of clearing up the offence and conducting the criminal prosecution are the responsibility of other prosecutors acting in the same case. This central office for “organized crime and corruption” principally has a coordinating and response function for legal and organizational questions. It is also responsible for organizing and coordinating supra-departmental training events and exchanges of experience, the drafting of forms, and the assessment of success, including securing the assets frozen.

It is worth noting that, even in the jurisdiction of England and Wales of the United Kingdom where the principles of separating strictly the responsibility for investigation and prosecution was established in 1986 on the creation of the Crown Prosecution Service, such principles were swiftly jettisoned in relation to serious fraud offences. The Serious Fraud Office, which is staffed by lawyers, accountants and others with relevant experience, was created in 1988. It is a unified organization properly resourced with statutory powers of investigation. Working closely with the police, this Office controls investigation and prosecution.

Similarly in Thailand, where the prosecutors are not empowered to investigate by themselves, an establishment of the Special Investigation Bureau was recommended in 2001, by the Committee for the reorganization of the Ministry of Justice, which was chaired by the Deputy Prime Minister. The Special Investigation Bureau will have the jurisdiction to investigate “sophisticated crimes” as will be defined by law. The establishment of this Bureau will provide a scheme for prosecutors to work closely with the special investigators from the start so as to make more effective investigation and prosecution of such “sophisticated crimes”.

IV. PROBLEMS DISCUSSED

A. Psychological Traits of the Police and Prosecutors

After undergoing lengthy, laborious and complicated investigation process, police investigators generally tend to develop a feeling of exclusiveness, and feel that the entire investigation domain is their responsibility. As a result any sort of advice and instruction from outside is taken as interference and unnecessary. Resistance is shown if they are told to bring more substantial evidence, or amend or improve the evidence collected. Police officers and organizations tend to take their entire work and especially the case handling as a professional and skilled job. Though they work and do the investigation within their own legal, and procedural codes, their practical and operational framework makes them believe that they have their own chain of command system which works as efficiently as prosecutorial agencies and which they believe, can provide them guidance and instructions.

With academic background in jurisprudence hence having greater sensitivity to human rights, rule of law and due process, prosecutors tend to develop more legalistic approach in handling police files. Prosecutors will first examine the appropriateness of evidence and will then evaluate its fitness for the court proceedings. Pressure from colleagues in an investigating agency for prosecution may embarrass him in case his disposition appears to lead to acquittal. Similarly, as is the case in Nepal, investigators may bring applications for arrest warrants to a prosecutor even at midnight and ask for speedy scrutiny, which will put pressure and strain on the prosecutor.

These mutually repellant psyches of investigators and prosecutors have hampered the smooth working relationship between the two.

B. Conflicting Views over Case Disposition

Despite the difference in the legal system of each country, which governs the relationship between the police and prosecutors, most of the participants reported that the police feel frustrated when the prosecutors' case-disposition conflicts with the expectations of the police. It is totally disappointing for investigators if an arrested suspect is set free by prosecutors on the ground that the prerequisites have not been fulfilled for keeping the suspect in custody, or where investigatory activity despite the great deal of time and effort involved leads to the termination of the proceedings.

It was pointed out that in such cases prosecutors also feel stress, which may lead to negative influence on the working relation between the police and prosecutors.

C. Lack of Shared Common Goals

It was reported that, in England and Wales of the United Kingdom, there had been a lack of confluence in the aims and objectives of the police and the Crown Prosecution Service. The conviction of charged defendants had not been considered as a priority in the policing plan. A lack of sharing common goals with prosecutors as such can cause difficulty for prosecutors to motivate police to produce quality files on their investigations, especially in some of the countries with common law traditions where the prosecutors are empowered only to prosecute, but not to investigate.

In such cases where the police and prosecutors do not share the common goals in criminal proceedings, the police may develop practices, which are not compatible with the prosecutorial purposes, such as relying only on information that is not admissible as evidence in the court.

D. Lack of Objectivity

In some of the countries with common law traditions such as Australia,⁴ Kenya, Pakistan, Papua New Guinea and Tanzania, most criminal prosecutions in the lower courts are conducted by prosecutors who are full-time serving members of the police force. Even though there should be no disagreement between police investigators and prosecutors on the disposition of cases in such a system, several participants from those countries reported that a lack of independence of prosecutions in such a system leads to a lack of objectivity among prosecutors, which results in inappropriately screened prosecutions. As prosecutors are full time members of the police department themselves, and in some countries they wear the same police uniforms and share the same hierarchical chain of command structure as their colleague investigators, they feel inhibited to write an advice, which may substantially affect the investigations. A lack of appropriate supervision of and guidance to investigations in such a system may also result in a low conviction rate in the court.

It is also reported that, in some of these countries, there is a case in which those lawyers who otherwise do not foresee any future for themselves in private practices join the police as prosecutors. Such police prosecutors in some cases do not possess sufficient knowledge and ability to furnish appropriate guidance to police investigators. Moreover, in such countries, these prosecutors are sometimes unsatisfied with their promotion, pays and other facilities in the police organization. Accordingly, violation of due process, regulations and laws by the vested interests can go unchecked, as prosecutors does not possess enough skill and authority to caution or challenge any wrongdoing.

E. Lack of Discretion in Police Investigations

In the countries with civil law traditions such as Brazil, Chile, El Salvador, Germany, Indonesia, Italy, Japan and Korea, prosecutors are entrusted authorities concerning investigations, which include authority to implement investigations of its own, and authority to supervise, at least to some extent, police investigations.

In almost all civil law countries the entrustment of investigation and supervision of investigation to prosecutors have historical connotations. In some countries irrelevance of the police to human rights at certain times in the past or a particular event like arrest of a suspect who was later acquitted, lead to greater involvement of prosecutors in the course of investigations. On the other hand, events have taken place where the police have taken refuge behind the argument that their failure or inefficiency is due to interferences by prosecutors.

Some of the participants from those countries, however, reported their concerns over the excessive interference of prosecutors into police investigations. In some of those countries, the police are given very little discretion in the course

⁴ Chris Corns, *Police Summary Prosecutions: The Past, Present and Future* (1999)

of their investigation, resulting in a lack of flexibility in police investigation. In this context, it is worth noting that, in Italy, there is an argument that the police's stifling dependence on prosecutors is gravely undermining the professional competence of the police in the conduct of investigation.⁵ It was also pointed out that the increase of both complexity and multitude of crime is making prosecutors' complete supervision over all aspects of police investigation more and more unrealistic and ineffective.

It was also suggested that the establishment of a supervising organ such as a coordinating committee might be beneficial to mediate and coordinate the discretionary authorities of the police and prosecutors.

In Germany, the police are now intensifying their demands for an expansion of their police powers in criminal proceedings at the expense of the functions exercised by the public prosecution office and by judges, which were greeted with extreme caution by the judiciary. There is an opinion in Germany that, even though it is often considered appropriate to limit the power of prosecutors supervising investigations to the basic issues and central aspects of the investigation proceedings, and to give the police a free hand with regard to the detail, the police authorities should only be given additional powers if there is no doubt that they are fully capable of exercising them.

V. SYSTEMATIC RELATIONSHIP BETWEEN THE POLICE AND PROSECUTORS

A. Systematic Checks and Balance Mechanism of Criminal Justice

Participants were of the view that, it is rather natural and desirable for the two organizations, which bear different responsibilities to have conflicting views over certain case dispositions. Such conflicts between the police and prosecutors should be considered as evidence for the proper functioning of the checks and balances mechanism of the criminal justice system. Accordingly, the police should welcome, or at least try not to avoid, such checks from prosecutors. On the other hand, the prosecutors' supervisory functions such as giving advice/instructions to police investigators should always be accompanied with clear and reasonable explanations of their grounds.

It was pointed out that, in order to make such a relationship more effective, both sides should make efforts to understand and respect each other's responsibility in criminal procedure. The police should respect the prosecutors' advice with a view to sustain successful prosecution, and try their best to protect the due process of law in the course of their investigation. Prosecutors should try to understand the difficulty the police are facing in the course of police investigations and to pay as much respect as possible, within existing legal framework of each country, to the discretion of the police in their investigation.

B. Elaboration of the Relationship

With a view to enhancing the effectiveness in the collaboration between the police and prosecutors, several suggestions were discussed. Since there is no single clear solution to improve such a relationship, each country, depending on the circumstances and practical realities, can adopt one or a combination of the below stated models to improve the working relationship which, all the participants acknowledged, is inevitable for the systematic checks and balances mechanism between the police and prosecutors to effectively function in the modern society.

1. Sharing Common Values

Effective criminal justice management requires concerted action of all relevant authorities in the government, which have the same ultimate goal of realization of the rule of law. Those authorities should share substantial common values which are supported by strong political will, such as the "Joint Business Plan for the Criminal Justice System" in England and Wales of the United Kingdom. Such notion of "joined-up working" should surely promote practical cooperation between the police and prosecutors.

It was pointed out that, insofar as the prosecution concepts and investigation strategies of the police can have an impact on criminal prosecution, involvement of the public prosecution office in the form of mutual consultation and coordination seems to be effective. There might otherwise be a reason to fear that the measures taken by the police would not be followed up by prosecutors and would thus prove fruitless. In Germany, the arrangement spelled out from the "Joint Guideline of the Ministers of Justice and Ministers of the Interior to Cooperation between the Public Prosecution Office and the Police in the Prosecution of Organized Crime" is a prime example of how to structure cooperation extending beyond individual cases between the public prosecution office and the police to combat organized crime. Strategies for combating domestic violence have also been developed in Germany by the public prosecution office and the police in

⁵ Giuseppe Di Federico, Prosecutorial Independence and the Democratic Requirement of Accountability in Italy (1998)

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collaboration with other authorities, in order to effectively protect women and children against violence, and to impose appropriate sanctions for offences and prevent recidivism.

2. More Communication

Participants were of the view that the key to the good working relation between the police and prosecutors is the promotion of mutual understanding through informal person-to-person contact.

(i) *Intensive Early Stage Consultation*

Intensive consultation with the police about matters arising in connection with a particular investigation reduces police frustration about releasing the accused or about subsequent termination of the proceedings, and leads to better results in the investigation, because there can then be precise determination in advance of what is actually needed for the purpose of preparing the main hearing. The motivation for efficient collaboration between police investigators and prosecutors cannot be overestimated in relation to the goal of avoiding, or at least reducing, frustration experienced by the police.

The same approach can be observed in the countries of common law tradition. In England and Wales of the United Kingdom, special *ad hoc* Crown Prosecution Service units are set up in such events as riots. After first successful arrangement of this kind in 1990 in London, in which prosecutors with police officers analyzed the available material identifying perpetrators of crime and advising the police which of those identified as being involved should be the focus of attention. Prosecutors were not only able to guide the police to those most culpable, but also to indicate some sort of framework around which potential interviews could be built. The approach undoubtedly assisted in focusing on what had to be done and eliminated much effort, which might otherwise have been wasted. Similar tactics are being adopted in other riot cases after football matches, and May Day, thus economies of effort and improved chances of successful convictions were prompted. As London has been subjected to May Day riots aimed at centers of commerce, the degree of liaison between police officers in devising strategies to deal with those arrested has been a feature and planning meeting now regularly take place in the weeks preceding May Day.

(ii) *Regular Meetings, Workshops, Seminars*

Several participants suggested that regular meetings at least once a month would be beneficial. It was pointed out that regular joint official discussion between the police and prosecutors might lead to coordinated and simplified investigations.

Apart from regular meetings, it was further suggested that regular workshops and seminar should be used to exchange views on areas of contention in order to forge closer working relationship. During these seminars, sensitization should be done to ensure that both prosecutors and the police understand that they are set up for the same purpose to combat crime.

(iii) *Close Liaison*

Some participants emphasized the benefit of sending liaison to each other's office. In this context, it is worth noting that, in the United Kingdom, the placement of prosecutors in police stations, even though the efforts to offer pre-charge advice to police investigators was not proven to be effective, indeed produced an improved working relationship between the police and the prosecutors.⁶ Furthermore, consideration should be given to the secondment of personnel between the police organization and the prosecutors' office.

Also in the countries of civil law tradition, relocation of offices such as having the police criminal investigation department at the prosecutors' office, or else having prosecutors at the police criminal investigation department is considered useful for intensifying cooperation and reduce bureaucratic sequences as a result of the closer proximity. It is considered to be obvious that adjacent accommodation for the prosecutors' office and the police may also be beneficial. In fact, the police headquarters of some of the large German cities have made an office available on their premises to prosecutors.

In Germany, there is also a police project where they have established "the House of Juvenile Justice" where the youth welfare office, the police and prosecutors are under one roof and the nearby local court keeps time slots for hearing the cases. All institutions involved exchange their knowledge and coordinate assistance measures in the event of investigations or sanctions.

⁶ John Baldwin and Adrian Hunt, *Prosecutors Advising in Police Stations* (1998)

3. Legislation

Some participants were of the view that there should be legal provisions to clearly provide the role of prosecutors and the police. For example, in Brazil, after the promulgation of the constitution in 1988, the power of prosecutors was increased and prosecutors were given supervisory powers over the police. As a result the police have since lost discretion as to the extent of their responsibility or duty toward prosecution, creating imbalances between the police and prosecutors. One of the problems here is a lack of a provision with a clear definition of the authority of prosecutors in these criteria.

4. Cooperation Models for Simplified Proceedings/Diversion

It was suggested that consideration should be given to the question of whether closer cooperation between the police and prosecutors in the form of delegation of responsibilities or preliminary examinations could simplify and speed up the conclusive handling of criminal proceedings.

An example of such cooperation is seen in Germany where cooperation models are used to simplify proceedings in certain cases. In juvenile delinquency cases there are guidelines for combating juvenile delinquency that assign a broad range of responsibilities to the police in order to reduce the burden on the judicial authorities without encroaching on the authority of the public prosecution office. The term “diversion” used in this context means a deviation in sanction practice from the classic formal procedure involving the judicial authorities in favor of an informal, swift and flexible response. Accordingly, preference of charges and conviction may, following the exercise of socio-educational influence or implementation of socio-educational measures, be replaced by termination of the proceedings. The prerequisite for such flexible handling of proceedings is that it applies only to criminal offences of a minor nature. In order to submit only really suitable cases to prosecutors or the court, the police must determine in their investigations whether the accused has already voluntarily rendered meaningful socio-educational accomplishments or voluntarily suggests or actually renders such accomplishments. In such cases, the distribution of labor between the police and the public prosecution office is advantageous for all the parties involved, including the young person concerned. The aim of such administrative provisions is to provide and improve cooperation between the police and prosecutors, the youth welfare authorities and the court among others.

There are similar guidelines for mediation between the perpetrator and the victim in Germany, which instruct the police to submit a case they deem suitable for mediation between the perpetrator and the victim to the public prosecution office without delay. Insofar as the accused and the person harmed agree to such mediation, the public prosecution office requests a conflict mediation agency to carry it out. Upon conclusion of mediation between the perpetrator and the victim, the files are submitted to the public prosecution office, which then decides, with the involvement of the court if necessary, whether the proceeding should be terminated or whether the circumstances of the act nevertheless give cause for preferment of charges.

Models for more efficient efforts to combat shoplifting are being developed also in Germany, for efficient cooperation between the police and the public prosecution office. In the case of loot with a value of less than fifty dollars and if the perpetrator does not already have a theft record, the police offer the accused the option of terminating the proceedings upon payment of a regulatory fine. It is the decision of the public prosecution office whether to decide the proceedings should be terminated, but usually it concludes the proceedings.

V. CONCLUSION

In order to realize the rule of law, the prosecutors’ guidance to the police investigation is *sine-qua-non* for civilized and democratic society. Modern police forces are highly professional, well trained and well equipped while prosecutors on the other hand are highly qualified legal brains. It is apparent that the police and prosecutors are getting more and more mutually dependent due to the increasing complexity, multitude and other challenges of crime emerging in modern societies. Considering the heavy workload the police and prosecutors are facing, it is quite understandable that, in some countries, various ways of effective distribution of labor between the two organizations are being experimented.

Given such circumstances, it is not surprising that, despite the difference in the basic legal principles in criminal proceedings, or historical background relating to the relation between the police and prosecutors, most of the countries seem to be heading to the same direction, where closer collaboration between the police and prosecutors is emphasized.

In this context, it should be kept in mind that the development of new forms of cooperation between the police and prosecutors should not be viewed as just an adjustment for the sake of convenience, on the contrary, such developments in many countries are structured upon the deep consideration as to the independently entrusted roles of the police and

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prosecutors in the course of realizing the rule of law. The relationship between the police and prosecutors inevitably and desirably involves, to some extent, a conflicting nature. Accordingly, close collaboration between the police and prosecutors should be only developed on such a challenging, though positively stimulating, relationship.