

GROUP 2

MEASURES FOR EFFECTIVE TRIAL ADVOCACY AND COOPERATION BETWEEN PUBLIC PROSECUTORS AND INVESTIGATORS

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I. INTRODUCTION

The group started its group discussion on 3 September 2014. Mr. Stipp was elected as the Chairperson, Mr. Fukunaga as Co-Chairperson, Mr. Wangchuk as Rapporteur and Mr. Veeradej as Co-Rapporteur through general consensus. The Group started its discussion on the subject matter keeping in mind the following agenda: 1) Measures for Effective Trial Advocacy; 2) Effective involvement in investigation by prosecutors and cooperation between prosecutors and investigators; 3) Utilization of diversion programmes by prosecutors and investigators to bypass the traditional criminal justice system.

II. SUMMARY OF THE DISCUSSIONS

A. Measures for Effective Trial Advocacy

On this subject, the group discussed the need for making opening addresses and closing arguments concisely and efficiently, and also the need for questioning the witnesses and accused effectively at trial depending on the personalities of the witnesses and the accused and issues of the cases.

Most of the participants stated that the opening address and closing arguments were not in practice in their countries unlike the British system, which was clearly brought out by Ms. Janice Brennan (Barrister, the United Kingdom) in her lecture. In Japan, the opening address was sometimes done using electronic aids. It was mainly done in the *Saiban-in* Court in order to reconstruct and illustrate the history of the case where lay judges are involved in the hearing and trial procedure. The group suggested that the systems of opening address and closing arguments were effective in some countries but in other countries, due to lack of facilities, it was not practiced. Therefore, the group agreed that continued training would be a good practice to speed up the trial procedure and the usage of material facilities, and electronic aids should be introduced to enhance the outcome.

On questioning witnesses and the accused, the group discussed the protection of the witness and the use of intermediaries in cases where mentally disabled persons and juveniles are involved. The group discussed the experience of one of the participants as a first-time witness and suggested that the prosecutor or the defence lawyers should have a conversation before the trial, when necessary, with the witness, to avoid confusion or nervousness of the witness.

The group stressed the protection of the witness and his/her family from being intimidated by the suspects/offenders. Many suggested that use of video conferencing for the oral examination by the judge/prosecutor/defence lawyer was the best solution. Some also suggested that a screen be used in front of the witness box so that the witness would not be seen and intimidated by the suspect.

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The group also discussed the procedure for hearing from victims of sexual offences, juveniles and those women who were not able to face the crowd. Some participants suggested that oral testimony should be done through video conferencing from a separate room with the assistance of intermediaries as we saw during the visit to the Tokyo District Court.

In case of expert opinions, especially when the expert is abroad or residing in another country, the method of video conferencing may be adopted as mentioned by Ms. Janice Brennan in her presentation. As she stressed, in those cases it is better to ask for the result of the expertise before presenting the result.

The Group discussion on the above subject matter came to an end with a general consensus with the following suggestions:

- a) Relying on the equipment available such as the use of electronic media and other material facilities for opening addresses and closing arguments before the trial is a good way of illustrating the case, but it may be practiced depending on the severity and nature of the offence.
- b) The effective method of questioning the accused is to give him/her the possibility to speak freely as much as possible without interference and subsequently ask him/her specific questions.
- c) To protect the witness and the victim during the trial, electronic devices (e.g., video conferencing, visual/audio devices) and intermediaries (psychologists, interpreters, translators, etc.) should be used for oral testimony as best practices. In addition, to protect the juvenile offender, a closed-room trial should be guaranteed.
- d) For achieving effective trial advocacy, continued training should be given to the prosecutors/defence lawyers, court officials and investigators. Equipment and materials are needed to facilitate the explanation of the case. If needed, rehearsal before the trial is recommended.

B. Effective Involvement in Investigation by Prosecutors and Cooperation between Prosecutors and Investigators

The group discussed the above subject matter keeping in mind, the current legislation, current practices and analysis of advantages and disadvantages of such legislation and practices. Most participants agreed that in their countries, the prosecutors have the power to initiate investigation, investigate independently, give instruction to investigative agencies for supplementary investigations and send the cases back to the investigative agencies if there is a lack of evidence to prosecute. However, in some of the countries, such practice does not exist and is not applicable since the power of investigation lies solely with the investigators (police), and also since there are not enough prosecutors or separate investigative agencies.

The group also discussed current cooperative practices between the prosecutors and investigators. Many participants agreed that the prosecutors should have involvement at the early stage of the investigation because the crime scene should be checked from the point of view of a professional lawyer. The group agreed that such cooperation and involvement of both the prosecutors and investigators must take place at an early stage, but the degree of this cooperative practices may vary in each jurisdiction. In some countries prosecutors cannot work side by side with the investigators because of the workload of the prosecutors (insufficient in number, and prosecutors are busy in court). However, in such cases, advice from the prosecutors is recommended.

During the group discussion it was learned that many countries have many different relations and practices between the two stakeholders. In some countries, the investigations are being conducted by the investigators alone without the involvement of the prosecutors, and the investigation report is submitted to the prosecutor after the investigation. In such cases, the prosecutors have the right to send back the investigation report if there was a lack of evidence. This procedure is time consuming and many times not effective. In some countries the prosecutors work closely with the investigators; therefore, the cases are not sent back.

The group also discussed whether it was mandatory for the prosecutor to go to the crime scene in all the cases; it was found not necessary for the prosecutors to go to every crime scene, but they may do so depending on the magnitude/gravity of the case.

The group discussed the advantages and disadvantages of the cooperative practices between the prosecutor and the investigator, and the following points were suggested:

- i. Most of the participants agreed that the objective of both stakeholders is to prosecute the offender in a court of law and for speedy trial; therefore, it was advantageous to have the two working in close cooperation at an early stage of criminal investigation because the investigator can have the benefit from the legal advice provided by the prosecutors, and the prosecutors benefit by getting the required evidence and also by knowing the background of the case in advance of trial
- ii. The collective responsibility and collective decision making at an early stage of investigation will result in a well-informed investigation and enhance transparency, and promote the protection of human rights if the two stakeholders work in close cooperation, and many mistakes can be corrected at an early stage. However, the close cooperation between the prosecutors and the investigators may be inter-related and based on the mutual understanding and respect for each other's role in criminal investigation.
- iii. The disadvantage of having the involvement of the prosecutor at an early stage of investigation is that the whole process of investigation may get diverted by the guidance of the prosecutor and may result in biasness, absentmindedness and, possibly, dependence of the investigators on the prosecutor's guidance in the whole process of investigation. Therefore, involvement of the prosecutor at an early stage of investigation may vary with the crime situation and degree of the crime in each country. However, the group agreed that for heinous crimes, the involvement of the prosecutor is essential.
- iv. Each country has its own system of legislation regarding the prosecutor's rights; the group discussed that since the involvement of the prosecutors at an early stage of investigation has both advantages and disadvantages, there should be a mechanism to check and balance the procedure for transparency. In some countries, they have the internal review according to the chain of command. However, in many countries, the non-prosecution orders are subjected to review by the court, other organizations or committee as a measure of checks and balances.

C. Utilization of Diversion Programmes by Prosecutors and Investigators to Bypass the Traditional Criminal Justice System

The group discussed the above subject matter keeping in mind the following points of discussion:

(i) Suspension of prosecution by prosecutors

Some participants suggested that in many countries, the discretion to issue non-prosecution orders or to dismiss the case relies solely to the approval of the court, and the trial procedure for such approval could be considered as a burden and time-consuming procedure for the court. Therefore, the prosecutor should be entitled to the power to issue non-prosecution orders or to dismiss cases during the prosecution stage; however, the exercise of the prosecutor's power should be subjected to checks and balances in each country for transparency and to check the misuse of authority.

(ii) Plea bargaining

Many participants agreed that plea bargaining at the pretrial investigation stage may be an effective method of diversion. The advantage of this method is to reduce the time of investigation due to the fact that the accused is willing to cooperate in investigation for a lesser charge, thereby avoiding lengthy trial procedure, and the trial will be conducted only for the purpose of confirming the agreement. Moreover, cases solved through this method as alternative dispute resolution are unlikely to be appealed since the accused is satisfied through such plea bargaining.

(iii) Non-referral of non-serious cases from investigators to prosecutors

During the discussion, the group did not find sufficient legal background supporting the non-referral of non-serious cases to the prosecutors. However, in some countries there are exceptions to such cases. For example, in Japan, the chief prosecutor of the district prosecutors' office gives standards that define which cases may be dropped in advance to chief investigators. These standards allow investigators to drop minor cases such as a minor shoplifting. However, the investigators have to send summary reports of the minor cases they have dropped to the district public prosecutors' office, and prosecutors confirm whether the investigator observed the standards. The non-referral of non-serious cases to the prosecutor would be an effective measure of diversion supported by legal background.

(iv) Providing medical treatment to drug addicts or mentally disordered offenders instead of punishment

The group agreed that the offenders who are mentally unfit to stand trial should not be subjected to punishment because the crimes they commit are out of ignorance and without intent; therefore, they should be given medical treatment to correct their mental disorders. In the case of drug addicts, the majority of the group stated that the offender should be given medical treatment and rehabilitation programmes on humanitarian grounds, instead of or together with punishment.

(v) Administrative disposition of traffic cases etc.

In most of the countries, traffic cases are disposed of at the administrative level by imposing fines and through mediation or mutual compromises between the aggrieved and suspects. This practice not only saves time and workload of the three stakeholders of the criminal justice system (courts, prosecutors and investigators), but it also benefits both the victim and the suspects. In the Philippines, as pointed out by Mr. Gaña in his lecture, they have mediation at the local community level known as *Lupon Tagapamayapa*, literally meaning peace keeping council, which is not a judicial tribunal but has the authority to bring parties together for amicable settlements of their disputes; such mediation may be adopted as a diversion method too.

III. CONCLUSION

At the end of the discussion, the Group reached a consensus that the following should be recommended as possible measures for Effective Trial Advocacy and Cooperation between Public Prosecutors and Investigators:

1. For measures for effective trial advocacy, proper projection of the case in the pre-trial stage through making opening statements and closing arguments, when applicable, using the best available method should be adopted so that the Judge or the Jury understand the case better and clearly before the onset of the trial, and they may pass judgement accordingly.
2. Protection of witnesses through using electronic media such as video links, closed-room trials and screens would enhance the confidence of the witnesses and victims to come forward and reveal necessary evidence. In cases of disabled persons and juveniles, services of psychologists, interpreters and experts are very important to deliver effective justice and speedy trials.
3. The involvement of the prosecutors at an early stage of investigation leads to effective indictment and speedy trial.
4. It is suggested that there should be close cooperation and coordination between the prosecutors and the investigators throughout the whole criminal justice system for efficient and speedy trials, with mutual respect for each other's roles and responsibilities.
5. The group considered that the rights of the suspect or accused should be regarded, and diversion methods should be applied when applicable. Some of the suspects are juveniles, mentally disordered persons, and first-time offenders of petty cases.
6. It is suggested that the diversion method of suspension of trial, plea bargaining, and mediation

through mutual agreement should be adopted as diversion and correctional measures to bypass the traditional criminal justice system. The prosecutors and the investigators should be given the discretionary power by law to utilize such diversion programmes with a system of checks and balances.