ANNUAL REPORT FOR 1997

and

RESOURCE MATERIAL SERIES No. 53

UNAFEI

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Participants' Papers

INTRODUCTORY NOTE

The Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) is proud to submit to the international community the Annual Report for 1997 and Resource Material Series No. 53.

In the first part of this publication, the Annual Report outlines the Institute's main activities in 1997, as well the work programme for 1998.

Resource Material Series No. 53 comprises the second part of this publication. It contains the work product of the 107th International Training Course, "The Role and Function of Prosecution in Criminal Justice", which was conducted at UNAFEI from 1 September to 21 November 1997. Specifically, the papers contributed by the visiting experts, selected country reports from among the Course participants, and the reports of the Course are published.

Briefly, I would like digress and take this opportunity to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice and the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation. Without their indispensable and unwavering support, UNAFEI international training programmes would not be so successful.

Resource Material Series No. 53 also features the Ninth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions. This meeting was convened on 27 October 1997 with a twofold purpose: to review and assess the work accomplished by UNAFEI in the past, and to consider proposals to improve and enhance future programmes. Contained herein are my report to the Committee on the recent activities and future perspectives of UNAFEI and the evaluation report prepared by the Committee.

In my report to the Ad Hoc Advisory Committee, I explained that the publications of the Institute are designed to meet the practical needs (including training) of criminal justice officials by providing comprehensive information on urgent and contemporary criminal justice issues. Primarily these efforts have been realized through the Resource Material Series. Unfortunately, in recent years, the timeliness of UNAFEI's publication of the Resource Material Series greatly diminished—falling behind by more than one year.

However, it is truly my pleasure to report that the completion of Resource Material Series No. 53 marks the end of a black chapter in UNAFEI history. Owing to the truly herculean efforts by the editors of the Resource Material Series, Mr. Yuzuru Takahashi (Chief of Training Division) and Ms. Ana M. Vander Woude (Linguistic Adviser), an unprecedented five editions of the Resource Material Series have been published in a period of less than one year, bringing the institute up-to-date. In consideration of the above, I must request the understanding of the selected authors for not having sufficient time to refer the manuscripts back to them before publication.

Moreover, to widen the scope of UNAFEI's target audience and to disseminate even more rapidly our training programme results, the Resource Material Series, as well as the UNAFEI Newsletter, will be available soon on our new homepage, which is scheduled to open in the very near future.

Resource Material Series No. 53 is significant for another reason also. Towards further increasing the international perspective of our publications, the number of participants' papers published by UNAFEI has been increased from the usual four or five to ten. Regrettably, not all the papers submitted by the Course participants could be published, but certainly, a larger representation is present now.

By continuing to improve its training, research and publication activities, UNAFEI wishes to demonstrate its firm commitment to promoting the sound development of criminal justice administration in the Asia-Pacific region, as well as the entire international community.

January 1998

Toichi Fujiwara
Director of UNAFEI

PART ONE

ANNUAL REPORT FOR 1997

- ***Main Activities of UNAFEI***
- ***UNAFEI Work Programme for 1998***

UNAFEI

MAIN ACTIVITIES OF UNAFEI
(1 January 1997 - 31 December 1997)

I. ROLE AND MANDATE

The Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) was established in Tokyo, Japan in 1961 pursuant to an agreement between the United Nations and the Government of Japan. Its goal is to contribute to sound social development in Asia and the Pacific region by promoting regional cooperation in the field of crime prevention and criminal justice through training and research.

UNAFEI has paid the utmost attention to the priority themes identified by the Commission on Crime Prevention and Criminal Justice at its first session. Moreover, UNAFEI has been taking up urgent, contemporary problems in the administration of criminal justice in the region, especially problems generated by rapid socio-economic change (e.g., drug trafficking, drug abuse, organized crime, corruption, prison overcrowding and juvenile delinquency) as the main themes and topics for its training courses, seminars and research projects.

II. TRAINING

Training is the principal area and priority of the Institute's work programmes. In the international training courses and seminars, participants discuss and study pressing problems of criminal justice administration from various perspectives. They deepen their understanding, with the help of lectures and advice by the UNAFEI faculty, visiting experts and *ad hoc* lecturers. This so-called "problem-solving through an integrated approach" is one of the chief characteristics of UNAFEI programmes.

Each year, UNAFEI conducts two international training courses (duration: three months) and one international seminar (duration: one month). Approximately 60 government officials from various overseas countries receive fellowships from the Japan International Cooperation Agency (JICA; a governmental agency for ODA programmes) each year to participate in UNAFEI training programmes.

Training courses and seminars are attended by both overseas and Japanese participants. Overseas participants come not only from the Asia-Pacific region but also from the Middle and Near East, Latin America and Africa. These participants are experienced practitioners and top-level administrators holding relatively senior positions in criminal justice fields.

During its 36 years of existence, UNAFEI has conducted a total of 107 international training courses and seminars, in which approximately 2,593 criminal justice personnel have participated, representing 89 different countries. In their respective countries, UNAFEI alumni have been playing leading roles and holding important posts in the fields of crime prevention and the treatment of offenders and in related organizations.

A. The 105th International Seminar

1. Introduction

From 27 January to 28 February 1997, 25 participants from 19 countries attended the 105th International Seminar to examine the main theme of "The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials."

2. Methodology

Firstly, the Seminar participants respectively introduced their countries' experiences regarding corruption. Secondly, General Discussion sessions in the conference hall examined the subtopics of the main theme. In sum, the causes and dynamics of corruption were analyzed in order to seek concrete countermeasures. In order to conduct each session effeciently, the participants were divided into the following six groups under the guidance of faculty advisers:

Topic 1: Current Situation of Corruption by Public Officials,
Topic 2: The Importance of the Independence and Neutrality of Investigative Agencies,
Topic 3: Corruption by Public Officials: Current Problems in Administrating Criminal Justice and Solutions in General at the Investigation Stage,
Topic 4: Current Problems in Administrating Criminal Justice and Their Solutions in Regards to Corruption by Public Officials at the Trial Stage,
Topic 5: General Measures to Prevent Corruption, and
Topic 6: Corruption in the Criminal Justice System and Preventive Measures.

Each group elected a chairperson and rapporteur to organize the discussions. Subsequently in the conference hall, all the participants and the UNAFEI faculty seriously studied the designated subtopics and exchanged views. Final reports were complied based on said discussion, which were ultimately adopted as the reports of the Seminar. These reports will be printed in their entirety in UNAFEI Resource Material Series No. 52.

3. Outcome Summary

Regrettably, whether in developed or developing countries, some form of corruption exists at all levels of government—including the criminal justice system. Of course, the ideal solution would be to seek measures towards the eradication of corruption. However, such a task would be practically unrealistic. Thus, it is incumbent on the criminal justice system of each country to fight corruption effectively as the second best option.

The complexity and the different facets of corruption made discussions quite challenging. Obstacles included such factors as the absence of a clear and universal definition of corruption and the multitude of interrelated causal factors (e.g., different political systems, criminal justice systems, cultural values and beliefs, economic development, etc.).

First and foremost, a sustained drive against bribery and corruption requires a wholly independent and neutral investigative agency and judiciary. This should be sought in accordance with the situation of the country, whether resulting in the establishment of new agencies and courts or improving existing ones.

As to countermeasures, greater transparency is suggested at the recruitment and promotion stages in order to prevent such factors as nepotism, favoritism, political

interference and bribery. A code of conduct and ethical standards should be adopted also and stringently enforced. Other measures considered to be notable include effective training programs, good working conditions guaranteed by a high salary and allowances, internal and external inspection, and the use of job rotation and job enrichment as administrative tools. Also recommended is a system similar to the ombudsman office of some countries.

Additionally, the adoption of a system requiring the periodic submission and publication of an official's statement of assets and liabilities is seen as a strong anticipatory measure to hinder the commission of corruption. Finally, it is reiterated that a penalty system that is commensurate with the tremendous power and responsibility placed upon the hands and shoulders of public officials should be put in place as a deterrent to the commission of corruption.

However, even the implementation of all of the above measures would not suffice to control corruption without the involvement of the public. To this end, public education campaigns regarding corruption and the debilitating effects of corruption on their daily lives would go a long way to sustaining the drive against this menace. Equally important is establishing measures which encourage the public to play a proactive role in identifying areas of corruption yet protect their privacy interests such as "Whistle Blowing" and "P.O. Box" systems.

B. The 106th International Training Course

1. Introduction

UNAFEI conducted the 106th International Training Course (from 14 April to 4 July 1997) with the main theme, "The Quest for Effective Juvenile Justice Administration." This Course consisted of 29 participants from 19 countries.

The Institute's selection of this theme reflects its concerns that juvenile delinquency is becoming increasingly serious and rampant in the world, and that juveniles committing heinous offences are becoming younger and younger and coming from all walks of life. Criminal justice practitioners should seriously cope with such situations by improving the juvenile justice administration.

2. Methodology

The participants identified the causes and nature of juvenile delinquency and searched for effective countermeasures and prevention activities. Also considered were the proper dispositions and treatment programs for juvenile delinquents, making reference to the role, use and application of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

The objectives were primarily realized through the Individual Presentations and the Group Workshop sessions. In the former, each participant presented the actual situation, problems and future prospects of his respective country with respect to the main theme of the Course. The Group Workshops further examined the subtopics of the main theme. To facilitate discussions, the participants were divided into the following three groups under the guidance of faculty advisers:

Group 1: Current Situation and Preventive Measures,
Group 2: Dispositions Rendered by Criminal Justice Agencies, and
Group 3: Institutional Treatment and Community-Based Programmes.

Each group elected a chairperson(s) and rapporteur(s) to organize the discussions. The group members seriously studied the designated subtopics and exchanged their views based on information obtained through personal experience, the Individual Presentations, lectures and so forth. Nineteen sessions were allocated for Group discussion.

In the eighth week, Plenary Meetings were held to discuss the interim outline of the Group Workshop reports and to offer suggestions and comments. During the final Plenary Meetings in the tenth week, drafts of the Group Workshop reports were examined and critiqued by all the participants and the UNAFEI faculty. Based on these discussions, the Groups further refined their reports and presented them in the Report-Back Session, where they were endorsed as the reports of the Course. The full texts of the reports will be published in UNAFEI Resource Material Series No. 52.

3. Outcome Summary

The lack of a universally recognized definition for "juvenile" places limitations on responses to the problem of juvenile delinquency worldwide. Moreover, the lack of a standard reference age makes comparative international evaluations difficult.

Juvenile delinquency cannot be entirely considered a criminal justice-related problem. In effect there is ample evidence to suggest that delinquency is just one aspect of larger antisocial behavior. Traditionally problems of juveniles were managed by the family and extended family structures. However, increasingly the state has had to adopt a role in loco parentis. Consequently, special training on juvenile delinquency should be imparted to criminal justice officers in order to create better understanding and coordination amongst them to cope uniformly with such problems.

The need to establish a juvenile court system in the respective countries with professionally qualified personnel, as well as broad jurisdiction and decision-making power, was emphasized by the participants as a major step in the improvement of the juvenile justice system. Also underscored was the need for police or public prosecutors to perform the prosecution role in juvenile courts to alleviate the difficulty of fact-finding, especially in a plea of not guilty.

Diversion has the major advantage of minimizing the stigmatization of the juvenile offender. Moreover, aware of the fact that research suggests that the majority of delinquent children rarely re-offend, the participants were convinced that it should be encouraged to minimize the adverse effects of the juvenile justice system.

The police cautioning programs in Australia and the suspension of prosecution of juvenile offenders on the condition of parental guidance in the Republic of Korea provide good examples of diversion by the police and public prosecutors. Additionally, the disposal of juvenile offenders by agencies outside the criminal justice system like the family conference system of New Zealand and the mediation system in Germany were seen as good diversion measures.

In regards to criminal punishment, deprivation of liberty should be of the last resort, limited to those cases in which a juvenile has been adjudicated of a serious act involving violence against another person or persists in committing other serious offences and there is not any other appropriate response.

If a juvenile is institutionalized, the loss of liberty must be restricted to the minimum possible degree with special institutional arrangements for confinement and differences in kinds of offenders, offences and institutions. Additionally, more attention and importance should be given to the treatment of the juvenile delinquent than to his punishment. The objective of an institution should be to provide the juvenile with care, protection, education and vocational skills with a view to assisting him to become a good and law-abiding citizen.

C. The 107th Inernational Training Course

1. Introduction

From 1 September to 21 November 1997, UNAFEI conducted the 107th International Training Course with the main theme, "The Role and Function of Prosecution in the Criminal Justice." This Course consisted of 29 participants from 19 countries.

2. Methodology

Although the degree of prosecutors' authority and responsibility varies from country to country, it is commonly recognized that they play a crucial role in the effective and efficient administration of criminal justice. A large number of countries suffer from a low conviction rate, shortage of staff, delayed proceedings in investigation and trial, and overcrowding. Based on such actual and specific problems faced by each country, the 107th Course participants explored solutions to further improve prosecution systems and practices from the prosecutors' point of view, which would thereby contribute to the development of the whole criminal justice system. Particularly, during this Training Course, the role and function of prosecutors at the stages of investigation, initiation of prosecution and trial were extensively deliberated.

The objectives were primarily realized through the Individual Presentations and the Group Workshop sessions. In the former, each participant presented the actual situation, problems and future prospects of his respective country with respect to the main theme of the Course. The Group Workshops further examined the subtopics of the main theme. To facilitate discussions, the participants were divided into the following three groups under the guidance of faculty advisers:

Group 1: The Relationship of the Prosecution with the Police and Investigative Responsibility,
Group 2: The Role of Prosecution in the Screening of Criminal Cases, and
Group 3: Issues Concerning Prosecution in Relation to Conviction, Speedy Trial and Sentencing.

Each group elected a chairperson(s) and rapporteur(s) to organize the discussions. The group members seriously studied the designated subtopics and exchanged their views based on information obtained through personal experience, the Individual Presentations, lectures and so forth. Nineteen sessions were allocated for Group discussion.

In the eighth week, Plenary Meetings were held to discuss the interim outline of the Group Workshop reports and to offer suggestions and comments. During the final Plenary Meetings in the tenth week, drafts of the Group Workshop reports were examined and critiqued by all the participants and the UNAFEI faculty. Based on these discussions,

the Groups further refined their reports and presented them in the Report-Back Session, where they were endorsed as the reports of the Course. The reports will be published in full in UNAFEI Resource Material Series No. 53.

3. Outcome Summary

Unquestionably, there is a need for sustained cooperation between prosecutors, investigating agencies, defense counsel, judges, support staff and all persons involved in the administration of criminal justice. In particular, investigation and prosecution are fundamentally linked. In countries where prosecutors have an authorized role in police investigation or where they have the authority to investigate, the results of investigation are good and the conviction rate is higher than in countries where prosecutors are afforded neither role. For example, in Singapore, Sri Lanka and Thailand, prosecutors can only depend on the police's files in coming to a decision of whether to prosecute or not. However, coupled with the lack of coordination between the police and prosecution, such practice often results in insufficient evidence due to poor investigation and consequently inadequate trial preparation.

Additionally, prosecution in many countries plays a very vital role in case screening. In essence, prosecution acts as a quasi-judicial entity, operating at an intermediate position between the Executive and the Judiciary. The participants identified several presecution-related problems that affect screening such as a lack of investigative skills and expertise due to the absence of powers of investigations.

The participants recommended enhancing the discretion of the prosecution to withdraw prosecution. In some deserving cases, the withdrawal of prosecution would give offenders a chance to reform and reintegrate into society. It would also prevent overloading the court with unnecessary and trivial cases, as well as the overcrowding of prisons. However, the practice of withdrawal of prosecution should be safeguarded so as to ensure transparency and accountability in the decision-making process.

The importance of the role played by the prosecutor in a criminal trial cannot be overemphasized. Prosecutors also have a professional duty as representatives of the public interest to ensure that the appropriate sentence is meted out by the court. It is for this reason that prosecutors in most jurisdictions are required to assist the courts by disclosing as much information as possible relating to sentencing. Nonetheless, the participants discussed some problems which adversely affect appropriate sentencing, such as (1) the court's failure to consider the opinion of the prosecutor; (2) the prosecutor always requesting the maximum punishment; and (3) the police and the prosecutor lacking information about the defendant's past criminal record.

Finally, adequate initial and continued professional training are necessary for the efficient and diligent performance of prosecutorial functions. Furthermore, probity should be a requisite for admission into the profession. Prosecutors should adhere to the established professional ethics throughout their career. The participants also recognized the importance of the institution of police prosecutors in some jurisdictions. However it was stressed that police prosecutors should receive sufficient legal training, since many are not law graduates.

III. THIRD SPECIAL SEMINAR FOR SENIOR CRIMINAL JUSTICE OFFICIALS OF THE PEOPLE'S REPUBLIC OF CHINA

The Third Special Seminar for Senior Criminal Justice Officials of the People's Republic of China was conducted from 1 to 19 December 1997 with the main theme of "The Quest for Effective Juvenile Justice Administration". Ten senior criminal justice officials and the UNAFEI faculty comparatively discussed the problems faced by Japan and China in the realization of criminal justice, with particular attention to juvenile justice issues.

IV. TECHNICAL COOPERATION

A. Joint Seminars

Since 1981, UNAFEI has conduced 17 joint seminars under the auspices of JICA and in collaboration with host governments in Asia including China, the Republic of Korea, Malaysia, Nepal, Pakistan and the Philippines. With the participation of policy-makers and high-ranking administrators, including members of academia, the joint seminars attempt to provide a discussion forum in which participants can share their views and jointly seek solutions to various problems currently facing criminal justice administration in both the host country and Japan.

In March 1997, UNAFEI was to have held the Bangladesh-UNAFEI Joint Seminar in the Bangladeshi capital city of Dhaka. Unfortunately, unexpected budgets cuts by JICA at the end of the fiscal year prevented the realization of the Joint Seminar. The Bangladesh-UNAFEI Joint Seminar has been rescheduled for March 1998.

B. Regional Training Programmes

1. Thailand

In January 1997, UNAFEI dispatched two experts to Thailand to assist the Office of the Narcotic Control Board (ONCB) in organizing the Fifth Regional Training Course on Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration. The training course was held with the cooperation of JICA and the Royal Thai Government. Participants from various Asian-Pacific countries attended this two-week seminar and discussed such issues as the implementation of the Vienna Convention in their respective countries and international cooperation based upon the Convention, as well as the improvement of investigative techniques.

2. Costa Rica

From 28 July to 8 August 1997, UNAFEI assisted the Latin American Institute for the Prevention and the Treatment of Offenders (ILANUD) in organizing the Tenth Regional Seminar, "Effective Measures for Combatting Drug-related Crimes and Improving the Administration of Criminal Justice" in San Josè, Costa Rica. The seminar was held with the cooperation of JICA and the Government of Costa Rica. About 20 representatives from Latin America and the Caribbean, mostly high-ranking judges, public prosecutors and administrators were invited to ILANUD. With the help of several experts on drug offences, including the Deputy Director and a professor of UNAFEI, the representatives exchanged views on tackling drug-related offences, including money laundering.

V. COMPARATIVE RESEARCH PROJECT

Reflecting its emphasis on the systematic relevance of training activities and priority themes identified by the Commission at its first session, the research activities of the Institute are designed to meet practical needs, including those for training materials for criminal justice personnel. For example, UNAFEI is updating its research by requesting several experts from countries in the Asia-Pacific region to report on their respective probation systems. UNAFEI will subsequently compile and publish these reports for international distribution in a book tenatively titled "Criminal Justice Profiles of Asia: Probation".

VI. INFORMATION AND DOCUMENTATION SERVICES

The Institute continues to collect data and other resource materials on crime trends, crime prevention strategies, and the treatment of offenders from Asia, the Pacific, Africa, Europe and the Americas, and makes use of this information in its training courses and seminars. The Information and Library Service of the Institute has been providing, upon request, materials and information to United Nations agencies, governmental organizations, research institutes and researchers, both domestic and foreign.

VII. PUBLICATIONS

Reports on training courses and seminars are published regularly by the Institute. Since 1971, the Institute has issued the Resource Material Series, which contains contributions by the faculty members, visiting experts and participants of UNAFEI. In 1997, the 49th and 50th editions of the Resource Material Series were published. Additionally, issues 92 to 94 of the UNAFEI Newsletter include a brief report on each course and seminar (from the 105th to the 107th respectively) and provide other timely information.

VIII. THE NINTH MEETING OF THE AD HOC ADVISORY COMMITTEE OF EXPERTS ON UNAFEI WORK PROGRAMMES AND DIRECTIONS

The Ninth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions convened on 27 October 1997. The experts comprised distinguished criminal justice officials from the United Nations, overseas and Japan.

The purpose of the meeting was twofold: to review and assess the work accomplished by UNAFEI in the past, and to consider proposals to improve and enhance future programmes.

The Report of the Ninth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions will be published in its entirety in Resource Material Series No. 53.

IX. OTHER ACTIVITIES

A. Public Lecture Programme

On 12 February 1997, the Public Lecture Programme was conducted in the Grand Conference Hall of the Ministry of Justice. In attendance were many distinguished guests, UNAFEI alumni and the 105th International Seminar participants. This Programme was jointly sponsored by the Asia Crime Prevention Foundation (ACPF), the Japan Criminal Policy Society (JCPS) and UNAFEI.

Public Lecture Programmes purport to increase the public's awareness of criminal justice issues through comparative international study by inviting distinguished speakers from abroad. This year, the Programme sponsors invited Dr. Prasit Damrongchai (Secretary General, Office of the Commission of Counter Corruption, Kingdom of Thailand) and Dr. David L. Carter (Professor, School of Criminal Justice, Michigan State University, United States of America). Their lectures were entitled "Money Laundering Law and Corruption Investigation" and "The Identification and Prevention of Police Corruption", respectively.

B. Assisting UNAFEI Alumni Activities

Various UNAFEI alumni associations in various countries have commenced or are about to commence research activities in their respective criminal justice fields. It is, therefore, one of the important tasks of UNAFEI to support these contributions to improve the crime situation.

C. Overseas Missions

Mr. Toichi Fujiwara (Director) and Ms. Kayo Konagai (Professor) visited Hong Kong to attend the Pacific Rim Regional Conference, "Re-integration of Discharged Prisoners: Rehabilitation, Employment and Prevention of Recidivism". In a keynote address, Director Fujiwara discussed the general activities of UNAFEI. Professor Konagai delivered a lecture entitled "The Japanese Approaches to Facilitate the Re-integration of Discharged Prisoners into the Community" in Plenary Session 1. Additionally, they visited various Hong Kong criminal justice agencies during their stay.

Mr. Terutoshi Yamashita (Professor) and Mr. Ryosuke Kurosawa (Professor) attended the Fifth Regional Training Course on Effective Countermeasures against Drug Offenses and Advancement of Criminal Justice Administration in Bangkok, Thailand. Mr. Yamashita contributed to the course from 19 to 26 January 1997, and Mr. Kurosawa assisted from 16 January to 1 February 1997. They delivered lectures respectively entitled "Confiscation of Illicit Proceeds and Anti-Money Laundering Law of Japan" and "Treatment of Drug Abused Offenders in Asia and the Pacific". Additionally, they visited various Thai criminal justice agencies during their stay.

Mr. Mikinao Kitada (Deputy Director) attended an organizational meeting at the United Nations Crime Prevention and Criminal Justice Branch in Vienna, Austria from 8 to 16 February 1997. The meeting concerned a United Nations project entitled "Information-Gathering and Analysis of Firearms Regulation." This project focuses on the regional and international exchange of data and information on firearms regulation. It will also assist the United Nations Secretariat in pursuing the possible establishment of a database and biennial publication of relevant reports. The Deputy Director attended in his capacity as Project Expert for the Asia-Pacific region.

Mr. Yuzuru Takahashi (Professor) and Mr. Chiaki Iizuka (Administrative Staff) visited three Southeast Asian countries in preparation for the 107th International Training Course. Specifically, Mr. Takahashi traveled to Indonesia, Singapore and Malaysia from 8 to 22 March to study the unique prosecution systems of these respective nations.

Ms. Tomoko Akane (Professor) attended the Fortieth Session of the Commission on Narcotic Drugs of the United Nations Economic and Social Council in Vienna, Austria from 17 to 29 March 1997. Ms. Akane attended various plenary meetings and focused primarily upon issues relating to the implementation of international drug control treaties and money laundering.

Mr. Toichi Fujiwara (Director) attended the Sixth Session of the United Nations Commission on Crime Prevention and Criminal Justice in Vienna, Austria from 28 April to 12 May 1997. During a plenary meeting, the Director delivered a statement regarding the recent activities of UNAFEI.

Mr. Toichi Fujiwara (Director) and Mr. Hiroyuki Yoshida (Professor) visited the Philippines from 30 May to 2 June 1997 to attend the inauguration and turn-over ceremonies for the first halfway house established in that nation. This event, known as the Muntinlupa Project, involved the joint efforts of various organizations including the Philippine Department of Justice and ACPF.

Mr. Terutoshi Yamashita (Professor) in his capacity as UNAFEI-ACPF Liaison Officer attended the ACPF Working Group Meeting on Extradition and Mutual Assistance in Criminal Matters held in Kuala Lumpur, Malaysia from 27 to 31 May 1997.

Mr. Toichi Fujiwara (Director) and Mr. Ryosuke Kurosawa (Professor) visited four Southeast Asian countries from 13 to 28 July 1997. Specifically, they traveled to Indonesia, Singapore, Malaysia and Thailand to study the unique criminal justice systems of these respective nations. During their visits, UNAFEI Alumni Association receptions were held in each of the countries.

Mr. Masahiro Tauchi (Deputy Director) and Ms. Tomoko Akane (Professor), attended the Tenth Regional Seminar, "Effective Measures for Combatting Drug-related Crimes and Improving the Administration of Criminal Justice" in San José, Costa Rica from 28 July to 8 August 1997. They presented papers respectively entitled "The Confiscation of Drug Trafficking Proceeds" and "Effective Countermeasures against Drug Trafficking: Anti-Money Laundering Policies, Legislation and Practices by Law Enforcement". The seminar was organized by the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD), under the sponsorship of the Government of Costa Rica, JICA, UNAFEI and the Supreme Court of Costa Rica.

Mr. Toichi Fujiwara (Director) and Mr. Masahiro Tauchi (Deputy Director) served as members of the Japanese Evaluation Team of the ten ILANUD Regional Seminars, which have been conducted in Costa Rica since 1989. Towards this purpose, a series of meetings were held in San José, Costa Rica from 7 to 15 August 1997 in collaboration with representatives of ILANUD and the Costa Rican Ministry of Foreign Affairs. The team, headed by Mr. Fujiwara, also comprised JICA officials, specifically, Mr. Osamu Makino and Mr. Masahiro Nakai.

Mr. Terutoshi Yamashita (Professor) attended the Second Annual Conference and General Meeting of the International Association of Prosecutors (IAP) held in Ottawa, Ontario, Canada from 2 to 6 September 1997. During the Workshop "A View from Asia", Mr. Yamashita made a short presentation concerning the role of UNAFEI in international cooperation.

Mr. Masahiro Tauchi (Deputy Director) attended the Twelfth Co-ordination Meeting of the Network of U.N. Institutes in Courmayeur Mont Blanc, Italy from 2 to 3 October 1997.

Mr. Masahiro Tauchi (Deputy Director) attended the International Scientific and Professional Advisory Council of the United Nations Crime Prevention and Criminal Justice Programme (ISPAC) International Conference, "Violent Crime and Conflict: Towards Early Warning and Prevention Mechanisms" in Courmayeur Mont Blanc, Italy from 4 to 6 October 1997.

Mr. Hiroyuki Yoshida (Professor) and Ms. Kayo Konagai (Professor) traveled to Nairobi, Kenya from 5 to 18 October to lecture at the JICA Seminar for the Prevention of Juvenile Delinquency and the Treatment of Young Offenders. Additionally, during their stay, they visited various Kenyan criminal justice agencies where they delivered additional lectures on juvenile delinquency and prevention.

D. Assisting ACPF Activities

UNAFEI cooperates and corroborates with ACPF to further improve crime prevention and criminal justice administration in the region. Since UNAFEI and ACPF have many similar goals and a large part of ACPF's membership consists of UNAFEI alumni, the relationship between the two is strong. Some examples of cooperation and corroboration can be seen as follows:

1. UNAFEI has assisted ACPF extensively in all its World Conferences, as both an organizer and a contributor, including the Sixth ACPF World Conference which was held in Tokyo from 28 to 31 October 1997. Additionally, the participants of the 107th International Training Course attended the Symposium held on October 29, which focused on the theme of prosecution.
2. An ACPF Working Group meeting was held at UNAFEI in October 1996, and the 104th Course participants joined the meeting to discuss international cooperation. Also, a UNAFEI faculty member attended another ACPF Working Group meeting held in Malaysia in May 1997 regarding international cooperation, drug-related crimes and environmental protection.
3. UNAFEI dispatched faculty members to Manila to corroborate with ACPF and Asia Crime Prevention Philippines, Incorporated (ACPPI) in establishing the first halfway house in the Philippines. (Established in June 1997.)
4. To proceed with an ACPF project to foster volunteer leaders in the crime prevention field, UNAFEI sent two professors to Thailand in December 1995 and one professor to Papua New Guinea in December 1996.

IX. HUMAN RESOURCES

A. Staff

In 1970, the Government of Japan assumed full financial and administrative responsibility for running the Institute. The Director, Deputy Director and seven professors are selected from among public prosecutors offices, the judiciary, corrections and probation. UNAFEI also has approximately 20 administrative members, who are appointed from among officials of the Government of Japan, and a linguistic adviser.

Moreover, visiting experts from abroad are invited by the Ministry of Justice to each training course or seminar. The Institute has also received valuable assistance from various experts, volunteers and related agencies in conducting its training programmes.

B. Faculty Changes

Mr. Mikinao Kitada, formerly Deputy Director of UNAFEI, was transferred to the International Affairs Division of the Criminal Affairs Bureau of the Ministry of Justice and appointed Director on 1 April 1997.

Mr. Masahiro Tauchi, formerly Cabinet Councillor of the Cabinet Councillors' Office on Internal Affairs, was appointed Deputy Director of UNAFEI on 1 April 1997.

Mr. Tatsuhiko Araki, formerly Professor of UNAFEI, was transferred to the Rehabilitation Bureau of the Ministry of Justice and appointed Specialist on 1 April 1997.

Mr. Shoji Imafuku, formerly a Probation Officer of the Tokyo Probation Office, joined UNAFEI as a Professor on 1 April 1997.

X. FINANCES

The Institute's budget is primarily provided by the Ministry of Justice. The total amount of the UNAFEI budget is approximately ¥350 million per year. Additionally, JICA provides assistance for the Institute's international training courses and seminars. Through its financial contributions, ACPF is another constant and reliable supporter of UNAFEI activities.

UNAFEI WORK PROGRAMMME FOR 1998

I. TRAINING

A. The 108th International Seminar

UNAFEI will hold the 108th International Seminar from 26 January to 27 February 1998. The Seminar will focus on the main theme, "Current Problems in the Combat of Organized Transnational Crime," recognizing that the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders will take up the issue as an important theme. In light of the growing threat by organized transnational crime at both national and international levels, the Seminar will examine the current situation of organized crime and legislation against such crime as well as the problems faced by criminal justice agencies in the participating countries.

B. The 109th International Training Course

The 109th International Training Course will be held from 13 April to 3 July 1998 with the main theme of "Effective Treatment Measures for Prisoners to Facilitate Their Re-integration into Society". The smooth re-integration of discharged offenders into society relies upon the establishment, proper implementation, and strengthening of treatment programs within and without the prison walls. Thus, correctional treatment in prisons, release systems, and treatment in the community must be designed to supplement and complement each other in order to secure the re-integration of prisoners into the community, as well as to benefit the community which will receive them after release. Thus, in this Training Course, these issues will be discussed from the perspective of the participating countries in terms of the actual situation, problems and countermeasures.

C. The 110th Internationl Training Course

The 110th International Training Course, "Effective Countermeasures against Economic Crime and Computer Crime", is scheduled to be held from 31 August to 20 November 1998. Participants are expected to analyze the present situation of economic crime and computer crime; explore overall strategies by criminal justice agencies worldwide to the problems by said crimes; and deepen their understanding of the relevant United Nations instruments.

II. TECHNICAL COOPERATION

A. Bangladesh-UNAFEI Joint Seminar

From 14 to 18 March 1998, the Bangladesh-UNAFEI Joint Seminar on Contemporary Problems in the Criminal Justice System and Administration will be held in the Bangladeshi capital city of Dhaka. The Government of the People's Republic of Bangladesh through the Ministry of Home Affairs and UNAFEI will organize the Joint Seminar.

B. India-UNAFEI Joint Seminar

In December 1998, the India-UNAFEI Joint Seminar will be held in Delhi. The Government of the Republic of India through the National Institute of Criminology and Forensic Science of the Ministry of Home Affairs and UNAFEI will organize the Joint Seminar.

C. Regional Training Programmes

1. Kenya

From July to October 1998, one UNAFEI professor will be dispatched to Kenya to assist the Children's Department of the Ministry of Home Affairs and National Heritage in a project to develop nationwide standards for the treatment of juvenile offenders.

2. Sixth Regional Training Course on Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration

In March 1998, one UNAFEI professor will travel to Thailand to assist the Royal Thai Government and the Office of the Narcotics Control Board (ONCB) in organizing the Sixth Regional Training Course on Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration. Approximately 20 participants from various Asia-Pacific countries will attend the two-week course and will discuss drug-related issues identifying the actual problems in the participating countries. Discussion topics in the Course will included the improvement of investigative techniques, effective measures against money laundering, the implementation of the Vienna Convention, international cooperation, and the treatment of drug offenders.

III. OTHER ACTIVITIES INTERREGIONAL GOVERNMENTAL EXPERT MEETING ON "INVESTIGATION AND PROSECUTION OF COMPUTER NETWORK CRIME"

UNAFEI will organize and host the interregional governmental expert meeting on "Investigation and Prosecution of Computer Network Crime" in October 1998 during the 110th International Training Course. This expert meeting will be convened in preparation for the Workshop on "Crimes Related to the Computer Network" of the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. UNAFEI willingly assumed this responsibility in response to a request made during the Twelfth Co-ordination Meeting of the United Nations Crime Prevention and Criminal Justice Programme Network held in Courmayeur, Italy in 1997.

APPENDIX

MAIN STAFF OF UNAFEI

Director	Mr. Toichi Fujiwara
Deputy Director	Mr. Masahiro Tauchi
Faculty:	
Chief of Training Division and Professor	Mr. Yuzuru Takahashi
Chief of Research Division and Professor	Mr. Hiroyuki Yoshida
Chief of Information and Library Service Division and Professor	Ms. Kayo Konagai
Professor	Ms. Tomoko Akane
Professor	Mr. Terutoshi Yamashita
Professor	Mr. Ryosuke Kurosawa
Professor	Mr. Shoji Imafuku
Linguistic Adviser	Ms. Ana M. Vander Woude
Secretariat:	
Chief of Secretariat	Mr. Fusao Takayama
Deputy Chief of Secretariat	Mr. Kenji Matsuda
Chief of General and Financial Affairs Section	Mr. Azuma Okada
Chief of Training and Hostel Management Affairs Section	Mr. Chiaki Iizuka
Chief of International Research Affairs Section	Mr. Wataru Okeya

«AS OF 31 DECEMBER 1997»

1997 VISITING EXPERTS

THE 105TH INTERNATIONAL SEMINAR

Mr. Wong Sai-chiu, Ryan	Assistant Director of Operations, Operations Department, Independent Commission Against Corruption, Hong Kong
Mr. Jung-Soo Lee	Director, Investigation Planning Office, Central Investigation Department, Supreme Public Prosecutors Office, Republic of Korea
Dr. Prasit Damrongchai	Secretary General, Office of the Commission of Counter Corruption, Thailand
Dr. David L. Carter	Professor, School of Criminal Justice, Michigan State University, United States

THE 106TH INTERNATIONAL TRAINING COURSE

Prof. Ian O'Connor	Head of Social Work and Social Policy, University of Queensland, Australia
Dr. Edward Van Roy	Director, Social Develop Division, Economic and Social Commission for Asia and the Pacific (ESCAP)
Prof. Dr. Frieder Dünkel	Professor, Ernst-Moritz-Arndt-Universität Greifswald, Rechts-und Staatswissenschaftliche Fakultät, Lehrstuhl für Kriminologie, Germany
Dr. B. N. Chattoraj	Professor and Head Faculty of Criminology National Institute of Criminology and Forensic Science, Ministry of Home Affairs, India
Mr. John Harding	Chief Probation Officer, Inner London Probation Service, United Kingdom
Mr. Ralph Krech	Crime Prevention and Criminal Justice Officer, Crime Prevention and Criminal Justice Division, United Nations Office at Vienna
Ms. Judy Briscoe	Chief of Staff and Director of Delinquency Prevention, Texas Youth Commission, United States

APPENDIX

THE 107TH INTERNATIONAL TRAINING COURSE

Mr. Henri de Larosière de Champfeu	Judicial Research Official/Judge, Cour de Cassation, France
Mr. Antonius Sujata	Head of Planning Bureau, Attorney General's Office, Indonesia
Mr. Lee, Jung-Soo	Deputy Chief Prosecutor, Suwon District Prosecutor's Office, Republic of Korea
Mr. Francis Tseng	Deputy Head, Crime Division, Deputy Public Prosecutor, Senior State Counsel, Attorney-General's Chambers, Singapore
Mr. D. P. Kumarasingha	President's Counsel, Additional Solicitor General, Attorney General's Department, Sri Lanka
Prof. Dr. Kanit Nanakorn	Former Attorney General, Thailand
Ms. Nora M. Manella	United States Attorney, Central District of California, United States

1997 AD HOC LECTURERS

THE 105TH INTERNATIONAL SEMINAR

Mr. Katsuhiko Kumazaki	Director, Special Investigation Department, Tokyo District Public Prosecutors Office, Japan
Mr. Toru Akuzawa	Assistant Director, Service Regulations Division, Bureau of Employee Relations, National Personnel Authority, Japan

THE 106TH INTERNATIONAL TRAINING COURSE

Prof. Shin'ichiro Inose	Professor, Toyo University, Tokyo, Japan
Prof. Dr. Tetsuya Fujimoto	Professor, Department of Law, Chuo University, Tokyo, Japan
Mr. Akio Harada	Director General, Criminal Affairs Bureau, Ministry of Justice, Japan
Mr. Takashi Takee	Clinical Psychologist, Tachikawa Juvenile Counseling Center, Tokyo Metropolitan Police Department, Tokyo, Japan
Mr. Kuninao Minakawa M.D., Ph.D.	Child Psychiatrist, Tokyo Institute of Psychiatry, Tokyo, Japan
Mr. Shigeo Kifuji	Director General, Rehabilitation Bureau, Ministry of Justice, Japan
Mr. Shin'ichiro Tojo	Director General, Correction Bureau, Ministry of Justice, Japan
Mr. Takeshi Hirono	Assistant Principal Family Court Probation Officer, Tokyo Family Court, Tokyo, Japan
Prof. Dr. Jorg Martin Jehle	Direktor, Kriminologischen Zentralstelle Adolfsallee, Wiesbaden, Germany
Mr. Mitsuru Toida	Chief, Econometric Analysis and Forecasting Division, Statistical Research Department, Institute of Developing Economies, Tokyo, Japan

THE 107TH INTERNATIONAL TRAINING COURSE

Mr. Minoru Shikita	Chairman, Asia Crime Prevention Foundation (ACPF)
Mr. Katsuhiko Kumazaki	Director, Special Investigation Department, Tokyo District Public Prosecutors Office, Japan

APPENDIX

1997 UNAFEI PARTICIPANTS

THE 105TH INTERNATIONAL SEMINAR

Overseas Participants

Ms. Benabdallah Nadia	Magistrate, Tlemcen High Appeal Court, Algeria
Mr. Muhammad Majibur Rahman Mia	Deputy Secretary, Ministry of Home Affairs, Bangladesh
Mr. Zalo Leon Desiré	Dean of Instruction Judges, Court Deputy Chairman, Tribunal de Premiere Instance d'Abidjan, Côte d'Ivoire
Mr. Gamal El-din Abd Elaziz Mohamed Elgohary	Director Anti-Bribery & Influence Exploitation, General Administration for Public Funds Investigation, Ministry of Interior, Egypt
Mr. Emosi Vunisa	Deputy Director, CID Headquarters, Fiji
Mr. Chan, Hilton Kwok Hung	Chief Inspector, Criminal Intelligence Bureau, Royal Hong Kong Police Force, Hong Kong
Mr. Atul Karwal	District Superintendent of Police, Office of D.S.P. Porbandar, India
Mr. Antonius Sujata	Head of Planning Bureau, Attorney General Office of Indonesia, Indonesia
Mr. Mohammad Abdallah Saleh Al-Qdah	Assistant Director, The Metropolitan Police Directorate, The Public Security Directorate—Amman, Jordan
Ms. Margaret Warigia Wachira	Senior Resident Magistrate, Senior Principal Magistrate Court, Kiambu, Kenya
Mr. Law Hong Soon	Superintendent of Police, Deputy Officer in Charge of Criminal Investigation, Criminal Investigation Department, Ibu Pejabat Polis, Malaysia
Mr. Howard Maliso	Senior Investigator, Ombudsman Commission, Papua New Guinea
Mr. Apolinario D. Bruselas	Prosecutor IV, Department of Justice, Philippines
Mr. Cha, Keun-pyung	2nd Deputy Chief, Seoul Police Agency, National Security Division 1, Republic of Korea
Mr. Buwaneka Pandukabaya Aluwihare	Senior State Counsel, Attorney General's Department, Sri Lanka
Mr. Pison Piroon	Senior Judge, Thonburi Criminal Court, Thailand

Mr. Hoang Van Lai	Senior Police Inspector, General Department of Vietnamese Police, Viet Nam
Mr. Francis Xavier Musonda	Police Public Relations Officer, Zambian Police Service, Zambia

Japanese Participants

Mr. Noriaki Kojima	Assistant Director, Firearms Control Division, Community Safety Bureau, National Police Agency, Japan
Mr. Hiromi Nagai	Public Prosecutor, Tokyo High Public Prosecutors Office, Japan
Mr. Tetsuya Ozaki	Deputy Warden, Ichihara Prison, Japan
Mr. Masahiko Sayama	Professor, Research and Training Institute, Ministry of Justice, Japan
Mr. Yasuyuki Suzuki	Probation Officer, Chief of 3rd Examination Division, Kanto Regional Parole Board, Japan
Mr. Tsutomu Tochigi	Judge, Tokyo District Court, Japan

Observer

Mr. Ichiro Ishigami	Coordinator for the Planning of Construction, The Construction and Maintenance Division, Ministry of Justice, Japan

THE 106TH INTERNATIONAL TRAINING COURSE

Overseas Participants

Mr. Ikteder Ahmed	Director Judicial Administration Training Institute, Bangladesh
Mr. Crispin Lincoln Jeffries	Superintendent of Police (Community Policing), Police Headquarters, Belize
Ms. He, Min	Director, Research Section, Minister's Office, Ministry of Justice, China
Mr. César Augusto Rivera Arteaga	Social Psychologist, Department of Criminal Policy, Ministry of Justice, El Salvador
Ms. Sera Tagilala Bernard	Police Prosecutor/Sergeant, Police Prosecution Office, Fiji
Mr. Poon King-lai	Superintendent (Acting), Tai Lam Centre for Women, Hong Kong
Mr. Karamvir Singh	Deputy Inspector General of Police, Headquarters of the Director General of Police, India

Ms. Justina Dwi Noviantari	Chief, Section for Preparation of Rehabilitation Module for Drug Addicts, Directorate of Rehabilitation for Juvenile Delinquents and Drug Addicts, Ministry of Social Affairs, Indonesia
Ms. Mary Mukuhi Karau Kangethe	District Probation Officer, District Probation Office, Law/Juvenile Court, Kenya
Mr. Darussalam bin Budin	Prison Superintendent, Sungai Petani Prison, Malaysia
Mr. Muhammad Masood Khan	Lecturer (Law), Central Jail Staff Training Institute, Pakistan
Mr. Godfrey Niggints	Commanding Officer, Correctional Service Headquarters, Papua New Guinea
Mr. Arnulfo Bartido Repollo	Chief of Police, Tacloban City Police Station, Philippines
Mr. Lee Sang-won	Senior Supervisor, Choonchun Correctional Institution, Republic of Korea
Mr. John Mark Parafea	Assistant Commissioner of Police—Crime, ACP/ Crime, Police Headquarters, Solomon Islands
Mr. Pongpat Riangkruar	Provincial Chief State Attorney, Child Rights Protection Div., International Affairs Dept., Office of the Attorney General, Thailand
Mr. Joseph Narsiah	Acting Superintendent of Prisons, Trinidad, West Indies
Mr. Bob Thomson Dickens Ngobi	Assistant Commissioner of Welfare and Community Affairs/Chief Public Relations Officer, Police Headquarters, Uganda

Japanese Participants

Mr. Noboru Aitani	Family Court Probation Officer, Osaka Family Court, Japan
Mr. Masakazu Kawabe	Technical Officer, Narcotic Control Officer, Yokohama Branch, Kanto-shin'etsu Regional Narcotics Control Office, Japan
Mr. Kazuhiro Kuwabara	Probation Officer, Shizuoka Probation Office, Japan
Ms. Mihoko Manabe	Assistant Judge, Nagoya District Court, Toyohashi Branch, Japan
Mr. Soichiro Nishioka	Unit Chief of General Affairs, Kyoto Probation Office, Japan

Mr. Michio Sano	Police Inspector, Juvenile Division, National Police Agency, Japan
Mr. Hiroki Shimizu	Immigration Inspector (Special Inquiry Officer), Narita International Airport Office, Tokyo Immigration Bureau, Japan
Mr. Kazuto Shinmon	Chief Specialist in Charge of Psychological Assessment, Hakodate Juvenile Classification Home, Japan
Ms. Yuriko Tsubaki	Chief Specialist of Education Division, Marugame Juvenile Training School for Girls, Japan
Mr. Hideyuki Yamaguchi	Public Prosecutor, Okazaki Branch, Nagoya District Public Prosecutors Office, Japan
Mr. Tadatsugu Yamoto	Public Prosecutor, Hikone Branch, Ohtsu District Public Prosecutors Office, Japan

Observer

Ms. Korbkul Winitnaiyapak Kaewtipaya	Senior State Attorney, Legal Affairs Division, Office of the Attorney General, Thailand

THE 107TH INTERNATIONAL TRAINING COURSE

Overseas Participants

Ms. Pauline Christine Ngo Mandeng	Officer in Charge of Research, Directorate of Legislation, Ministry of Justice Cameroon
Mr. Guan, Fujin	Deputy Director of the First Special Investigation Department, General Bureau of Anti-Corruption and Bribery, Supreme People's Procuratorate of the People's Republic of China, China
Ms. Patricia Cordero Vargas	Trial Prosecutor, Public Ministry, Costa Rica
Mr. Winfred Ansah-Akrofi	Assistant Superintendent of Police (Prosecutor), Ghana
Mr. Madan Lal Sharma	Joint Director, Central Bureau of Investigation, India
Mr. Ersyiwo Zaimaru	Head, Sub-Division for Monitoring and Evaluation, Division of Cooperation for Foreign Legal Affairs, Bureau of Law and Public Relations, Attorney General's Office, Indonesia
Mr. Jonathan John Mwalili	Officer in Charge of Prosecutions, Prosecutions Branch-Nairobi Area, Kenya

Ms. Lithnarong Pholsena	Deputy Director of Administration of Justice System, Ministry of Justice, Lao People's Democratic Republic
Mr. Abdul Razak Bin Haji Mohamad Hassan	Assistant Commissioner of Police Royal Malaysia Police, Police Headquarters, Sarawak Contingent, East Malaysia
Mr. Mohamed Jameel Ahmed	State Attorney, Attorney General's Office, Republic of Maldives
Dr. Meen Bahadur Poudyal Chhetri	Under Secretary, Ministry of Home, Nepal
Mr. Zafar Ahmad Farooqi	Deputy Director, Economic Crime Wing, Federal Investigation Agency, Economic Crime Wing, Pakistan
Mr. Menrado Valle Corpuz	State Prosecutor II, Department of Justice, Philippines
Mr. Lee, Yong-Hoon	Public Prosecutor, Inchon District Public Prosecutor's Office, Republic of Korea
Mr. Winston Cheng Howe Ming	Deputy Public Prosecutor, Attorney General's Chambers, Singapore
Mr. Gamalath, Suhada Kalyana	Senior State Counsel (Prosecutor), Attorney General's Department, Sri Lanka
Ms. Somjai Kesornsiricharoen	Senior State Attorney, International Affairs Department, Office of the Attorney General, Thailand
Mr. Alex Mwachishi Chilufya	Senior Prosecutions Officer, Department of Prosecutions, Zambia

Japanese Participants

Mr. Kyoji Ishikawa	Judge, Osaka District Court, 5th Criminal Division, Japan
Mr. Hiroyasu Ito	Maritime Safety Officer, 9th Maritime Safety Headquarters, Japan
Mr. Yoshitaka Izumi	Probation Officer, Utsunomiya Probation Office, Japan
Mr. Yutaka Kubo	Judge, Nagoya District Court, Japan
Mr. Hideki Kurashige	Prison Officer, Yamaguchi Prison, Japan
Mr. Yasuo Nakazawa	Public Prosecutor, Urawa District Public Prosecutors Office, Japan
Mr. Takahiro Saito	Public Prosecutor, Tokyo District Public Prosecutors Office, Japan

Ms. Mariko Suzuki	Public Prosecutor, Otsu District Public Prosecutors Office, Japan
Mr. Toshiaki Takahashi	Police Inspector, 2nd Investigative Division, Criminal Investigation Bureau, The National Police Agency, Japan
Mr. Takahiro Ueda	Public Prosecutor, Osaka District Public Prosecutors Office, Sakai Branch, Japan
Mr. Hiroki Yamanishi	Public Prosecutor, Toyama District Public Prosecutors Office, Japan

THIRD SPECIAL SEMINAR FOR SENIOR CRIMINAL JUSTICE OFFICIALS OF THE PEOPLE'S REPUBLIC OF CHINA

Mr. Wang, Dan-Bo	Director, Management Division, Bureau of Reeducation through Labor, Ministry of Justice
Ms. Hao, Qing-Hua	Assistant Director, Bureau of Prison Administration, Ministry of Justice
Ms. Zhao, Lin-Na	Deputy Director, International Affairs Division, Department of Foreign Affairs, Ministry of Justice
Mr. Sun, Qian	Deputy Director-General, Criminal Procuratorate Department, Supreme People's Procuratorate
Mr. Wu, Jian-Ping	Section Chief, Imprisonment and Detention, Procuratorate Department, Supreme People's Procuratorate
Ms. Li, Shu-Fen	Research Fellow, Ministry of Public Security
Ms. Ji, Su-Lan	Associate Research Fellow, Institute of Public Security, Ministry of Public Security
Mr. Wang, Ming-Da	Vice President, Beijing High People's Court
Ms. Ye, Xiao-Ying	Judge, Supreme People's Court
Ms. Guo, Yan-Dong	Judge, Supreme People's Court

THE NINTH MEETING OF THE AD HOC ADVISORY COMMITTEE OF EXPERTS ON UNAFEI WORK PROGRAMMES AND DIRECTIONS

LIST OF EXPERTS

United Nations

Mr. Joseph Acakpo-Satchivi	Secretary, Fifth Committee of the General Assembly and the Committee for Programme and Coordination United Nations, New York
Mr. Mohamed E. Abdul-Aziz	Senior Crime Prevention and Criminal Justice Officer, United Nations Crime Prevention and Criminal Justice Division United Nations Office at Vienna

Overseas

Mr. Wang Lixian	Director-General, Foreign Affairs Department, Ministry of Justice People's Republic of China
Ms. Nazhat Shameem	Director of Public Prosecutions Fiji
Dr. Barindra Nath Chattoraj	Professor and Head of National Institute of Criminology and Forensic Science, Ministry of Home Affairs India
Dato' Mohd Ismail B. Che Rus	Commissioner of Police, Director, Criminal Investigations Department, Royal Malaysia Police Headquarters Malaysia
Mr. Ved V. Kshetri	Public Service Commission Nepal
Mr. Chronox D. Manek	Deputy Public Prosecutor, Public Prosecutors Office, Department of Attorney General Papua New Guinea
Mr. Severino H. Gaña, Jr. *Rapporteur	Senior State Prosecutor, Department of Justice Philippines
Mr. Thomas G.P. Garner *Vice-Chairperson	Editor, New Society, The Newsletter of ACPF, and former Commissioner of Prisons, Hong Kong Portugal/Hong Kong

Mr. Han Youngsuk	Vice Chairman, Korea Crime Prevention Foundation Republic of Korea
Dr. S. Chandra Mohan	Official Assignee & Public Trustee Singapore
Mr. H.G. Darmadasa *Rapporteur	Rtd. Commissioner of Prisons Sri Lanka
Dr. Kanit Nanakorn *Vice-Chairperson	Former Attorney General and Professor, Faculty of Law, Thammasat University and Chulalongkorn University Thailand

Japan

Mr. Masaharu Hino	Superintending Prosecutor, Nagoya High Public Prosecutors Office, and a former Director of UNAFEI
Mr. Kunihiro Horiuchi	Private Practitioner, Ex-Director of UNAFEI
Mr. Kazutomo Ijima	Supreme Court Justice
Mr. Kiyoshi Isaka	Managing Director, Hachioji International Training Center, JICA
Dr. Koya Matsuo	Professor, Faculty of Law, Jochi University
Dr. Koichi Miyazawa	Professor, Faculty of Policy Studies, Chuo University
Mr. Minoru Shikita *Chairperson	Chairman of the ACPF Board of Directors, and a former Director of UNAFEI
Mr. Hiroyasu Sugihara	Director-General, Public Security Investigation Agency, and a former Director of UNAFEI
Mr. Yoshio Suzuki	Professor, Faculty of International Relations, Asia University, and a former Director of UNAFEI

APPENDIX

DISTRIBUTION OF PARTICIPANTS BY PROFESSIONAL BACKGROUNDS AND COUNTRIES

(1st – 107th International Training Programmes, 1st-3rd Special Chinese Seminars, U.N. Human Rights Courses and 1 Special Course)

Professional Background / Country	Judicial and Other Administration	Judges	Public Prosecutors	Police Officials	Correctional Officials (Adult)	Correctional Officials (Juvenile)	Probation/Parole Officers	Family Court Investigation Officers	Child Welfare Officers	Social Welfare Officers	Training & Research Officers	Others	Total
Afghanistan	7	8	5	3									23
Bangladesh	14	10		11	4		4			5		2	50
Bhutan				3									3
Brunei	4				2								6
Cambodia	1	2	1	3	1								8
China	10	13	17	19	5						6	10	80
Hong Kong	13			9	24	3	9		1	3			62
India	12	10		41	6	1	1			2	6	3	82
Indonesia	17	20	16	19	12		3			5		1	93
Iran	5	11	8	8	6						2	1	41
Iraq	5	3	3	5	5	5					2		28
Jordan				3									3
Lao People's Dem. Rep.	4	4	3	9									20
Malaysia	16	1	2	37	30	7	3		1	5	3		105
Maldives			1										1
Mongolia				1									1
Myanmar	3			2									5
Nepal	23	12	4	31								2	72
Oman				2									2
Pakistan	14	9	2	21	7	1	2				2	1	59
Philippines	17	6	21	30	8	3	9	3	1	5	1	5	109
Republic of Korea	11	3	49	6	18	4					3		94
Saudi Arabia	4			5	3						1	1	14
Singapore	10	18	5	12	10	3	10			3	1	1	73
Sri Lanka	21	17	11	19	17	1	10		1	2		1	100
Taiwan	12	4	2	2	1								21
Thailand	19	27	34	12	13	7	10	1		8	4	1	136
Turkey	1	1	1	2							1		6
United Arab Emirates	1												1
Viet Nam	10	5	2	5						4			26
A S I A	**254**	**184**	**187**	**320**	**172**	**35**	**61**	**4**	**4**	**42**	**32**	**29**	**1,324**

Professional Background / Country	Judicial and Other Administration	Judges	Public Prosecutors	Police Officials	Correctional Officials (Adult)	Correctional Officials (Juvenile)	Probation/Parole Officers	Family Court Investigation Officers	Child Welfare Officers	Social Welfare Officers	Training & Research Officers	Others	Total
Algeria		3											3
Botswana				2									2
Cameroon	2												2
Côte d'Ivoire		1		1									2
Egypt	1										2	1	4
Ethiopia	3			1									4
Ghana				3	1								4
Guinea			1	2									3
Kenya	5	4	1	9	6		5				2		32
Lesotho				1			2						3
Liberia											1		1
Mauritius		1											1
Morocco			1	4									5
Mozambique	1				1								2
Nigeria	1			2	5							1	9
Seychelles				1			1						2
South Africa											1		1
Sudan	2		1	13	1						2		19
Swaziland				2									2
Tanzania	4	3	4	2	1								14
Uganda				2								1	3
Zambia		1		6									7
Zimbabwe	1			2									3
AFRICA	**20**	**13**	**8**	**53**	**15**	**0**	**8**	**0**	**0**	**0**	**8**	**3**	**128**
Australia			1				1			1			3
Fiji	5	1	8	17	11					1			43
Marshall Islands	1			3									4
Micronesia							1						1
Nauru				1									1
New Zealand	1			1									2
Papua New Guinea	9		3	10	7		2			1		2	34
Solomon Islands	2			2									4
Tonga	2	1		5	2						1		11
Vanuatu				1									1
Western Samoa	1			1			1					1	4
THE PACIFIC	**21**	**2**	**12**	**41**	**20**	**0**	**5**	**0**	**0**	**3**	**1**	**3**	**108**

APPENDIX

Professional Background / Country	Judicial and Other Administration	Judges	Public Prosecutors	Police Officials	Correctional Officials (Adult)	Correctional Officials (Juvenile)	Probation/Parole Officers	Family Court Investigation Officers	Child Welfare Officers	Social Welfare Officers	Training & Research Officers	Others	Total
Argentina	2	2		1									5
Barbados				1									1
Belize				1									1
Bolivia		1										1	2
Brazil	2		3	9					1				15
Chile	1			3	2								6
Colombia	1	1	2	1					1			1	7
Costa Rica	2	3	3								1	2	11
Ecuador			1	4		1							6
El Salvador	1												1
Guatemala					1								1
Honduras				3									3
Jamaica	3				1								4
Panama			1	2								1	4
Paraguay				9		1							10
Peru	4	10	2	1							1	2	20
Saint Lucia	1				1								2
Trinidad and Tobago	1				1								2
U.S.A. (Hawaii)								1					1
Venezuela	1		1	5							1		8
NORTH & SOUTH AMERICA	**19**	**17**	**13**	**40**	**6**	**2**	**0**	**1**	**2**	**0**	**3**	**7**	**110**
Bulgaria				1									1
Hungary	1												1
Macedonia	1												1
Poland				1									1
E U R O P E	**2**	**0**	**0**	**2**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**4**
J A P A N	**97**	**122**	**202**	**83**	**72**	**64**	**153**	**52**	**38**	**2**	**42**	**42**	**969**
T O T A L	***413***	***338***	***422***	***539***	***285***	***101***	***227***	***57***	***44***	***47***	***86***	***84***	***2,643***

PART TWO

RESOURCE MATERIAL SERIES
No. 53

I. Work Product of the 107th International Training Course

"The Role and Function of Prosecution in Criminal Justice"

UNAFEI

REMARKS BY PROGRAMMING OFFICER

1. The 107th International Training Course was conducted at UNAFEI from 1 September to 20 November 1997 with the main theme, "The Role and Function of Prosecution." Twenty-nine participants (overseas: 18, Japanese: 11) attended the Course from various regions of the world.

2. Fundamentally, the rationale of the main theme can be summarized as follows:

The prosecution of offenders and the appropriate request of punishment are indispensable procedures in the realization of criminal justice. These prosecutorial functions are commonly established in the criminal procedure of many countries. However, the personnel and organization authorized to assume these functions, the breadth of their authority, and the actual practices of prosecution differ among the various criminal justice systems worldwide. Since prosecution is a fundamental component of the criminal justice system, it is essential to deliberate on issues related with its proper role and function in order to seek a better prosecution system and ultimately a better criminal justice system.

Moreover, the role played by the prosecution system in each country has grown even more important as crime becomes more sophisticated and organized or new criminal phenomena appear. Thus there is a great need for the involvement of prosecutors in the promotion and development of national criminal policy by such means as planning and drafting legislation related to criminal justice.

3. UNAFEI usually selects themes which relate to all fields of criminal justice, invites participants from these different fields, and discusses issues from much broader perspectives. This method is commonly called the "integrated approach". However, in this 107th International Training Course, in consideration of participant evaluations in past programmes, UNAFEI selected the above main theme focusing only on prosecution. Moreover, the Institute invited overseas participants who were prosecutors or whose profession was closely related to this field.

Prosecutors selected from prosecutorial organizations attended from such countries as China, Costa Rica, Indonesia, the Philippines, the Republic of Korea, Sri Lanka and Singapore. Police prosecutors participated from such nations as Kenya, Ghana and Zambia. From such countries as Cameroon, India, Malaysia, Nepal and Pakistan, participants had prosecution-related duties in their respective Ministry of Justice, Ministry of Interior, Criminal Investigation Department of Police and so on.

Eminent experts were invited from abroad as well as Japan to share their knowledge and experiences. They too were mainly from the prosecution field.

4. Participants actively engaged in discussions during the Individual Presentations, lectures by experts and UNAFEI faculty, and the Group Workshop sessions regarding the role and function of prosecutors at the stages of investigation, initiation of prosecution, trial and so on. Discussion results are summarized as follows:

a. In regards to the investigation authority of prosecutors, there are mainly three types of legal systems: one which grants them authority to investigate all kinds of crimes (Japan and the Republic of Korea); one which allows prosecutors to investigate specific types of crimes (China and Indonesia); and one which does not provide prosecutors with the authority to investigate (Ghana, India, Malaysia, Pakistan, Singapore, Sri Lanka, Thailand and Zambia). Incidentally, Cameroon adopts a dual system: in the region of so-called English-speaking Cameroon, the third system applies and in the region of so-called French-speaking Cameroon, the second system prevails.

Also there are countries which have the system of police prosecutors, namely, India, Ghana, Malaysia, Pakistan, Singapore, Sri Lanka and Zambia; while other countries are strangers to such system, that is, China, Costa Rica, Japan and the Republic of Korea.

In whatever system, when prosecutors give appropriate instructions and supervision based on their ample legal knowledge and experience, the standard of quality of police investigation is enhanced. The police can obtain from prosecutors precise guidelines as to what criminal facts can be deduced, what evidence should be collected, and who should be prosecuted. Moreover, prosecutors prevent illegal investigation activities as well as the undue infringement of human rights.

There are countries where prosecutors are given investigation authority and they independently exercise it. This system helps to preclude political influence on the development of investigation and prosecution.

b. It is a fundamental mission of the police and prosecutors to select cases which should proceed to criminal trial. In order to realize criminal justice, prosecution must be initiated decisively and expeditiously when there is sufficient incriminating evidence against the accused and criminal punishment is warranted. At the same time, proceedings should not be taken against a person who is not likely to be found guilty.

The evidentiary standard is not uniform as to when prosecution or non-prosecution is determined: prima facie (India, Kenya, Pakistan and Sri Lanka); reasonable prospect for obtaining guilty judgment (Singapore); and proof beyond reasonable doubt (China, Japan and the Republic of Korea).

Prosecutors should make this selection of prosecution or non-prosecution objectively, legally and independently. The establishment of an independent prosecutorial organization contributes to guarantee such desirable exercise of prosecution powers. It is also important to improve the internal and external checking systems for prosecutorial abuse; to guarantee the systematic independence of prosecution; and to secure capable human resources through sound appointment practices and continued education.

Even if there is sufficient evidence to prove the accused guilty, it may not always necessary to impose punishment on him. In such cases, the system of suspension of prosecution is of great use, as is employed in such countries as Japan and the Republic of Korea. Such a decision is made by public prosecutors on the merits of each individual case. Said system has contributed to preventing the unnecessary imposition of punishment, reducing the number of cases handled by the courts, and mitigating the overcrowding situation in prisons and jails. Therefore, barring insurmountable hindrances, it is worthwhile for some countries to introduce this system.

c. In regards to judgment by the courts, some jurisdictions enjoy a high conviction rate (Indonesia, Japan and the Republic Korea), but others suffer from a low conviction rate (India, Nepal, Pakistan and Sri Lanka). There are conceivable circumstances which lead to such differences: the ability of investigation agencies to collect evidence; the evidentiary standard for indicting a suspect; the exactness of selection of cases by prosecutors for bringing cases to the courts; the strictness of rules of evidence; the credibility of witness testimony; and the speediness of trial.

The conviction rate cannot be the sole and absolute standard, but it is an indicator for measuring how effectively the criminal justice system functions. It shows the results of effective investigation, the precise selection of cases for trial, and the prosecution's appropriate performance in the courts. Too low of a conviction rate reflects unsuccessful endeavors at any of these stages.

Prosecutors must play an important role in realizing speedy trial. The causes of trial delays are manifold. For example, some derive from the

court's organization and its administration of cases (shortage of judges, sporadic trial dates, etc.); others relate to prosecution's activities (lack of preparation, inappropriate assessment of cases, etc.); some are caused causes by the defence (dilatory tactics, uncooperative attitude, etc.); and others include such issues as the non-appearance of witnesses. Whatever the circumstances, prosecutors are required to make a plan for establishing their case, to sufficiently prepare the necessary proof, and to secure witnesses to appear in the courts.

In addition, prosecutors should contribute to securing an appropriate sentence by proffering sufficient evidence to the court of first instance to assist in its decision-making or even, when necessary, making an appeal to a higher court.

5. It is my firm belief that, by creating a forum of participants mainly from the prosecution field, the 107th International Training Course profoundly and substantially discussed the current problems in the area of prosecution and successfully identified some effective countermeasures. In particular, the participants comparatively studied the characteristic features of the various prosecution systems represented in the Course, and compiled concrete means for the improvement of their own respective systems.

The materials provided in this volume carry salient features of the Course materials and discussion results, but of course are not exhaustive of the entire results of the Course. As to administrative information concerning this Course, please refer to UNAFEI Newsletter No. 94.

I applaud all the participants of the 107th International Training Course for their tireless dedication to achieve better training results, thereby contributing to the development of criminal justice throughout the world. I also extend my deep appreciation to all the people concerned who provided valuable assistance to the successful completion of the Course.

I sincerely hope that the day will come in the near future when the seeds of knowledge sown during the 107th International Training Course bear fruit in the form of the better administration of criminal justice in the respective countries of the participants.

Yuzuru Takahashi
107th Course Programming Officer and
Chief of Training Division

THE CRIMINAL JUSTICE SYSTEM IN JAPAN: PROSECUTION

I. PUBLIC PROSECUTORS

A. Qualification

In Japan, a private attorney, a judge and a public prosecutor have quite the same qualifications. There are other different qualifications[1], but they are so exceptional and rare that only the important ones will be focused upon.

To become a Japanese legal practitioner, one must pass the National Bar Examination, which is one of the most difficult examinations. About 700 candidates (about three percent those who take the examination) pass each year. The average age of successful candidates is about 28 years old. Since most candidates graduate from a university at the age of 22 or so, most of the candidates study under the financial support by their parents for several years.

After passing the Examination, they must take a two-year training course as legal trainees at the Legal Research and Training Institute of the Supreme Court. Legal trainees are government officials paid by the Supreme Court. The training period consists of two phases:

(1) academic training at the Institute for the first four months and the last four months; and

(2) sixteen months of practical training. Each trainee is dispatched to a certain prefectural district court, public prosecutors office and private law office.

This practical training enables the trainees to choose their future careers based on a comparison of each role.

[1] See, e.g., the Court Organization Law, Articles 41, 42 and 44 (CJLJ p. 23), and the Public Prosecutors Office Law (hereinafter PPOL), Article 18.

B. Recruitment

After completing such training, trainees can become a private attorney, a judge or a public prosecutor. Roughly speaking, more than 500 trainees become private attorneys, about 100 trainees become judges and about 40 to 80 trainees become public prosecutors annually. The possible reasons for the smallest number include the toughness of the work and frequent transfers. If a judge or a public prosecutor quits his job, he can become a private attorney, and most of them do so. At present, there are about 2,100 judges, 1,100 public prosecutors and 16,000 private attorneys in Japan. Similarly, a private attorney also can become a judge or a public prosecutor. However the number of such judges or public prosecutors is quite small[2].

C. Organization and Training

In Japan, the prosecution system comprises the Supreme Public Prosecutors Office (headed by the Prosecutor-General), 8 High Public Prosecutors Offices (headed by a Superintending Prosecutor), 50 District Public Prosecutors Offices (headed by a Chief Prosecutor) and 203 branches, and 438 Local Public Prosecutors Offices (consisting mainly of Assistant Public Prosecutors[3]).

Regarding the size of district public prosecutors offices, the average office has 10 public prosecutors. The smallest one has only 5 public prosecutors, and the largest one has more than 200 public prosecutors. Each office has a Chief and a

[2] In the last eight years, only 30 private lawyers have become subsequently judges. Only six professors or assistant professors in legal science in universities have become judges since 1969 other than Supreme Court Justices.

Deputy Chief Prosecutor, who do not investigate and handle trials, but rather, focus on supervisory and administrative matters. Thus, for example, in the smallest office, only three public prosecutors actually investigate and prosecute cases. In small offices, the public prosecutor who investigates and indicts a suspect, is the same person who handles the trial. In contrast, in large offices, two different public prosecutors carry out these duties, working in either the Investigation Department (usually called "Criminal Affairs Department") or the Trial Department.

First-year public prosecutors used to work at one of the largest offices such as Tokyo, Osaka or Sapporo for only one year. Since two years ago, they undergo a two-month training all together at the Research and Training Institute of the Ministry of Justice. Afterwards, they are assigned to a relatively large-sized public prosecutors office, other than the Tokyo office, for 10 months. Then they are transferred every two or three years. In their first ten years as public prosecutors, most of them work at various sized offices.

During their career, public prosecutors receive three kinds of job-related training at the Research and Training Institute of the Ministry of Justice, in addition to the first-year training described above.

[3] The number of assistant public prosecutors is about 900. Their qualification is different from public prosecutors'. They have to pass a special examination conducted by the Ministry of Justice after working in a criminal justice agency for a certain period. See PPOL Article 18, paragraph 2. They deal with mainly misdemeanors like theft and traffic offenses.

1. Course for Third- and Fourth-Year Public Prosecutors

The number of participants is limited to approximately 40 at one time. It is conducted twice a year for a duration of seven days each time. The purpose of this course is to develop the expertise of public prosecutors who deal with general criminal cases. It consists of lectures and discussions. The lectures are given by experts in various fields, including senior public prosecutors, on fundamental knowledge and skills necessary to perform better as a public prosecutor, including bookkeeping and accounting. Discussions are based on real cases to find out how they should deal with them for better disposition.

2. Course for Eighth- and Ninth-Year Public Prosecutors

The number of participants is limited to approximately 40 at one time. It is conducted twice a year for a duration of two weeks each time. The purpose of this course is to provide special expertise in the investigation and disposition of cases of tax evasion, bribery, crimes related to public security, and various other complex economic crimes. It also consists of lectures by experts and senior public prosecutors, and discussions based on relevant cases.

3. Course for Twelfth- and Thirteenth-Year Public Prosecutors

The number of participants is limited approximately 15 at one time. It is conducted once a year for a duration of one week. The purpose of the course is different from the other courses. Considering that the participants are relatively senior and experienced, and that they are expected to occupy a status in the hierarchical structure of public prosecutors offices in which they will be required to give advice to junior staff members, the purposes of the course are limited to administrative ones,

such as developing knowledge and skills about personnel management and the administration of the organization. It consists of lectures by various individuals and discussions based on practical cases involving personnel or administrative matters.

D. Status (Independence and Impartiality)

Public prosecutors have a status equivalent to that of judges. They receive equal salaries according to the length of the term in office. Their independence and impartiality are also protected by law. They are thought to be impartial representatives of the public interest. Aside from disciplinary proceedings, they cannot be dismissed from office, suspended from the performance of their duties or suffer a reduction in salary against their will, with some exceptions.[4]

Prosecutorial functions are part of the executive power vested in the Cabinet[5], and the Cabinet is responsible to the Diet in their exercise.[6] The Minister of Justice should have the power to supervise public prosecutors to complete his responsibility as a member of the Cabinet. However, prosecutorial functions have a quasi-judicial nature, inevitably exerting an important influence on all sectors of criminal justice, including the judiciary and the police. If the functions were controlled by political influence, then the whole criminal justice system would be jeopardized. To harmonize these requirements, Article 14 of the Public Prosecutors Office Law provides that "[the] Minister of Justice may control and supervise public prosecutors generally[7] in regard to their functions.... However, in regard to the investigation and disposition of individual cases, he may control only the Prosecutor-General.[8]" The Minister of Justice cannot control an individual public prosecutor directly.

In addition, many public prosecutors are assigned to key positions in the Ministry of Justice, for example, as Vice-Minister of Justice and Director-General of the Criminal Affairs Bureau.

E. Functions and Jurisdiction

The different levels of public prosecutors offices correspond to a comparable level in the courts. Consequently public prosecutors exercise such functions such as investigation, instituting prosecution, requesting the proper application of law by courts, supervising the execution of judgement and others which fall under their jurisdiction (PPOL articles 4 to 6). When it is necessary for the purpose of investigation, they can carry out their duties outside their jurisdiction (CCP article 195).

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4 See PPOL Article 25. Exceptions are stipulated in Articles 22 (retirement), 23 (physical or mental disability, etc.) and 24 (supernumerary official). The age of retirement is 63, except the Prosecutor-General who retires at 65.

5 The Cabinet consists of the Prime Minister and the Ministers of State. Not less than half of the Ministers must be chosen from among the members of the Diet (Constitution, Articles 66 and 68).

6 See Articles 65, 66 and 73 of the Constitution.

7 "Generally" means, for example, to set up general guidance for crime prevention, the administrative interpretation of laws and how to dispose of affairs related to prosecution to maintain their uniformity.

8 This control was practiced only once in 1954. When public prosecutors investigated a big bribery case involving several high-ranking politicians and tried to arrest the Secretary-General of the majority party, the Minister of Justice, who belonged to the same party, ordered the Prosecutor-General to avoid the arrest, effectively terminating the investigation. However, since it produced severe criticism from the public through the mass media, the Minister of Justice had to resign quickly.

II. SURVEY OF CHARACTERISTICS OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

A. Characteristics

Before explaining the Japanese prosecution system, I would like to point out some characteristics of the Japanese criminal justice system in order to avoid any confusion.

(1) Public prosecutors have the authority to investigate cases referred by the police and to initiate investigation without the police, which, in practice, they often do.

(2) Only public prosecutors may request a judge to detain suspects, and prosecute suspects. Japan does not have private prosecution or police prosecution.

(3) Japan conducts virtually no undercover operations or electronic surveillance.

(4) Public prosecutors have the discretionary power not to prosecute even though the evidence is sufficient to secure a conviction. Many factors are considered, especially the possibility of the suspect's rehabilitation without formal punishment.

(5) Japan has no jury or assessor system. All cases are handled by competent judges.

(6) Even if a suspect admits his guilt, the case is brought to trial. Moreover, plea bargaining is unavailable.

(7) Japan has the hearsay rule. However, a judge could admit a written statement, especially taken by a prosecutor, as evidence under certain conditions. Therefore prosecutors often produce written statements based on an interview with a suspect or a witness.

(8) Public prosecutors recommend a specific sentence (e.g., specific term of imprisonment, specific amount of fine, etc.) at the closing statement. If they are not satisfied with a judge's decision, whether conviction or acquittal, they can appeal to a higher court.

(9) Japan implements the theory of "presumed innocent" until proven guilty. However, since the aquittal rate is extremely low (below 1 percent)[9], if a suspect is indicted, he/she is likely to be regarded as "guilty" by people in the society.

(10) As mentioned below, the evolution of the Japanese criminal justice system is quite unique. It was influenced by the United States system (especially in trial; namely, an adversarial system) after World War II, but still retains the influence of the civil law countries.

B. Historical Background

Japan had been strongly influenced by the Chinese legal system since the seventh century. In 1890, Japan enacted the Meiji Constitution under the influence of the civil law countries, especially Germany. After its defeat in World War II, Japan has implemented the present Constitution influenced by United States law since 1947 without any change. A number of provisions regarding human rights on criminal matters were introduced to or strengthened in the Constitution, specifically, Articles 31 to 40. In short, no person shall be arrested or searched or seized without a warrant issued by a competent judge except in the case of a flagrant offence; be compelled to testify

[9] It might be attributable to several elements, including the discretionary power of public prosecutors, and the high probability of a confession by defendants.

against himself; and be convicted in cases where the only proof against him is his own confession. An accused[10] has the right to retain his own counsel.

The Code of Criminal Procedure (hereinafter CCP) was also changed in 1949. The CCP was greatly influenced by the adversarial system, especially in trial, and adopted the restrictive use of evidence and the need for a warrant for all kinds of compulsory measures.

III. INVESTIGATION

A. Investigative Agencies

Since public prosecutors as well as the police are authorized to conduct investigations (CCP articles 189 and 191), I will explain the Japanese investigation procedure as part of prosecutorial functions. Of course, the police have the first and primary responsibility for criminal investigation. Actually most criminal cases (over 99 percent) are initially investigated by the police and other judicial police officers. Once the police investigate a case, they must refer it to a public prosecutor together with documents and evidence, even when the police believe evidence is insufficient. The police have no power to finalize cases, except for two minor types of disposition (see Figure 1).

Public prosecutors may investigate cases themselves and often do so supplementarily; that is, they interview victims and main witnesses directly, and instruct the police to further collect evidence, if necessary. Moreover, public prosecutors may initiate and complete investigation without the police, and often do so in complicated cases such as bribery or large scale financial crimes involving politicians, high-ranking government officials or executives of big enterprises. In three major cities (Tokyo, Osaka and Nagoya[11]), the public prosecutors offices established a Special Investigation Department, where a considerable number of well-trained and qualified public prosecutors and assistant officers are assigned to initiate investigations. Since April 1996, several districts have a Special Criminal Affairs Department dealing with white collar crimes. If necessary, an *ad hoc* investigation unit composed of prosecutors and assistant officers can be organized. However, in practice, it may be quite difficult in many small-scaled offices because of staff shortages.

B. Investigation Process

1. Outline

Figures 1 and 2 show the outline of the process of investigation, prosecution etc., for adults.

Since the Japanese system is unlike some countries where an arrest is a prerequisite for prosecution, the police and public prosecutors conduct investigation and prosecution on a voluntary basis as much as possible. Although investigators arrest suspects in serious cases, even in such cases, they collect as much information as possible before arresting them and carefully examine the necessity of arrest, considering the suspect's age and surroundings, the probability of flight and destruction of evidence.

[10] The Constitution provides the right to retain a defence counsel for the accused, meaning a defendant after indictment, and the Code of Criminal Procedure provides the same right for a suspect. However, if he cannot hire a defence counsel, the state will assign a defence counsel only to an accused, not to a suspect (CCP articles 30 and 36).

[11] The Special Investigations Departments in the Tokyo and Osaka offices have a long history and have investigated a number of cases relating to bribery, breach of trust, tax evasion, etc. However, Nagoya's department was just established in April 1996.

The procedure after arrest is as follows:

(1) When the police arrest a suspect, they must refer the suspect with documents and evidence to a public prosecutor within 48 hours otherwise they must release him (CCP article 203).

(2) Unless the public prosecutor releases the suspect or prosecutes the suspect, the public prosecutor must ask a judge for a pre-indictment detention order within 24 hours after receiving him. (CCP article 205).

(3) The pre-indictment detention period is 10 days. The public prosecutor may ask a judge for an extension of the detention for up to 10 days, if necessary (CCP article 208).

(4) The public prosecutor must release the suspect by the termination of the detention period unless prosecution is initiated.

2. Arrest

In principle, no one may be arrested without a warrant issued by a judge. Enough probable cause must exist to believe that the suspect committed the alleged offence.

Police officers designated by law[12] as well as public prosecutors are authorized to directly ask a judge to issue an arrest warrant. Japan does not recognize the so-called "cognizable offence" that permits the arrest of a suspect without warrant. However CCP provides two exceptions as follows:

(1) Flagrant Offence (CCP articles 212 to 214):
Any person may arrest, without a warrant, an offender who is committing or has just committed an offence; or

(2) Emergency Arrest (CCP article 210):
"When there are sufficient grounds to suspect the commission of an offence punishable by the death penalty, or imprisonment for life or for a maximum period of three years or more, and if, in addition, because of great urgency a warrant of arrest cannot be obtained beforehand from a judge, a public prosecutor, a public prosecutor's assistant officer or a judicial police official may, upon statement of the reasons therefore, apprehend the suspect." In this case, the procedure for obtaining an arrest warrant from a judge shall be taken immediately thereafter. If the warrant is not issued, the suspect must be released at once.

After receiving the suspect, the public prosecutor must immediately inform him of the alleged offence and the right to hire a defence counsel, as well as give the suspect an opportunity for explanation. This is a public prosecutor's first and most important interview with a suspect because he learns the suspect's viewpoint. The interview is also important for a suspect because he can observe how much the public prosecutor knows about the facts or how confident he is in proving the case through his words and attitude. If the suspect presumes the public prosecutor has poor knowledge about the case, the suspect is not likely to confess.

3. Pre-indictment Detention

The public prosecutor must proceed to the next step as above-mentioned in section B. 1. b. If a public prosecutor arrests a suspect, the same procedure must be

[12] These police officers are designated by the National or Prefectural Public Safety Commission and are ranked at or above Police Inspector, which is the third rank from the bottom (CCP article 199. 2).

followed within 48 hours after the arrest (CCP article 204).

The power to ask a judge for a detention order is vested only in a public prosecutor.

The judge asked for the detention order reviews all documents and evidence, and interviews the suspect to afford him the opportunity to explain the alleged case. The judge may order the suspect's detention for 10 days if there are reasonable grounds to believe that the suspect has committed the offence, and

(1) the suspect has no fixed dwelling;
(2) there are reasonable grounds to believe that the suspect may destroy evidence;
or
(3) there are reasonable grounds to believe that he may attempt to escape.

Otherwise, the judge must dismiss the application. (CCP articles 60, 207 and 208). In practice, it is granted for the most part since the police and public prosecutors carefully screen suspects to be arrested or detained (see Table 1).

When an extension of detention is requested, a judge examines all the documents and evidence without interviewing the suspect. Then the detention can be extended up to 10 days, including weekends and national holidays. A suspect's maximum term of custody before indictment is consequently 23 days[13]. By the termination of the detention term, a public prosecutor should decide whether to prosecute or release the suspect. The power to prosecute is vested only in a public prosecutor with one exception[14]. During the detention period, no suspect is entitled to bail, but he may be bailable after indictment (CCP article 88).

Furthermore, a suspect is usually detained in a police jail substituted for a detention house[15] during the above-mentioned period even after referral to a public prosecutor. CCP Article 198 is interpreted that a suspect under arrest/ detention is obligated to appear before an investigation official to be questioned when requested. In the Japanese system, the police and public prosecutors are expected to find truth by interrogating a suspect, showing him parts of evidence, etc. Detention houses in Japan are located in the suburbs and insufficient to facilitate such needs. Accordingly, a judge permits a suspect to be detained in a police jail during a detention period.

4. Relation between the Police and Public Prosecutors

Investigation is defined as the whole process of identifying an offender and collecting evidence in order to prosecute him when a crime is deemed to have occurred. Since prosecution does not terminate until the case is finalized at the trial stage, investigation may be needed until then. Accordingly, the police continue investigating even after referring a case to the public prosecutors office. Since the police and public prosecutors are respectively independent organizations, the relationship between both is basically cooperative. Public prosecutors may instruct the police and let the police assist in their investigation, and the police are required to follow the instructions by law (CCP article 193). Some police officers do not want to admit that public prosecutors have such power, especially in investigations initiated by the police. Rather they interpret such instructions are requests which the police kindly accept.

[13] CCP Article 208-2 provides a further 5-day extension for the crimes related to insurrection. However its use is extremely exceptional and rare.

[14] See section IV. 2, Exception to the Monopolization of Prosecution: Quasi-Prosecution.

[15] Prison Law Article 1, paragraph 3.

Regardless of the different interpretations of Article 193, public prosecutors monopolize the power to request a detention order from a judge and to prosecute. The police, nonetheless, follow public prosecutors' instructions to successfully complete their work.

In some difficult and complicated cases, the detention term is not enough to collect sufficient evidence to decide whether to indict, since the criteria for indictment is actually the same as "beyond a reasonable doubt" of a trial. Thus, the police and public prosecutors should work together quickly and efficiently. Accordingly, in a murder case, the police immediately inform a public prosecutor. Then the prosecutor to be assigned to the case usually goes to the crime site and the place where the corpse is located, and observes the autopsy by a designated doctor. The prosecutor can directly discuss with the police how to investigate the case, what problems exist, and what kinds of evidence are at the crime site.

5. Collection of Evidence

Unlike the U.S. and some other countries, undercover operations are not allowed in Japan. Although it is said that undercover operations can be used in the investigation of crimes related to drug and gun trafficking, it is still unpopular, because Japanese society perceives such methods as unfair and deceitful. Typical investigative measures include scientific investigations, such as examination of blood, fingerprints, hair, voice and handwriting, which are fully utilized for identifying the suspect.

Unlike the common law countries, "evidence" in Japan sometimes means not only real evidence but written statements taken by investigators unless the differences between both are intentionally stressed. Although investigators collect as much real evidence as possible, it is indispensable to collect witness statements explaining the meaning of such real evidence in order to find the truth. Written statements are made in the following way: Investigators interview a witness or a suspect, then they prepare a written statement based on what he said. After the investigators precisely read the statement to him and he agrees with the content, he is requested to sign on the line after the last sentence to guarantee the voluntariness and veracity of the statement.

Public prosecutors often take such written statements of the main witnesses. Of course, any statement untested by cross-examination is inadmissible as evidence in trial. However, CCP Article 321.1.2 provides that a written statement taken by a public prosecutor is admissible as evidence when:

(1) the witness does not appear or testify on the date for public trial because of death, unsoundness of mental condition, is missing or staying outside Japan; or

(2) the witness, appearing on the date, testifies contrarily to or materially different from his previous statement contained in the document.

In the latter case, this shall apply when the court finds that special circumstances exist in which the previous statement is more credible than the present testimony[16]. There is stronger likelihood that it will be admissible as evidence as compared to a statement taken by the police (Id. section 3). That is why public prosecutors often make such written statements. Even when the written statements made by both the police and public prosecutors may inadmissible as evidence, they might be used for determining the credibility of the testimony (CCP article 328).

[16] For example, rape victims, or both victims and witnesses of an offence committed by an organized crime group.

Regarding a suspect's written statement made in the same way as above-mentioned, if it, regardless of the source, contains a confession or an admission of facts adverse to his interest, it is admissible as long as made voluntarily (CCP article 322). The suspect does not have the right to be with his lawyer during interrogation. Of course, he has the right to remain silent and to see and consult his counsel at any time.

6. Reasons of Public Prosecutors' Investigative Authority

Some participants, especially those from the common law countries where the police have the power of both investigation and prosecution, might not understand the wide power granted to Japanese public prosecutors. However, each criminal justice system is rooted in its society and history. Possible reasons are as follows:

a) Theoretical Reason

Public prosecutors should know how to investigate because they have to know how to prove cases beyond a reasonable doubt in trial. The main reason for the investigative authority of public prosecutors is to lead them to correct decisions and check on police investigations. If public prosecutors could not interview witnesses or collect evidence independently, they would have to rely on the police investigation (which is a sort of hearsay for public prosecutors) entirely and could not overcome any problems which may arise during by the police investigation. In the Japanese system, the police investigation is strictly and carefully checked by public prosecutors, who have the same qualifications as judges. The check is expected to be almost the same as that by judges. This is a significant safeguard for protecting the rights of a suspect since the Japanese police cannot prosecute, and it would be difficult for them to realize fully what would happen in trial and what evidence should be collected for conviction. Thus, the Japanese system avoids subjecting a suspect, who is likely to be acquitted, to a long detention and trial by releasing him at an earlier stage. Consequently, this system deeply respects a suspect's human rights.

b) Historical and Practical Reason

Although public prosecutors offices were established in 1872, public prosecutors did not originally have the power to investigate crimes independently. Since a preliminary inquiry proceeding[17] was available at that time, public prosecutors either directly brought a case to trial or asked for a preliminary inquiry proceeding. A court precedent in those days denied the admissibility of a suspect's written statement taken by a public prosecutor regarding a case where the police arrested a suspect based on an arrest warrant. Under such system, in 1896, the ratios of prosecution, dismissal rate[18] and acquittal rate were 80 percent, 44 percent and 7 percent respectively. Gradually the investigative practice was established since the people wanted to avoid prosecuting a suspect without sufficient evidence to support his conviction. The effort was successful, and in 1921 the ratios of prosecution, dismissal rate and acquittal rate lowered to 31 percent, 5 percent and

[17] In this system, an examining judge investigated a case to decide whether a particular suspect under the jurisdiction of the District Court should be formally tried.

[18] Under the previous system, if an examining judge found in the course of preliminary inquiry proceeding that the suspect should not be formally tried, he would finalize the case by "dismissal". Since the system of preliminary inquiry proceedings no longer exists in Japan, the word "dismissal" now means the dismissal of a case after brought to trial.

[19] These statistics are quoted from "Textbook of Prosecution" issued by the Ministry of Justice (Japanese version), p. 7.

1.6 percent respectively[19]. Subsequently, public prosecutors' investigative authority was codified by law. Thus, this practice continues to the present, with public prosecutors, as well as the police and other law enforcement agencies, conducting full investigations and strict screening of cases, thereby receiving strong public support.

Good or bad, Japanese society has a tendency to regard a person as an actual offender even if only arrested, and much more so if prosecuted. Therefore, from a rehabilitative viewpoint, such investigations are highly encouraged. Additionally, the decrease the caseload of the courts and the entire criminal justice system.

IV. DISPOSITION OF CASES

A. Initiation of Prosecution

There are two main forms of prosecution: formal and summary. If the case is serious and the suspect deserves a penalty of imprisonment or death, the prosecutor indicts the suspect for formal trial even if he admits his guilt. The prosecutor utilizes summary procedure when the suspect deserves a fine not exceeding ¥500,000, admits his guilt and accepts a monetary sentence. In general, minor offenses, such as traffic violations or bodily injury through professional negligence, are dealt with through this system. However, in cases where a suspect accused of assault or bodily injury confesses and compensates the victims' damage, summary procedure is also utilized.

To indict, a public prosecutor must submit a bill of indictment to the court, identifying the defendant (usually by showing the permanent domicile and present address, his name and date of birth), showing the offence charged and the facts constituting such offence (CCP article 256). [See an example bill of indictment (translated into English) in Appendix.] An arrest warrant, a pre-indictment detention order and a document signed by the suspect identifying his defense counsel are attached to a bill of indictment to make clear the past procedure. The submission of documentary or real evidence is prohibited at this stage, unlike the Chinese system.

If the suspect had been detained already when indicted, the pre-indictment detention automatically becomes an after-indictment detention limited to two months. After these two months, the detention term may be extended every month, as required.

After indictment, the suspect's situation changes due to adopting the adversary concept. The suspect should be detained in a detention house and interrogation regarding the indicted fact is prohibited in principle. He may now be bailable.

B. Monopolization of Prosecution

1. Principle

As stated previously, public prosecutors have the exclusive power to decide whether to prosecute (CCP article 247). Japan does not have a system of private or police prosecution; nor a grand jury or preliminary hearing system conducted by judges. In other words, the court cannot recognize any crime unless public prosecutors prosecute. This system is called "monopolization of prosecution," which is supported by the public because of the successful efforts by public prosecutors mentioned in section III. B. 6.

2. Exception to the Monopolization of Prosecution

The sole exception is called the system of "Analogical Institution of Prosecution through Judicial Action" or "Quasi-Prosecution" (CCP articles 262 to 269). This system purports to protect the parties injured by crimes involving abuse of authority by public officials. A person, who has made a complaint or accusation and is

not satisfied with the public prosecutor's decision not to prosecute, may apply to the court to order the case to be tried. The court, after conducting hearings, must either dismiss the application, or order the case to be tried if well-founded. If the application is granted, then a practicing lawyer is appointed by the court to exercise the functions of the public prosecutor.

C. Non-prosecution

1. Insufficiency of Evidence

It is natural for public prosecutors not to prosecute a suspect without sufficient evidence. The standard for whether to prosecute based on "probable cause", "beyond a reasonable doubt" or other standards, differs from country to country. Japanese laws do not clearly mention it. However, there exists a burden of proof to be met by public prosecutors, and one of the public prosecutors' functions is to request the proper application of the law by the court. To abide by the laws sincerely, the standard should be the same as that of the court, that is, "beyond a reasonable doubt." In practice, public prosecutors decide non-prosecution based on insufficiency of the evidence under this criterion.

2. Suspension of Prosecution

One of the most unique characteristics of Japanese criminal procedure is that public prosecutors can drop cases even when there is enough evidence to secure a conviction. This is called "Suspension of Prosecution." Thus, this wide discretionary power granted to public prosecutors has a significant role in encouraging suspects' rehabilitation.

The concept of discretionary prosecution contrasts with that of compulsory prosecution. The latter concept requires that prosecution always be instituted if there are some objective grounds for belief that the crime has been committed by the suspect and if the prerequisites for prosecution exist. This prevents arbitrary decisions by public prosecutors and vagaries in the administration of criminal justice. On the other hand, the system of discretionary prosecution is advantageous in disposing of cases flexibly according to the seriousness of individual offenses and the criminal tendency of each suspect and in giving them the chance to rehabilitate themselves in the society.

a) Application of suspension of prosecution

Needless to say, in practicing discretionary prosecution, arbitrariness should be avoided above all. Adhering to CCP Article 248, public prosecutors must consider the following factors concerning the suspect and the crime:

(1) The offender's character, age, situation, etc. Generally, youths or the aged, having no or little previous criminal record, or having had difficult a childhood may be advantageous factors for offenders;
(2) The gravity of the offence;
(3) The circumstances under which the offence was committed. For example, the motivation for the offence, and whether or not and to what extent the victim had fault in provoking the offence; and
(4) Conditions subsequent to the commission of the offence. For example, whether or not and to what extent compensation for damages is made; the victim's feelings are remedied; settlements between both parties; the influence to the society; and whether or not the offender repents commission of the offence.

The most important factors for suspension of prosecution are compensation and the remedy of the victim's feelings. Thus, a suspect's family, employer and private attorney always try

to compensate as much as possible to avoid indictment.

Table 2 breaks down non-prosecution by justification. The most common reason is "suspension of prosecution", constituting nearly 80 percent, followed by "lack or insufficiency of evidence," ranging from 14 to 15 percent. Table 3 reflects that around one-third of all offenses (excluding road traffic violations) are disposed of by suspension of prosecution: 32.7 percent in 1993, 34.6 percent in 1994, and 37.0 percent in 1995. Of course, in major offenses such as homicide, robbery, rape or arson, the ratio is much lower than less serious offenses.

b) Historical perspective

Reviewing the historical development of the system, there is little doubt that originally the impetus for this practice derived from the overburdening of the criminal justice system attributable to the confusion after the Meiji Restoration. Although this system started around 1884, the practice was not endorsed legislatively until 1922. Originally, the practice was commenced mainly for the purpose of reducing criminal cases, particularly trivial ones, for being brought before courts and thereby saving the costs of trial proceedings as well as housing prisoners, including those awaiting trial. Indeed the careful use of time and expense at the trial stage was regarded as an important factor in the efficient functioning of the criminal courts and other institutions, including the public prosecutors offices.

However, had it not been for the underlying policy oriented to the rehabilitation of offenders rather than the necessity of satisfying such needs as administrative efficiency and economy, the practice could have hardly survived the professional criticism and the public fear prevailing then. The government justified the practice by asserting that the purpose of punishment was not only to deter the public by showing the authority of law, but also to make the offender repent his criminal conduct and recognize that he should refrain from committing another offence. Therefore, prosecution should be instituted only when such purposes could not be attained without resorting to criminal sanctions. The practice of suspension of prosecution was considered an effective measure not only of expediting the processing of criminal cases, but also of facilitating the rehabilitation offenders.

In addition, the amended "Offenders Rehabilitation Law[20]" provides that a person who has not been prosecuted because of lack of its necessity could, if he applied in an emergency case, get rehabilitation aid services such as accommodations and food at rehabilitation hostels during the six months after release from arrest or detention. Public prosecutors are expected to inspire a suspect to utilize this service for his smooth rehabilitation.

B. Restraints on the Prosecution System

Any use of discretion by a prosecutor is accompanied by a risk of abuse. In order to prevent an erroneous or arbitrary exercise of discretion, there are several systems of checks in Japan. The first works as a self-check system. If the prosecutor still makes an arbitrary decision, there are two additional restrictions: (1) inquest of prosecution and (2) analogical (or quasi) institution of prosecution.

1. Internal Restrictions

In Japan, each public prosecutor is fully competent to perform his prosecutorial duties. It can be said that each prosecutor

[20] The effective date of the amended Law is April 1, 1996. However, the same provision was stipulated in the "Law for Aftercare of Discharged Offenders", which was abolished on the same day.

constitutes a single administrative agency. On the other hand, being subject to the control and supervision of senior public prosecutors, their approval is required in making prosecutorial decisions. It is evident that prosecutors themselves are aware that they may easily fall into self-righteousness, leading to arbitrary dispositions, whether intentionally or unintentionally. It is sometimes very useful, for especially young and inexperienced prosecutors, to consult a senior to discuss the best disposition of a case. Accordingly, the public prosecutors offices have developed some procedures for making their decisions more objective:

(1) a prosecutor, whenever refraining from instituting a prosecution, must show his reasons in writing; and
(2) a prosecutor must obtain approval from his senior, who in turn is careful to examine whether his decision is well grounded.

2. Inquest of Prosecution (Prosecution Review Commission)

This system's purpose is to maintain the proper exercise of the public prosecutors' power by subjecting it to popular review. The Inquest Committee consists of 11 members selected from among persons eligible to vote for members of the House of Representatives of the Diet. It is empowered to examine the propriety of decisions by public prosecutors not to institute prosecution. The Inquest Committee must conduct an investigation whenever it receives an investigation request from an injured party or a person authorized to make a complaint or accusation. In some instances, the Committee can carry out investigations on its own initiative, and is competent to examine witnesses in the course of the investigation.

The Committee then notifies the Chief Prosecutor of the District Public Prosecutors Office of its conclusion. If the non-prosecution is concluded improper by the Committee, the Chief Prosecutor orders a public prosecutor of the office to further investigate of the case and to re-examine the original disposition. After the re-investigation and re-examination, the public prosecutor in charge must ask for the approval of the Superintendent Prosecutor before making the final disposition.

Although the Committee's verdict is not binding upon the prosecutor, it is highly respected in the re-investigation process. Since Japan does not have a jury system and private prosecution system, "inquest of prosecution" allows the public to participate in criminal justice administration. There is a Committee in each district court.

3. "Analogical Institution of Prosecution through Judicial Action" or "Quasi-Prosecution"

(supra VI. B. 2.)

V. PUBLIC PROSECUTORS AT THE TRIAL STAGE

A. Outline of a Japanese Trial

Japan does not have a jury trial[21] and guilty plea system. All the cases prosecuted are examined by competent judges. Even cases where the suspects or defendants have confessed and admitted their guilt are brought to trial, if they are deemed to deserve imprisonment. A "trial" in Japan encompasses both the determination of guilt stage and the sentencing phase.

[21] The Jury Trial Law was enforced from 1923 to 1943. Under the Law, a defendant had the right to choose either a jury trial or a trial handled by competent judges. However, defendants seldom chose a jury trial. Possible reasons considered are that defendants bore the cost, an appeal was prohibited and the poor credibility of the jury trial. The law has been suspended since 1943.

Public prosecutors bear the burden of proving the defendant guilty "beyond a reasonable doubt" in all cases. They must establish the existence of an offence, the offender's identify, his sanity, criminal intent or negligence, the voluntariness of his confession at the investigative stage, etc. Although a Japanese trial is held infrequently, for instance once or twice a month, the defendants who admit their guilt usually consent to the use of documents (such as written statements) as evidence, which simplifies and accelerates the trial process. Thus approximately 90 percent of all the cases brought to trial are completed within six months in the first instance. There are only some specific cases which have been on trial for several years. However, generally speaking, Japan does not suffer from serious delays in the courts.

B. Preparation for Trial

After indictment, public prosecutors in charge of a trial have to plan how to prove the case by selecting documentary or real evidence to prove it beyond a reasonable doubt. In large public prosecutors offices, since public prosecutors in charge of trial are separated from the public prosecutor who indited the case, the former have to carefully read and examine all the documents and evidence. If they feel the necessity to further collect evidence, they do it themselves or request the public prosecutor or the police officers who investigated the case to do it.

To facilitate speedy trial, public prosecutors are likely to select the best documentary or real evidence. Then they must give the defense counsel an opportunity to inspect the selected documentary or real evidence prior to the trial (CCP article 299). Discovery is limited to the documentary or real evidence that the public prosecutor intends to use in trial. If the defense counsel wants to inspect other documents or evidence, he may make a request before the court to get an order for discovery under certain conditions.

In complicated cases or serious cases, defence counsels, judges and public prosecutors have a preparatory meeting in order for the trial to proceed smoothly. Since the judges are fact-finders, unlike a jury system, they have only the indictment sheet, the arrest warrant and the detention order before the start of trial. They must not be informed of the contents of documentary or real evidence on any occasion other than the trial. Accordingly, in such a preparatory meeting, they discuss only court proceedings like the estimated number and duration of testimonies, not the content of evidence.

C. Trial Activities: Testimony

Usually written statements of witnesses are made by police officers and/or public prosecutors at the investigation stage. If not, the public prosecutor in charge of trial interviews the witnesses and takes their written statements before requesting the testimony of the witnesses. The public prosecutor usually requests the court to admit the written statements as evidence. Since most documentary evidence constitutes hearsay and cannot be admitted, only items of evidence whose introduction the defense accepts can be examined. When the defense disagrees to the introduction of documentary evidence, the public prosecutor may request the court to examine witnesses and/or the defendant(s) instead. If such request is granted, the court then determines who will be examined.

A few days before the testimony, the public prosecutor again interviews the witnesses to ensure their appearance on the trial date and how they are going to testify. Since Japanese trials are held infrequently, witnesses are sometimes required to appear before the court several times in seriously contested cases.

Consequently, in cases where many witnesses are required to testify, the trial may continue for several years. If the witnesses do not appear before the court after several requests, they are detained in order to testify at trial. If they refuse to testify, their written statements may be examined at trial (CCP article 321). Moreover, if the witnesses' testimony contradicts a prior statement, the written statement can also be used to reduce the credibility of their testimony, that is, impeachment (CCP article 328).

After completing the examination of evidence and witnesses for fact-finding, the defendant is usually questioned by his counsel, the public prosecutor and judges at trial. The defendant may rebut the prosecution's evidence or show how repentant he is and how he will rehabilitate in the future. At this stage, the evidence relating to his environmental surroundings (such as criminal records, background, personality, etc.) is examined for determining sentence.

D. Closing Statement at the Trial

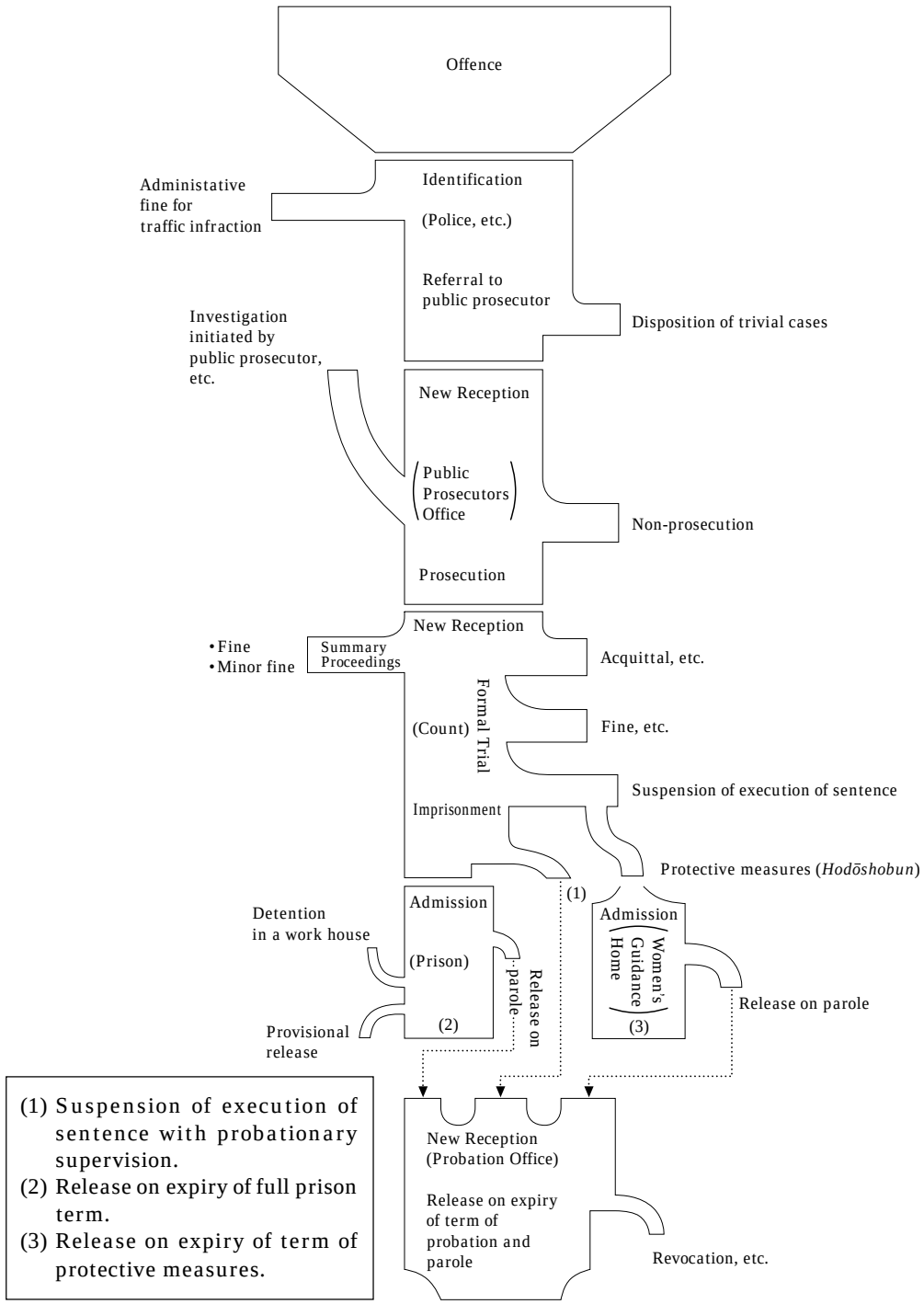
CCP Article 293 provides that "after the examination of evidence has been completed, the public prosecutor shall state the opinion regarding the facts and the application of the law." Also it has been a long-standing practice in Japan, as well as in some European countries, for the public prosecutor at that time to express his opinion as to the appropriate specific penalty to be imposed upon the defendant.

The public prosecutor has discretionary power in selecting from among a variety of sanctions provided by law. Nevertheless, recommendations tend to be uniform because of the public prosecutor's subordination to the general direction of the Prosecutor-General, who is mindful of public opinion and issues directives from time to time. Throughout the country, a similar recommendation is suggested for similar cases. This recommendation of a specific penalty is initially determined by the public prosecutor who indicted the case. Of course, it can be changed according to the different situation after indictment by a public prosecutor in charge of the trial. Although such a recommendation does not bind judges, they give serious consideration to the recommended penalty. If the public prosecutor feels that the sentence is inadequate, he can appeal the sentence. As a result, disparities in sentencing are prevented.

Whether to recommend a suspension of execution of sentence is occasionally discussed among prosecutors, especially in cases where even prosecutors presume that the defendant can rehabilitate himself in the community. One opinion favors public prosecutors making such recommendations because they are representatives of the public interest, which includes the interest of the defendant. The opposing opinion is that such duties should be assumed by a defendant's counsel or the judges. In fact, most prosecutors do not recommend a suspension of execution of sentence. Moreover, they sometimes stress that the execution of sentence should not be suspended when they strongly believe that a defendant should be imprisoned.

Figure 1

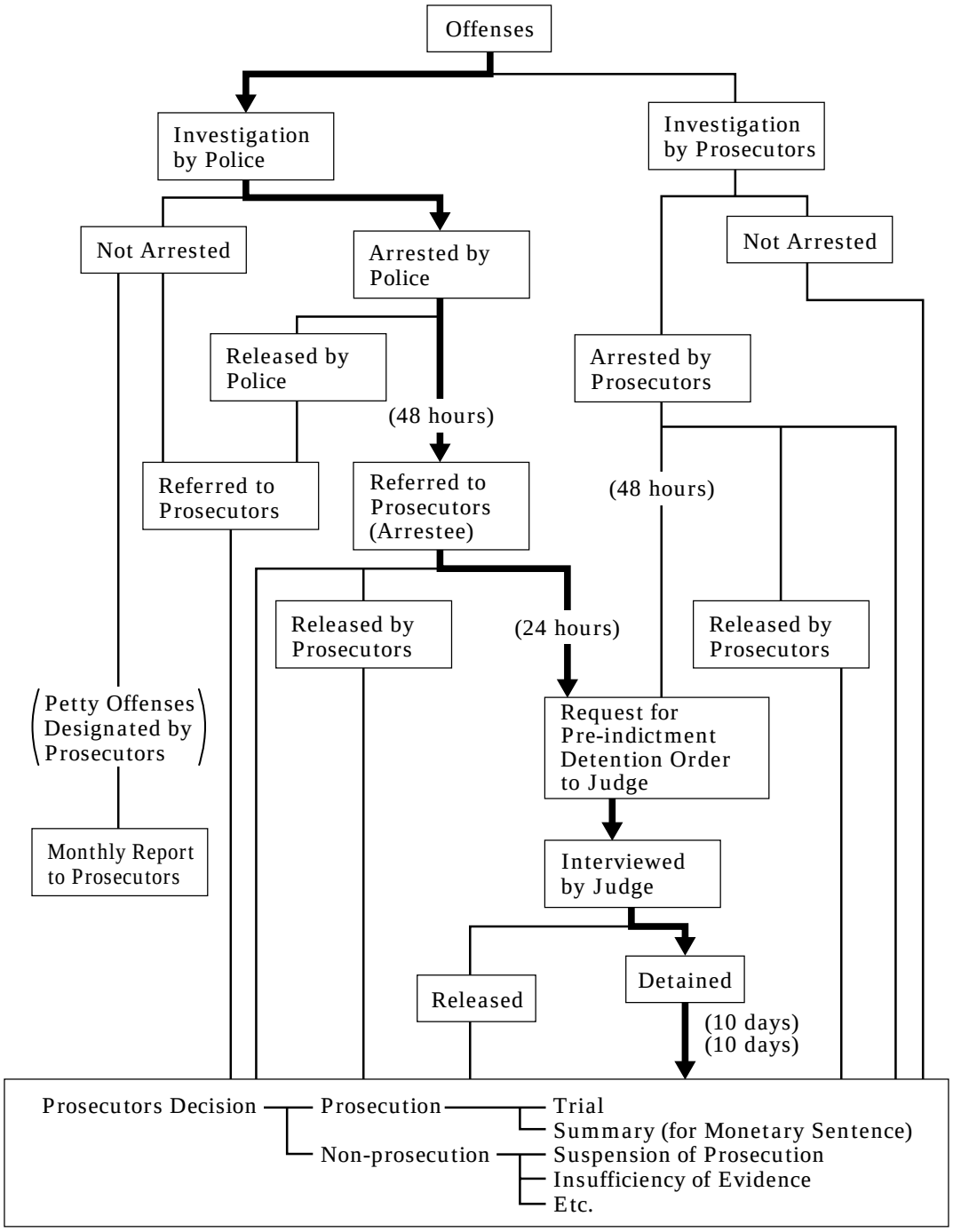
CRIMINAL PROCEEDINGS FOR ADULT OFFENDERS



Source: Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 56. *(Slight modifications)*

Figure 2

INVESTIGATION PROCEDURE



Note: The dark line indicates the most common procedure.

Table 1

ARRESTEES AND DETAINEES AMONG SUSPECTS WHOSE CASES WERE DISPOSED OF BY THE PUBLIC PROSECUTORS OFFICERS, BY OFFENCE (1995)

Offence	Number of Suspects Arrested/Not Arrested						Request for Detention		
	Total (A)	Arrested and referred by police (B)	Arrested by public prosecutor (C)	Arrested and released by police	Not arrested	(B+C)/A (%)	Granted (D)	Denied (E)	D+E/B+C (%)
Total	335,554	95,310	350	5,978	233,916	28.5	87,058	98	91.1
Penal Code offences	243,266	62,628	225	4,717	175,696	25.8	57,088	65	90.9
Homicide	1,875	946	4	11	914	50.7	948	-	99.8
Robbery	2,156	1,512	-	22	622	70.1	1,427	-	94.4
Bodily injury	24,163	10,719	19	666	12,759	44.4	9,361	9	87.3
Extortion	9,197	4,151	7	87	4,952	45.2	3,796	2	91.3
Larceny	126,357	24,533	38	1,712	100,074	19.4	22,524	18	91.7
Rape	1,428	1,063	1	5	359	74.5	1,039	-	97.7
Others	78,090	19,704	156	2,214	56,016	25.4	17,993	36	90.8
Special Law offences	92,288	32,682	125	1,261	58,220	35.5	29,970	33	91.5
Firearms and swords	4,170	2,028	5	222	1,920	48.6	1,525	5	75.4
Stimulant drugs	24,102	16,206	19	77	7,800	67.3	16,067	5	99.1
Others	64,016	14,453	101	962	48,500	22.7	12,378	23	85.2

Notes: 1. Traffic Professional Negligence and Road Traffic violations are not included.
2. Cases such as those resumed after suspension of the period of limitaiton, transferred to another public prosecutors offices, or involving juridical persons are not included.
3. The number of suspects not arrested includes those arrested for other offences.

Source: Annual Report of Statistics on Prosecution. Quoted in Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 58.

Table 2

SUSPECTS NOT PROSECUTED, BY REASON (1991-1995)

Year	Total	Suspension of Prosecution		Lack or Insufficiency of Evidence		Non-existence of Valid Complaint		Lack of Mental Capacity		Others	
		Number	%	Number	%	Number	%	Number	%	Number	%
1991	74,012	58,250	78.7	10,658	14.4	1,826	2.5	430	0.6	2,848	3.8
1992	71,404	56,531	79.2	10,161	14.2	1,746	2.4	404	0.6	2,562	3.6
1993	79,755	63,082	79.1	11,631	14.6	1,854	2.3	494	0.6	2,694	3.4
1994	77,302	60,523	78.3	11,787	15.2	1,921	2.5	436	0.6	2,635	3.4
1995	78,862	62,041	78.7	11,329	14.4	2,164	2.7	457	0.6	2,871	3.6

Note: Traffic Professional Negligence and Road Traffic violations are not included.

Source: Annual Report of Statistics on Prosecution. Quoted in Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 60.

Table 3

RATE OF PROSECUTION AND SUSPENDED PROSECUTION, BY OFFENCE (1993-1995)

Offence	1993		1994		1995	
	Prosecution Rate	Suspension Rate	Prosecution Rate	Suspension Rate	Prosecution Rate	Suspension Rate
Total	66.0	32.7	64.1	34.6	61.7	37.0
Penal Code offences (excluding traffic professional regigence)	54.3	38.5	55.0	38.3	55.3	37.9
Homicide	35.4	6.7	39.3	5.1	43.8	4.3
Robbery	80.1	6.0	81.0	5.4	80.6	6.5
Bodily Injury	71.0	26.0	70.5	26.4	72.8	24.1
Extortion	55.4	36.6	55.2	36.6	59.5	33.8
Larceny	54.4	41.9	54.9	41.4	54.9	41.3
Fraud	59.6	32.0	62.0	29.5	62.2	29.6
Embezzlement	18.2	80.1	16.5	82.1	13.9	85.0
Rape	66.6	12.7	66.7	12.9	67.3	13.7
Indecent Assault	48.2	16.8	48.0	16.0	47.5	14.3
Arson	59.4	13.2	62.3	15.2	60.6	14.2
Bribery	73.2	22.4	71.7	22.6	67.0	22.9
Gambling	52.8	46.6	58.2	40.7	64.0	35.5
Violent acts	70.1	25.7	69.4	26.3	71.3	24.9
Traffic Professional Negligence	16.4	83.2	15.7	83.8	15.0	84.6
Special Law offences (excluding road traffic violations)	68.6	28.1	70.7	25.8	70.6	26.4
Public Offices Election Law	45.0	54.2	43.2	49.8	48.7	50.6
Firearms and Swords	65.7	28.8	63.8	31.1	62.5	32.3
Stimulant Drugs	85.2	7.9	85.8	7.3	87.5	6.6
Poisonous Agents	91.8	6.8	91.6	6.8	92.9	6.3
Road Traffic Violations	95.0	4.6	93.7	5.9	93.7	5.9

Note: Suspension rate = $\frac{\text{number of suspects granted suspension}}{\text{number of suspects prosecuted and granted suspension}} \times 100$

Source: Annual Report of Statistics on Prosecution. Quoted in Summary of the White Paper on Crime 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 59.

APPENDIX

SAMPLE OF INDICTMENT

Bill of Indictment

March 15, 1993

To: Tokyo District Court

A public action is hereby instituted in the following case.

Tokyo District Public Prosecutors Office
Public Prosecutor, KONO Ichiro *(his seal)*

Defendant

Permanent Domicile:	Yoshida 823, Mizumaki-cho, Onga-gun, Fukuoka Prefecture
Present Address:	Room Number 303 of the dormitory of the Pachinko Parlor named “New Metro”, Ebisu 2-4-7, Shibuya-ku, Tokyo
Occupation:	None
Name:	YAMADA, Taro
Date of Birth:	April 6, 1947
Status:	Under detention

Fact Constituting the Offense Charged

At around 11 p.m., on February 22, 1993, the defendant stuck a knife (its edge is about 10 centimeters long) into the chest (left side) of Akio Mori (24 years of age) with the intent to murder on a street located in Ebisu 2-4-7, Shibuya-ku, Tokyo. The victim’s death resulted from blood loss attributable to the stab wound in the chest at around 11:58 on the same day at YAMADA Hospital located in Komaba 3-1-23, Meguro-ku, Tokyo.

Charge and Applicable Law

Murder Penal Code Article 199

VISITING EXPERTS' PAPERS

SOME ASPECTS OF THE FRENCH PENAL PROCEDURE

*Henri de Larosiére de Champfeu**

To explain the French procedure, which is very different from the Anglo-Saxon model in force in Great Britain, the United States, and the largest part of the Asiatic world, it is necessary to present some of the rules that govern the judiciary personnel and the organization of the criminal jurisdiction.

I. FRANCE: THE COUNTRY OF WRITTEN LAW

French law is a mixture of Frank and Germanic customs with regulations coming from Roman law, which has profoundly influenced the formation of legal concepts still in force in the continental system. Contrary to the common law countries, the French system has the law as its principal legal source, and jurisprudence has only a very marginal creative role in the law. In France, the principal rules have been codified by the legislature. In criminal matters, the Penal Code, promulgated by Napoleon at the beginning of the XIX century, has been replaced by a new penal code in 1994. The Code of Penal Procedure, which dates from 1959, was modified in profoundly 1993.

International treaties and agreements duly ratified have, in France, a superior authority to that of domestic law, and are immediately applicable. France has, thus ratified, the European Convention of Human Rights in 1974, and has accepted in 1981, the right of individual appeal by any person before the European Court of Human Rights in Strasbourg. Thus, France has not only signed these international commitments protecting human rights, but has also accepted that an international jurisdiction safeguards their effective respect. Moreover, the domestic courts have the right to put aside the application of the national law if it does not recognize one of the rights protected by the European Convention of Human Rights, or any other international provision of the same rank.

II. UNITY OF THE FRENCH JUDICIARY BODY

In France, there are two different legal systems, which for historical reasons date back to the French Revolution. On the one hand, actions at law against governmental and administrative authorities are judged by special courts called Administrative Courts. They are organized in a hierarchy headed by the Supreme Court of the Administrative Body, the Conseil d'Etat (highest administrative court and advisory body to the government in matters of legislation). Members of the Administrative Court are recruited in the same manner as high-ranking civil servants.

On the other hand, all civil and criminal cases are judged by jurisdictions called the judiciary, headed by a different Supreme Court called the Cour de Cassation. Members of this judicial court, the judges as well as the public prosecutors, belong to the same body in France, the Magistrature. This term in France has a very different meaning than the one in English, where the word "magistrate" designates non-professional judges in charge of ruling in cases of minor importance, whether civil or criminal.

* Referendary Judge of Appeal, Cour de Cassation (Criminal Chamber), France.

III. THE SAME RECRUITMENT, IDENTICAL EDUCATION FOR JUDGES AND PUBLIC PROSECUTORS

French magistrates, judges and public prosecutors, are recruited in the same manner, i.e., by competitive entrance examinations, and their education is identical. Contrary to the Anglo-Saxon system, judges in France are recruited from among students and not from experienced jurists.

A very selective competitive exam is organized each year for students receiving a diploma after finishing at least four years of university studies in law. The candidates admitted join the Ecole Nationale de la Magistrature *(National School of Magistrature)* (whose main headquarters are in Bordeaux, and was established in 1958 by General de Gaulle) where they receive training for two and a half years. The number of places offered at the beginning of each competitive exam depends on the number of places vacated due to retirement in the magistrature. On average each year, 150 students are admitted to the school, from more than 3,000 candidates. It should be pointed out that the majority of candidates admitted are women. The French magistrature is presently in the majority female. Two other competitive examinations to enter the Ecole Nationale de la Magistrature are organized: one for civil servants having a certain seniority, and the other for persons having held certain publicly elected functions, or other activities which particularly qualify them for the exercise of judiciary functions.

During their training at the Ecole de la Magistrature, the students are remunerated. Their education consists of learning the procedure and professional techniques, as well as a training period of one year at a court of justice. However, the education has a probationary character as well. At the outcome of the final exam, certain students could be obliged to redo a part of their schooling, or be declared unsuited for judiciary functions. Those students declared qualified may choose to practice, according to their rank of classification at the end of the exam, as judges or public prosecutors. They are then given supplementary training in the area to which they will be nominated.

Approximately four-fifths of the 4,800 French judges and 1,800 public prosecutors are trained at the Ecole Nationale de la Magistrature. However, it is possible to become a magistrate without passing the competitive entrance exam, or graduating from the Ecole de la Magistrature. Professional jurists and attorneys at law for the most part, having practiced at least eight years, could be nominated as a judge or public prosecutor, after a few months in a training program, in order to verify their aptitudes. Nonetheless, this type of recruitment is in the minority.

All magistrates are obliged, during their entire career, to attend a one-week continuous training program every year.

IV. DISTINCT STATUTORY RULES FOR JUDGES AND PUBLIC PROSECUTORS

During his career, a magistrate may occupy successively the functions of judge and public prosecutor. This is a direct consequence of the unity of the judiciary body. However, the specificity of the functions of judge and public prosecutor is expressed by district rules. Judges are irremovable ispo jure, they cannot be given another assignment, nor have their jurisdiction changed, even by promotion, without their agreement. Judges are independent and in the exercise of their functions cannot be given orders from any source. The disciplinary power over judges belongs to the Superior Advisory Board of the Magistrature, an organ composed in its

majority by magistrates elected by the judiciary body. Public prosecutors could be transferred in the interest of the department and receive a new appointment without their consent, even though, in practice, this is very rare. The disciplinary power over public prosecutors belongs to the Minister of Justice. The Superior Advisory Board does not decide the sanction to be applied; rather, it may only propose a sanction.

The promotions of judges and public prosecutors follow rules in part distinct. All magistrates are formally nominated by the President of the Republic, but according to different procedure terms as that for judges and public prosecutors. The heads of the prosecution departments at Courts of Appeal are chosen by the Cabinet of the government. Other public prosecutors are nominated on the advice of the Advisory Board of the Magistrature. However, this is only a simple advice which the government need not take into account. Judges are nominated in accordance with the advice of the Superior Advisory Board of the Magistrature. Thus, the government cannot go against the advice of the Superior Advisory Board in naming a judge, but it could in the naming of a public prosecutor. Moreover, the government takes no part in the choice of certain judges, such as members of the Cour de Cassation, or those presiding judges at misdemeanor and appeal courts. It is up to the Superior Advisory Board to select the holders of these functions.

V. THE DEPARTMENT OF THE PUBLIC PROSECUTOR: A HIERARCHICAL INSTITUTION

Public prosecutors have as their task to defend the interests of society before these courts. They must initiate legal proceedings of criminal infractions before the appropriate court, and demand the judges to punish the authors. Beyond this task, they intervene before civil courts in cases where law and order is implicated. Public prosecutors are in a hierarchy. Collectively they form an institution, the Department of the Public Prosecutor, still called "the parquet" *(the prosecution department)*.

At each of the 171 courts of higher instance and the courts which judge all civil and criminal cases at the first instance, there is a department of the Public Prosecutor composed of several public prosecutors. The public prosecutors at the court are placed under the authority of the head of the Prosecution Department at the Court of Appeals. There are 33 heads of Prosecution Departments at the Courts of Appeal in France, and one Director of Public Prosecution in each Court of Appeal. The heads of the Prosecution Departments at the Courts of Appeal are under the authority of the Minister of Justice.

The Minister could give instructions of a general nature to the heads of the prosecution departments and to the public prosecutors, and ask them to initiate legal proceedings in a particular manner for a certain category of infractions. The Minister could also order the head of the Prosecution Department at the court of first instance to initiate legal proceedings in a particular case, or to adopt a determined attitude in an individual case. In this event, the head of the prosecution department must follow the instructions given him, and initiate legal proceedings in the direction desired by his hierarchy.

However, at the open hearing before a jurisdiction, the public prosecutor is entirely free to express his convictions orally, and if he considers it useful, to criticize the instructions given him, or the legal proceedings he initiated. The principle of the freedom of expression at the hearing—very specific to the continental system—marks the adherence of the members of the Department of the Public Prosecutor to the judiciary. Under

the hierarchical authority, public prosecutors must initiate legal proceedings in accordance with the instructions given to them. The judiciary body can express itself freely before the judges. This rule is given in the saying, "the pen is slave, but speech is free". In practice, it is very rare that public prosecutors receive orders in particular cases. Their daily latitude of manoeuvre is important, and only cases having a strong incidence on law and order, or having a political character give rise to instructions from heads of prosecution departments at the Courts of Appeal or the Minister.

The institution of the Department of the Public Prosecutor in France does not have an equivalent in the Anglo-Saxon system, with the exception of the "fiscal procurator" in Scotland. French public prosecutors have appreciably more extensive responsibilities than those of members of the Crown Prosecution Service in England.

VI. TOWARDS A RAPPROCHEMENT OF THE STATUTORY RULES BETWEEN JUDGES AND PUBLIC PROSECUTORS?

The successive governments in France between 1990 and 1997 tried to divert the hierarchical power of the Minister over public prosecutors in order to curb the criminal proceedings against politicians belonging to the party in power, who were accused of illicit financing of political parties. This interference of the political power in the normal functioning of judicial institutions led to a very net rejection in the public opinion. The electoral body severely penalized, in 1993, 1995 and 1997, the majority governments or the presidential candidates who wanted to take advantage of their functions in order to hinder the course of justice.

Aware of these deviations, the President of the Republic, in January 1997, entrusted an independent commission, chaired by the Senior Presiding Judge of the Cour de Cassation, to draw up proposals rendering public prosecutors more independent from the executive power. The alignment of the disciplinary system of the members of the Department of the Public Prosecutor with the one for judges, and the reinforcement of the intervention by the Superior Advisory Board of the Magistrature in the nomination of public prosecutors is being considered. Breaking with the custom of his predecessors, the new Minister of Justice, since June 1997, abstains from giving instructions to public prosecutors in particular cases.

VII. THE ORGANIZATION OF CRIMINAL TRIAL COURTS IN FRANCE

Criminal courts in France consist of judicial inquiry courts and trial courts. The trial courts are to declare guilty or innocent the defendants brought before them, and to apply the penalties provided for by law. There are three categories of trial courts. The Penal Code, in fact, classifies infractions into three categories according to their gravity. Each category of infractions corresponds to a different trial court.

The Police Courts, 454 in France, judge the breach of police regulations, that is to say, the least serious offences, liable, at the maximum, to a fine of 20,000 francs, and for which a prison term cannot be pronounced. A single judge rules in these courts. Only the more serious petty offences are prosecuted by the head of the Prosecution Department at the courts of first instance. For the minor offences, the legal proceedings are done by the police. In many cases for infractions of the Road Regulations, the police do not bring the affair before the court if the author of the infraction accepts to pay a fine immediately to avoid prosecution.

Infractions of a more serious nature, called misdemeanors, are brought to trial before the Tribunal Correctionnel *(Court sitting in criminal matters for misdemeanors)* (hereinafter referred to as the Petty Sessions Court). This court is benched by one or three judges, depending on the gravity of the infractions. The legal proceedings before the Petty Sessions Court are engaged by the head of the Prosecution Department at the court of first instance. In France, there are 171 Petty Sessions Courts which judge each year around 400,000 cases. The Petty Sessions Court can impose a prison term of up to ten years.

The most serious infractions, called felonies, are brought to trial before the Assize Courts, numbered 95 in France. These courts are composed of three professional judges, as well as nine jurors randomly picked from electoral lists. The particularity of the French system resides in the fact that the professional judges and the jurors deliberate together, and confer in common as to the verdict and the penalty to be imposed. The Assize Courts, since the abolition of the death penalty in France in 1981, could pronounce a punishment of up to life imprisonment. They judge approximately 2,500 cases per year.

The decisions of the Police Courts and the Petty Sessions Courts could be the object of an action before the Court of Appeal, contrary to the decisions of the Assize Court. There are 33 Courts of Appeal in France. The judgment pronounced by the court of first instance could be the subject of appeal by the defendant, the public prosecutor, and in certain cases, the victim. The Court of Appeal again judges the case in its entirety, from the point of view of the verdict and the punishment, as well as of the facts and the law.

The decisions of the Courts of Appeal and the Assize Courts could be the subject of an extraordinary action taken before the Cour de Cassation (supreme court) competent over the entire national territory. The Cour de Cassation does not judge the cases on its grounds. It assures that the decisions were rendered with full respect of the law. If it deems that an unlawful decision was taken, it does not judge the case but nullifies the judgment and refers the case to another court to be rejudged.

Finally, there exists specialized courts judging infractions committed by persons under the age of 18 years. These courts, which are not open to the public, are compelled to impose, when possible, educative rather than punitive measures.

VIII. JUDICIAL INQUIRY COURTS

Since the beginning of the XIX century, judges have participated considerably in the investigation of criminal cases. Thus, in each of the 171 courts in the country, there exists one or more Examining Magistrates, numbering around 570, over the entire territory. The Examining Magistrate is a judge of the court, he is independent and may not receive orders from the executive power, the head of the Prosecution Department at the court of first instance, or another judge. He can place a suspect in preventive custody before trial. It is also possible for him to sit in judgment in a case that he has not investigated.

The decisions of the Examining Magistrates are subject to appeal before the Chambre d'Accusation, a specialized chamber of the Court of Appeal.

IV. LEGAL PROCESS OF CRIMINAL PROCEEDINGS IN FRANCE: A PROCEDURE IN THREE STAGES

After the presentation of the principal aspects of the French legal and judicial systems, the legal process of the criminal procedure in France should be examined. It consists of three stages: the

investigations made by the police of the Criminal Investigation Department (C.I.D.), the judicial inquiry by the Examining Magistrate, and the trial.

A. The First Stage of the Criminal Proceedings: The Inquiry Made by the Criminal Investigation Department

When a crime is committed, it is up to the police officers of the C.I.D. to record it, search for the perpetrators, identify and arrest them, and inform the judicial authority.

The police officers of the C.I.D., in urban zones, are part of the national police and under the authority of the Minister of the Interior. In rural zones they are part of the national gendarmerie having a military training and under the authority of Defence Minister. Certain specialized services, in the fight against organized or economic crimes come under the Ministry of the Interior, and their jurisdiction covers both urban and rural zones. The officers of the C.I.D. under the Ministry of the Interior or Defence, are placed under the authority of the Head of the Prosecution Department at the court of first instance when conducting their criminal investigations.

When an infraction is committed, the officer of the C.I.D. must inform the Head of the Prosecution Department, who generally asks the police officer to continue the inquiry, but he could also remove the case from him and give it to a police officer belonging to another police service or to the gendarmerie. The public prosecutor could give directives to the police officer in charge of the inquiry, ask him to orient his investigation in a given direction, or to carry out certain acts of inquiry.

In France, the police have certain powers if they act quickly when an infraction is committed. Specifically they can start an inquiry immediately when a person is caught red handed. In this case, it is possible for them to proceed to search the domicile of the suspects without their consent, to seize objects useful in the manifestation of the truth, arrest the suspects and take them to the police station. If the police react in a space of time further removed from the commission of the act, they must proceed to a preliminary investigation and do not have the power of restraint, i.e., they cannot arrest a suspect, nor enter his home without his authorization. In all cases, officers of the C.I.D. can prescribe technical or medical examinations, and transmit the samples to a laboratory.

When a person has been arrested by the police, he can be detained at the police station for a duration of 24 hours. This is called police custody. The person placed in police custody has several guaranties: he may benefit from a medical examination and request that a member of his family be notified. However, the latter could be refused if it interferes with the progress of the investigation. The person placed in police custody can also consult with a lawyer for 30 minutes. During police custody, the person could be interrogated and does not have the right to be assisted by a lawyer during these hearings at the police station. The lawyer who conversed with the person in police custody does not have access to the procedure file drawn up by the police and may not assist in the interrogations. According to a movement of opinion that is presently developing in France, persons restrained by the police should have the right to be assisted by a lawyer during their interrogations from the very start of their police custody.

The 24-hour detention period under police custody could be extended for a new period of 24 hours by the head of the Prosecution Department at the court of first instance. Police custody could be extended up to 4 days in drug or terrorist cases. In the investigations concerning

these infractions, the consultation with a lawyer takes place only 72 hours after the commencement of custody.

In France, approximately 500,000 persons are placed in police custody each year, of which 100,000 for a duration of more than 20 hours.

Decision to Institute Proceedings

When the police have finished their inquiry, they communicate the results to the head of the Prosecution Department at the court of first instance, who may ask the police to make additional investigations. The public prosecutor could, given the inquiry, classify the case, and not institute criminal proceedings, even if it is established that an infraction was committed and the author identified. In certain countries, such as Germany, the public prosecutor must initiate proceedings for infractions that are exposed to him. Thus, by virtue of the principle of the legality of the proceedings, all infractions must be prosecuted if the author is identified. However, in France, the head of the Prosecution Department at the court of first instance, could decide not to institute proceedings for an infraction when the author is known because he is in command of the timeliness of the proceedings.

However, the public prosecutor does not have a monopoly on the institution of proceedings. In France, the victim of an infraction could also institute criminal proceedings. The trial judge not only decides as to the guilt of the defendant and the penalty to be imposed, but also the amount of damages to be allocated to the victim. Thus the proceedings instituted by the victim before a criminal court will lead, not only, to the attribution of damages to his benefit, but also the pronouncement of a penalty against the author of the infraction.

If the public prosecutor takes the decision to institute proceedings, he could bring the case directly before the trial court, when the inquiry made by the police is completed. This happens in approximately 90 percent of the cases where a misdemeanor has been committed. However if the infraction committed is a felony, or if the misdemeanor in question is particularly serious and complicated, the head of the Prosecution Department could refer the matter to an Examining Magistrate.

B. Inquiry by the Examining Magistrate

At the outcome of the police inquiry, the more serious and complicated cases are transmitted by the public prosecutor to an Examining Magistrate. The affair could also be brought before the Examining Magistrate by the victim, in the event the victim decides to file a lawsuit. The Examining Magistrate has at the same time powers of investigation and action, and jurisdictional powers.

The Examining Magistrate must initiate all investigative acts useful in the manifestation of the truth. He could carry out any or all of these investigative acts personally, but he is obliged to proceed in person to the interrogation of the suspects, who could, if they wish, be assisted by a lawyer when they are questioned by the Examining Magistrate. The Examining Magistrate could relegate the responsibility of investigation to the police or experts. In this case, the police or the experts are under his authority. The Examining Magistrate conducts the investigations in an independent manner, i.e., he is not an auxiliary of the public prosecutor. He must investigate both on behalf of and contrary to the interests of the defendant. The investigations conducted by him should not have as their sole objective to find evidence against the suspect, but also to uncover the truth. The public prosecutor, the defendant and the victim, could demand that the Examining

Magistrate proceed to certain investigative acts. The Examining Magistrate, if he does not carry out the acts solicited, must explain his decision by a ruling, which could be appealed before the Chambre d'Accusation. All the investigative acts are written down in a report and placed in the file, which is at the disposition of all parties. The Examining Magistrate could decide to tap telephone conversations.

The Examining Magistrate can indict any person he suspects of having participated in the acts concerning the case referred to him. Thus, the Examining Magistrate investigates the facts, not the individual. He must search for the person who committed the acts, and can indict all those who participated.

The Examining Magistrate can also place a suspect in preventive custody, and send him to prison before the person appears for trial. After a person has been detained by the police at the station for a period of 48 hours—which could be extended up to 96 hours in certain cases of terrorism and drugs—the suspect, if he is not judged, is freed. He could be placed in detention before judgment if the Examining Magistrate decides upon it. Also, the Examining Magistrate has the choice of not placing the suspect in detention, but under judicial control, in order to limit his movements and to keep an eye on his activities. The decisions rendered by the Examining Magistrate concerning judicial control or preventive custody could be appealed before the Chambre d'Accusation.

Approximately one-third of the 50,000 persons detained in French prisons have not been brought to trial. A public opinion movement contests the power, often considered excessive, granted by the law to the Examining Magistrate to decide alone as to the detention of a suspect. The reform projects contemplated are to remove from the Examining Magistrate the power of placing a suspect in preventive detention, and to have this capacity exercised by another judge of the court.

At the end of the inquiry, the Examining Magistrate could estimate that there is not sufficient evidence and renders a decision of nonsuit. If he decides that the suspect committed the misdemeanor, he orders a committal to trial before the Petty Sessions Court. If he thinks that the suspect committed a felony, he transmits the case to the Chambre d'Accusation, which could refer the case to the Assize Court.

Therefore, the Examining Magistrate not only conducts the inquiry, but also he appreciates the value of the evidence gathered during the inquiry and decides whether to continue or terminate the proceedings.

C. Pre-trial Procedure

Most of the time, it is the public prosecutor who refers a case to the trial court, when he estimates that the police inquiry is finished and that there is sufficient evidence to prove the existence of a misdemeanor. This jurisdiction could also be seized by the victim. However, in more serious cases, the trial court is seized by the decision of the Examining Magistrate.

Before trial, the defendant is assisted by a lawyer, who has access to the procedure file. The trial is public and the defendant could, contrary to the rules in force in the Anglo-Saxon countries, be tried in his absence. The public prosecutor upholds the accusation and indicates to the court which penalties appear to be most appropriate to reprimand it.

The judge, at the trial stage of the case and in order to decide the guilt, could take into consideration all the elements of proof that were presented before him. Contrary to the system in force in common law countries, France does not have the principle of the legality of proof. Thus, testimonies, confessions before the investigators or the Examining Magistrate

(even if they are retracted afterwards), documents, expert opinions, technical analyses, and the contents of telephone taps are susceptible to be retained by the judge in order to assess the guilt of a suspect. A simple indirect testimony is admissible. It is up to the judge to determine, in each case, the probative value of the different elements in the procedure. The suspect is questioned at the hearing, but is not sworn in. He is not obliged to tell the truth, and his lies before the judge are not punishable. The accusation is upheld by the public prosecutor before the court. However he may freely present his observations before the court, even to maintain that the prosecution is unfounded, or that the infraction was not constituted. The public prosecutor asks the court to pronounce a sentence that he believes the most appropriate for the defendant. It is up to the judge to decide, case by case, according to his intimate conviction.

This system confers a much more important role to the judge than in Anglo-Saxon countries. The freedom given to the judge to appreciate the probative force of the evidence presented before him may be difficult to comprehend by someone who exercises within the common law system, used to handling the principle of the legality of proof. If, in this respect, the French system offers less guaranties than the Anglo-Saxon system, it is, nonetheless, much more flexible.

Especially, the principal guarantee offered to the suspect by the French procedure is that he cannot be condemned without a trial, even if he does not deny the charges against him. The meaning of a defence by the suspect becomes immaterial in such cases. A conviction cannot be pronounced if all the evidence against the suspect has not been submitted for review by the judge. In the common law system, it is possible for a defendant to plead guilty and be sentenced without trial, even though the evidence against him would not have been sufficient to find him guilty had he been tried.

X. CONCLUSION

A country of written law, France at the beginning of the XIX century set up a criminal procedure which rests on two essential organs: the head of the Prosecution Department at the court of first instance and the Examining Magistrate. Both belong to the same judicial body. The head of the Prosecution Department at the court of first instance, placed under the authority of the Justice Minister, conducts the police inquiries when an infraction is committed, and intervenes during the entire procedure representing the interests of society.

The Examining Magistrates, an institution proper to the continental system, are completely independent and make inquiries in the more serious case, at the request of the public prosecutor or the victim. Their status protects them from political pressures, and thereby avoids important prosecutions of politicians from being hampered. However, it is more than likely that in the future they will lose the power to decide alone the placement suspects in detention before trial. This is the direction of advancement of French criminal procedure, and in line with the European Convention of Human Rights, in its attempts to increase the guaranties offered to the suspects, yet at the same time to assure an efficient supression of criminal offences.

THE DEVELOPMENT OF THE PROSECUTOR'S JURISDICTION IN THE CRIMINAL JUSTICE SYSTEM OF INDONESIA

*Antonius Sujata**

I. INTRODUCTION

Formerly, in 1605 the Indonesian Archipelago was colonized by the Dutch and in 1512, prior to the Dutch colonization, several Indonesian territories, especially Moluccas and Sumatera, were under the control of Portugal.

To carry out their colonization of Indonesia, the Dutch administration set up the Dutch East India Company (Verenigde Oast Indische Companie). With the establishment of the Company, not only did they succeed in eliminating the Portuguese administration, but they also became a prominent trader controlling the spice trade in Indonesia and managed to expand their power over the territory. The Dutch then gradually took over the administration, legislation and judicature[1] of the areas which they ruled. The Dutch East India Company formulated various rules of the law, appointing officers to protect their interests and also formed distinct legal bodies. Initially, in the area under their rule, the Dutch East India Company put into effect the same laws applicable to all walks of life, i.e., Dutch law. But since the circumstances did not permit and opposed reality (many rebellions broke out), the Indonesian people were subject to the customary law, which as far as it was concerned that the Dutch Law did not apply.[2] Indonesia declared independence on 17 August 1945.

Indonesia was colonized by the Dutch for more than 340 years. So bearing in mind the long period of said colonization, it is understandable that the Dutch legal system has a very strong influence on Indonesian law.

Up to now, there are still many legacies of Dutch law remaining valid in Indonesia, including the Civil Law Code, the Commercial Law Code, the Civil Procedure Code, and the Penal Code as well as many others, which make up a total of about 300. In order to adopt all the existing provisions of the law before the birth of Indonesia (17 August 1945), Article II of the Interim Regulations of the 1945 Constitution states that all existing provisions of law shall remain applicable unless superseded by new laws.

In Indonesia, the term prosecutor as we know now as "Jaksa" has its origin traced to the Sanskrit word "Adhyaksa".[3]

At the time when the territories of Indonesia were being divided into several governments, among the duties of a prosecutor was to double up as a judge and, more often than not, a prosecutor also acted as a defence counsel.

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1 Supomo and Djoko Sutono, Sejarah Hukum Adat/ History of the Prescriptive Law in Indonesia, 1609-1948, Djambatan Publisher, Jakarta, Indonesia.

2 Kima Windu Sejarah Kejaksaan Republik Indonesia 1945-1985/Forty Years' History of Prosecution, Republic of Indonesia 1945-1985, Attorney General of the Republic of Indonesia, Jakarta, 1985.

3 Mr. Tresna, R Peradilan di Indonesia/Court in Indonesia, Pradnya Paramita, Jakarta, 1978.

The Dutch colonial administration distinctively separated the duties of the prosecutor, judge and defence counsel. However, the duties of a prosecutor as we now have, experienced various developments.

The Dutch put into effect the Criminal Procedure Code for the first time in Indonesia through Law No. 23/1847. Based on this law, the courts hearing cases involving Indonesians were different from those for Dutch citizens.

Nevertheless the prosecution of criminal cases at both judicial bodies were handled by prosecutors.

Apart from that, in accordance with the law, prosecutors are duty bound to defend the rule of law and carry out the decision of the court. After that, the duties of prosecutors developed further to include the powers to conduct investigation and further investigation. In fact, the said power further was extended to include the following:

(1) power to exclude certain matters in public interest,
(2) power to file an appeal,
(3) power to file cassation to the Supreme Court in the interest of the law, whether in criminal or civil matters,
(4) representing the country and government in criminal and civil matters,
(5) applying to a judge to place someone in the hospital,
(6) applying to a judge to dissolve a corporate body, and
(7) petitioning for the annulment of a marriage.

On 8 March 1942 the Japanese Army took over administration from the Dutch and Indonesia.

At that time there were six different public courts in Indonesia namely:

- The Supreme Court (Saikoo Hooin),
- The Appellate Court—High Court (Kootoo Hooin),
- The Court of First Instance (Tihoo Hooin),
- The Police Court (Keizai Hooin),
- The District Court (Ken Hooin), and
- The Municipal Court (Gun Hooin).

These courts were respectively assigned with a prosecutor placed administratively under the charge of the Head of Prosecutors[4] instead of a Resident (Head of Administration).

II. INDONESIA BOARD OF PROSECUTORS AFTER INDONESIA'S INDEPENDENCE ON 17 AUGUST 1945

In the text of the Constitution, not even a word was used assertively or directly to describe specifically the prosecution. However, this does not mean that the persons drafting the Constitution failed to turn their attention on the existence of the prosecution. The Board of Prosecutors, which was formed at the time when Indonesia was established, is still recognized and its existence remains as it was by virtue of Article II of the Interim Regulations.

Under the circumstances after independence, the priority for the formation of the Board of Prosecutors was as important as the formation of the Board of Judiciary.

Since it is in unity with the board of judiciary, it was best that both the judiciary and prosecution be put under the Justice Department. The criminal procedure code currently prevailing adopted the criminal procedure code left behind by the Dutch. The New Indonesian Criminal Procedure Code has been in effect since 1941.

Based on the laws contained in the Criminal Procedure Code, the Board of Prosecutors, consisting of all prosecutors, is placed under the charge of the Attorney

[4] Article 3 Osamu Seirei No. 3 1942; Act of Indonesia No. 1 1942.

General; but at provincial level, it is headed by Chief Public Prosecutor.

Prior to this, the Board of Prosecutors was under the Interior Minister, and at district level, all prosecutors were under the Regent.[5]

Bearing in mind that the prosecution's organization is not autonomous, it is understandable that the local board of government has a strong influence over the functions of the Indonesian prosecution.

The position of the Indonesian Board of Prosecutors saw another change upon the enactment of the Emergency Law No. 1/ 1951. At that time, the Board of Prosecutors, which was originally under the Interior Department, was transferred to the Justice Department.

All prosecutors in the course of their daily prosecution duties are attached to the local court of first instance.

On 22 July 1961 with the enactment of Law No. 15/1961, the Board of Prosecutors was separated from the Justice Department to become an autonomous Board having its own organization under the charge of the Attorney General. Bearing in mind the change of status and organizational position, the date of 22 July is considered by the prosecution as an important day that marks the birthday of Indonesian Prosecution in the post-independence era.

The whole prosecution organization is placed directly under the power of the President and is accountable according to hierarchy. The Attorney General being the Assistant of President shall be appointed and retired by the President. According to the constitution, the President of Indonesia as the Head of State shall hold special powers in relation to criminal matters by ordering the Attorney General either to proceed with prosecution or withdraw prosecution by granting amnesty or abolition.

The position of the prosecution in the structure of the Republic of Indonesia vested with the executive power in the aspect of justice has inherently taken root since the era of the Governments of Majapahit, Mataram and Cirebon.

During the colonial rule of the Dutch, the main tasks of the Board of Prosecutors were to protect the political, economic and security interests of the colonialists. However, during the independence, the prosecutors became the protectors of the Republic of Indonesia against the colonialists and other troublemakers.

After the Indonesian army had succeeded in dispelling the remnants of the supporters of the Dutch administration in 1950, several of the supporters were later tried after undergoing investigation and then faced with prosecution by the Attorney General of the Republic of Indonesia.

For that reason at the time of hearing cases involving military personnel, both the prosecutor and the judge hold honorary military ranks, so much so that the Attorney General is also acting as the Military Attorney General. The organizational relationship with the police apparatus is also different when compared to the present setting.

The police apparatus carries out the investigation of criminal cases functionally under the supervision of the prosecution because the police investigation status is to act in assistance to the prosecution.

As such the police apparatus, even though having its own organization, when carrying out its duties in investigation, will invariably obtain instructions from the prosecution.

The position of the police investigation apparatus as assistant to the prosecution until 1961 was actually efficient and effective in handling criminal cases because in the course of conducting

[5] A. G. Pringgodiado, Sejarah Pembuatan Undang-Undang Dasar 1945/History of drafting the 1945 Constitution, Legal and Comunity Magazine, Year 3, No. 2, May 1952.

investigation, the prosecution could directly give instructions without the bureaucratic influence of the police board.

In the past the relationship between the prosecution and the armed forces, especially in the handling of criminal offenders who were military personnel, was not a problematic one because the Attorney General was also the Military Attorney General. However, in 1971, the Civil Court was distinctly separated from the Military Court, thus rendering the Attorney General only to powers of prosecution against criminal offenders from among civilians.

In 1950, there was a condition touching on the special privileges of a minister who was charged for committing an offence (forum privilegiatum). It states that a minister could only be tried in the first and last instance by the Supreme Court. For example, a minister by the name of Sultan Hamid was tried by the Supreme Court and the public prosecutor was the Attorney General.

The said special privilege stood only for a while and was later lifted because it was not compatible with the basic principle that every one has equal status before the law.[6] The position of the Attorney General as a public prosecutor in cases at the Supreme Court bears the consequences that the Attorney General must be a professional Master of Laws and from time to time he shall be obliged to appear in the Supreme Court.

In other words, the Attorney General's post is a career rather than a political post (without experience as a prosecutor).

In its further development, in fact the Attorney General has held a ministerial post. By acting as an Assistant of the President, the post of Attorney General constitutes a political post. However this matter took place after the abolition of the regulations on special privilege on a minister to be tried by the Supreme Court (Forum privilegiatum). This post which is political in nature means that it should not be held by a Master of Laws or one who has experience in prosecution work.

In fact since 1966 the Attorney General of Indonesia generally has come from the military circle, and only recently in 1990 and for the first time, the Attorney General came from the Prosecution Department itself.

III. PROSECUTION PRIOR TO THE ENACTMENT OF THE NATIONAL CRIMINAL PROCEDURE CODE

The National Criminal Procedure Code came into force on 31 December 1981 and before this Criminal Procedure Code existed, the legacy of the Dutch Criminal Procedure Code was in force.

Taking into account its history originating from the legal product of the colonial Dutch, it is understandable that it contains numerous rules to protect the power of the Dutch and too little opportunity was given to the accused to seek justice.

In other words, in this penal code, human rights, i.e., the accused's, were not accorded with the necessary guarantee.

There was a dearth of protection for the accused in respect of remand and legal advice.

The accused might be remanded for a long and unlimited period of time even though every 30 days it ought to be extended. Also there was no obligation that during questioning the accused could be accompanied by a legal advisor.

At that time, the prosecution had an extensive power because in law they could conduct further investigation on all matters apart from investigation pertaining to criminal offenses economic in nature, corruption and subversion (political

[6] Pasal 27 Undang-Undang Dasar 1945/Article 27 of 1945 Constitution: All citizens have equal status before the law and in government and shall abide by the law and the government without any exception (The equal status of everyone in law and government).

offence). The prosecutor also had the power to coordinate the investigation machinery comprising the police investigator and civilian investigator from the government sector.[7] In coordinating said investigation machinery, the prosecutor could provide supervisory instructions or request that the case be surrendered to the prosecution. As a matter of fact, the prosecutor, being the person who will appear in court, should know about or complement the facts required to prove the case. By directly giving instructions or conducting investigation himself, the case could be disposed of more expeditiously.

Other than being speedier, any setback or errors regarding its legal substance could also be avoided. However, looking at the other perspective, this system also had weaknesses because of the overlapping of powers as both the police and the prosecutor have similar powers, making it highly possible that an accused person could be investigated by the police and the prosecutor. There was no explicitness in terms of criminal action, as the prosecutor could investigate any matters.

This system although has its advantages, certainly also has its weaknesses.

A. Religious Sects

As regards the power of the prosecution, apart from conducting investigation and further investigation or prosecution, it also carries out supervision and takes action against or dissolves the religious sects that may endanger the community and nation.

According to the law, there are five religions recognized in Indonesia, namely, Islam, Protestant Chistian, Catholic Christian, Buddhism and Hinduism. Apart from the foregoing, there are religious sects which do not fall within the import of religion originating from ancestral tradition and Indonesian culture. In practice, this trend of belief often runs counter with the religion recognized by the government, thus causing many incidents of riots since the problems between the religion and this belief are very sensitive. The prosecution is duty bound to prevent the confrontation by doing lawful surveillance or dispersing said religious sects.

In order to segregate the religions recognized by the Government from the community's religious sects, the Indonesian Government has taken a different approach.

The supervision of religions recognized by the government is entrusted to the Religious Minister, while the supervision of the religious sects is carried out by the Minister of Education and Culture.

According to the law, the police also has the power to conduct supervision on religious sects, but any supervision or action by the police must be focussed on a religious sect which is nationwide in scale and poses danger to the solidarity of the nation.

B. Economic Crime and Corruption

In 1960, there were many political flare-ups in Indonesia. To address this problem, Law No. 5 of 1959 confers power to the Attorney General in the name of the President to give orders directly to the police force, as well as the power to order preventive detention up to a maximum period of one year without extension against criminal offenders who commit offenses economic in nature, corruption and threaten the security of the nation by preventing the implementation of the government's programme. Said power is extraordinary because prior to this, it was non-existent. (Bear in mind that the power has set aside the hierarchy applied in the police organization.)

The condition also deviated from the procedure code which only gives power to the prosecutor to effect remand for a

[7] Section 2 of Law No. 15/1961 regarding the main laws of prosecution.

maximum period of 30 days with an extension of 30 days after obtaining the approval of Head of Court. The government is of the opinion that the period caused the commission of too much corruption, resulting in financial loss to the state and there is no special legal provision to curb it. Since the condition was so pressing, a legal provision was regulated but only as a temporary measure until such time when a permanent legislative provision could be formulated to prevent corruption.

After it was enforced for about two years, a satisfactory result was achieved. However, since it is urgent in nature and specifically meant for the prevention of corruption, it must be replaced by permanent laws of corruption.[8]

The Corruption Law gives power to the prosecutors with the liberty to conduct investigation into corrupt acts as follows:

(1) Any person suspected of having commited a corrupt act shall be required to give evidence of assets and properties of his spouse and children as well as the assets of the company he manages.
(2) Any person questioned as a witness must give a statement.
(3) The right to refuse being a witness (right of refusal) is only given to religious officers and doctors.
(4) The prosecutor can request for all documents deemed necessary be produced before him for his knowledge.
(5) The prosecutor has the right to open, examine and seize the letters sent by post, telegram or telephone, which he suspects to be related to a case of corruption that he is investigating.
(6) The prosecutor can at all times enter the premises that he deems fit to carry out his duty. If the occupier refuses, he must be accompanied by two witnesses.

In order to speed up investigation and prosecution in the case of corruption, there are abiding conditions, namely:

(1) The corruption case must first be investigated and then prosecuted.
(2) Within three months after the accused is remanded, his case must be referred to the court.
(3) Within six months after the accused is remanded, his case must have been examined by a judge.

C. Threatening National Security

Apart from the power of the prosecutor to handle corruption cases, there is also a preventive power to place those who have the inclination to threaten the security of the nation in a certain district so that they can not carry out their activities that could endanger the interest of the nation.

This power was once applied on the leaders of the Indonesian Communist Party. The people who supported the revolution were sent to Pulau Burn, but have since been released.

Other than that, the prosecution also has been vested with the power to carry out investigation on those who commit offenses of subversion.

Even though the police also has the power to carry out investigation on subversion offenses, the majority of the subversion cases put to trial were the result of the investigation done by prosecutors.

The subversion law for the past 20 years has created controversies (conflict of opinion). The Government of Indonesia is of the opinion that the Anti-Subversion Law[9] is still relevant to prevent any

[8] Law No. 3 of 1971 regarding the Prevention of Corruption, Republic of Indonesia Government Gazette No. 39 of 1971.

[9] Law No. 11/Pnps 1963 regarding the Prevention of Subversion Activities, Government Gazette No. 23 of 1963.

potential revolution attempts with the intention of alienating themselves from a united Indonesia or to topple the Government of Indonesia for another party.

Those who wanted this law to be abolished are lawyers, human rights activists and members of non-governmental organizations. They are of the opinion that the Subversion Law is a tool to suppress the groups who do not agree with or often criticize the government policies.

The Indonesian Subversion Law is contrary to human rights because in essence the element to be controlled and tried is the opinion of a person and not the act he is carrying out. Every person is entitled to his opinion and this is universally recognized.[10] Each time during the court session of a case concerning subversion, all legal advisors in their opening statements would without hesitation raise objections that the existence of the Anti-Subversion Law is actually illegal as it is not consistent with the basic freedom that has become one of the principles in the Constitution of Indonesia. The formulation of the Subversion Law is not concrete and ambiguous, thus making it open to abuse. Since it is too abstract, there is a possibility that its application will go beyond the dimension entrusted by the legislators.

As regards the difference of opinion, it is generally said that the court has decided that the Anti-Subversion Law is de facto legal as law, which is currently in force and has not been abolished by the House of Representatives. As such all legal advisors and human rights activists adopt reasons which are material (substantial) in nature while the prosecution and the courts adopt reasons which are official in nature in order to declare that the Indonesian Anti-Subversion Law is still in force.

A subversive act includes any of the following:

(1) Toppling, damaging or undermining the authority of the lawful government or state apparatus,
(2) spreading widespread hostility or creating enmity, division, conflict, disturbance, turmoil, unrest among the people or community or between Indonesia and a friendly country,
(3) disturbing, impeding or disorganizing the industry, distribution, trade, cooperatives or transport run by the government,
(4) indulging in activities sympathizing with the enemies of Indonesia or a country which is not friendly with Indonesia,
(5) damaging or destroying buildings that function for the benefit of the public,
(6) carrying out spying activities, and
(7) committing sabotage.

The power of the prosecutor as an investigator handling subversion offenses is much wider than the power as stipulated by the law in general.

An investigating prosecutor under the Anti-Subversion Law may enter a place and search premises that are believed to be connected with subversion activities. According to general procedure, such power can only be exercised against the perpetrator apprehended at the time of committing the offence.

In investigating subversion cases, a prosecutor has the power to remand a suspect up to a period of one year without having to apply for extension from a judge.

Apart from the substance or the formulation of the subversion offence which is extensive in nature, the process of hearing should be expedited. After the case bundle has been received by the court from the prosecution, the case must be heard within 30 days.

[10] The Universal Declaration of Human Rights, Proclaimed by the United Nation on 10 December 1948.

All judges only have 30 days to study the case bundle and the case exhibits. If the judge decides on acquittal, then the prosecutor can file an appeal. A subversion case can still be heard and decided by the court even though the accused is absent or cannot be brought to appear before the court (in absentia).

D. Other

Other powers of the prosecutor also include investigation on members of the House of Representatives[11], Governor[12] and Justice of the Supreme Court[13].

Any investigation on a member of the House of Representatives must first have the approval of the President. After that the Attorney General will issue a warrant. The investigation may be carried out by the prosecutors or the police.

The procedure of investigation on a Justice of the Supreme Court is similar to the investigation of a member of the House of Representatives. In respect of the Governor, only the approval of the President is needed without having to wait for the warrant from the Attorney General. However, the outcome of the investigation must be reported to the Attorney General.

The procedure of obtaining the approval of the President and a warrant by the Attorney General shall be dispensed with if a member of the House of the Representatives, a Justice of the Supreme Court or a Governor:

(1) is arrested in the act of committing an offence,
(2) commits offenses punishhable by death based on preliminary proof, or
(3) commits offenses against the security of the nation.

IV. THE POWER OF PROSECUTORS IN THE EXECUTION OF A JUDGE'S DECISION

A decision of the court always involves two matters, either the conviction or acquittal of the accused and a determination as to the status of the case exhibits.

In respect of the status of the case exhibits, there are three possibilities, namely, return them to the witness/ accused, forfeiture to the state (to be auctioned/derive benefit therefrom) and seizure for destruction.

Executing the decision of the court, whether the person or the case exhibits, shall be the duty of the prosecutor. In executing imprisonment sentence against a person who is newly convicted by the court, the prosecutor shall take the prisoner to the prison/correctional service officer.

In regards to case exhibits, the prosecutor is obliged to return them to the witness or the accused and if the case exhibits are to be auctioned or destroyed, the prosecutor is obliged to carry it out.

In executing the decision of the court, the prosecutor is obliged to prepare a Summary of Report.

What about if the case involves a death sentence? Capital punishment is still being carried out in Indonesian, but its application is very rare and very selective. A death sentence is generally carried out after the case has gone through a process in which decisions have been made by the Court of First Instance, the Appellate Court, the Supreme Court and the President, who rejects the clemency petition.

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[11] Law No. 13 of 1970 regarding Procedure of Police Action against Member/Leader of People's Consultative Assembly and the House of Representatives, Government Gazette No. 73 of 1970.

[12] Law No. 5 of 1974 regarding Administration Law at District Level, Government Gazette No. 38 of 1974.

[13] Law No. 14 of 1985 regarding Supreme Court, Government Gazette No. 73 of 1985.

In fact there are also cases which had gone through a revisionary process by the Supreme Court. In the clemency petition to the President, the legal advisor and the accused himself will submit several points for consideration, and the Attorney General and the Minister of Justice will present their opinions.

That is why generally a death sentence is carried out five years after the accused has been convicted of an offence.

There are several conditions in executing the death sentence in Indonesia:[14]

(1) Death sentence is carried out in the Jurisdiction of the District Court that passes the sentence unless otherwise decided by the Minister of Justice.
(2) The time and place of the death sentence will be determined by the Head of Provincial Police after cousulting the opinion of the local Chief Public Prosecutor.
(3) The Head of Provincial Police shall prepare the personnel, equipment and other requirements.
(4) The prosecutor shall be informed of the execution of the death sentence three days in advance.
(5) If the condemned prisoner wishes to say something, his statement/ instruction must be put down in writing by the prosecutor.
(6) The defence counsel of the accused person may attend the execution of the death sentence.
(7) The death sentence is not carried out in public and will be carried out in as simple a manner as possible.
(8) To carry out the sencence, the Head of Provincial Police will form a team of marksmen comprising a Sergeant and twelve Corporals led by a Senior Officer.
(9) The team of marksmen will not be using their own weapons and they will be under the charge of the prosecutor.
(10) The accused shall be brought to the place of execution accompanied by a spiritual leader and his eyes will be covered with a piece of cloth.
(11) The distance between the accused and the team of marksmen is 5 to 10 meters and the prosecutor will give the command for the execution.
(12) The death of the accused will be confirmed by a doctor.

[14] Law No. 2/Pnps 1964 regarding the procedure of executing the death penalty meted out by the court in a civilian and military trial, Government Gazette No. 28 of 1964.

V. THE STATUS OF PROSECUTORS AFTER THE ENFORCEMENT OF THE NATIONAL CRIMINAL PROCEDURE CODE

In 1981, Indonesia adopted its own National Criminal Procedure Code to replace the Criminal Procedure Code left behind by the Colonial Dutch. We have already stated that the Dutch Criminal Procedure Code provided little protection for accused persons. Below are the several basic aspects found in the National Criminal Procedure Code.

A. Presumption of Innocence

Based on the presumption of innocence, the suspect should be given his rights, such as expedited questioning and be informed of his alleged act in the language understood by him, the right to prepare his defence, the right to an interpreter, getting legal aid, the right to visits by family members, and the right not to be burdened by the onus of proof, because the onus of proof lies in the public prosecutor.

B. Legal Aid at Every Stage of Questioning

The suspect is entitled to legal aid from the time he is arrested or remanded and questioned.

It is the right of the person involved in a case to have a legal advisor and to keep in contact with his legal advisor.

The legal relationship should be unimpeded, which means the suspect can put forward everything in preparation of his defence without being supervised by any officer. If there is evidence that the legal advisor abuses his right in his conversation with the suspect, then at that stage of examination the officer can give a reminder.

If said reminder is ignored, then said relationship will be limited, i.e., the relationship will be kept within sight but not within hearing. In the case the suspect commits an offence that carries a death sentence or an offence punishable with 15 years' imprisonment or more and he cannot afford his own legal advisor, then the officer handling his case shall provide him with free legal aid.

C. Limited Period of Arrest/Remand

In order to remand a person, there must be strong suspicion based on evidence that a person has committed an offence punishable with 5 years' imprisonment or more. Other reasons include the tendency of the suspect to abscond, hide or destroy case exhibits or repeat the criminal act. If the suspect thinks that the remand/arrest is illegal, he can submit an application for a pre-trial review.

The investigator may obtain a remand period of 20 days and it can be extended to 40 days by the public prosecutor.

The public prosecutor may obtain a remand for 20 days and be extended for 30 days. A judge may effect remand for 30 days and extend it twice for 30 days (60 days). The High Court (appellate court) may effect remand for a period similar to the District Court (court of first instance); whereas the Supreme Court may effect remand for 50 days and the period can be extended twice for 30 days (60 days).

D. Compensation and Rehabilitation

The suspect is entitled to claim compensation for wrongful arrest and detention. A claim for compensation is an application to obtain pecuniary compensation, while rehabilitation is a claim to obtain the right or status lost due to the questioning, arrest or remand.

The fundamental change in the National Criminal Procedure Code concerns the system which is now known as the "Integrated Criminal Justice System". This means that the law enforcers, especially the police and prosecutors, are distinctly defined in terms of their function, but between them there is a functional coordination relationship. They are clearly designated in that the police acts as the investigator and the prosecutor acts as a public prosecutor.

However, these two authorities are still mutually connected because:

(1) The investigator shall inform the public prosecutor about the commencement of an investigation.
(2) The investigator shall hand over the case bundle to an public prosecutor.
(3) The public prosecutor shall grant extension of remand to the investigator.
(4) The public prosecutor shall give instruction to the investigator, and the investigator shall complete the case bundle according to the instruction of the public prosecutor.
(5) If the investigator stops investigation, he shall inform the public prosecutor; likewise if the public prosecutor stops prosecution he shall inform the investigator.

VI. PERFECTING THE NATIONAL CRIMINAL PROCEDURE CODE

Lately the desire to refine the National Criminal Procedure Code has come to surface even though said code is only 15 years old.

It is evident that development and new demands are rapidly appearing in numbers, including new demands for justice.

When the National Criminal Procedure Code was formulated to replace the colonial Dutch Criminal Procedure Code, it managed to accommodate the growing demands presently existing so much so that the National Criminal Procedure Code can be regarded as seeped in national spirit.

However, due to very rapid developments in every sector of life in the society, more new demands keep on appearing, especially in respect of the Criminal Procedure Code. So it is imperative that these demands are accommodated in our legal system.

The new demands must be fitted in our legal system because at any point in time and at any place, the law shall serve as a vehicle towards achieving an assured dream, order and justice for the society.

A concept to streamline the Criminal Procedure Code without changing its existing fundamental concept is meant to solve the legal problems that arise from the development of the society; to improve efficiency and effectiveness; and to prevent excesses in law enforcement.

In other words, the conception of refining the Criminal Procedure Code is to optimize the Code itself.

The National Criminal Procedure Code was promulgated on 31 December 1981. It is a national legal product containing improvements devised to protect human rights in the process of the criminal law.

However, be that as it may, over a period of time, it is felt that the Criminal Procedure Code has its weaknesses and ambiguities in terms of its legal formulation, which have resulted in different interpretations and polemics among law enforcers, practitioners and academics in connection with several provisions set out in the Criminal Procedure Code.

More of these problems have cropped up lately as more and more statements are issued through the mass media by legal practitioners, academics and observers. The statements mainly seek a change and refinement of the Criminal Procedure Code to suit the developments of the society, which are becoming more progressive and complex. The ambiguity in the formulation of the legal provisions has given rise to differences in interpretations among the law enforcers, until the process of criminal justice as a system does not function as expected by the seekers of justice.

A. Recognition and Protection of Basic Rights

A constitutional state has a special feature, i.e., recognition and protection of basic rights which cannot be violated by anyone. One of the basic rights is equal status for everyone under the law without any discrimination against any group based on race, religion, sex, social culture, economic standing and others.

In a constitutional state like the Republic of Indonesia where the Pancasila (Philosophy of State) serves as a state ideology, state foundation and source of all legal sources, the protection and enforcement of human rights must be maintained so that individual interests and the public interest can remain in good balance. In discharging its duty, the state is obliged to preserve the public interest, whether all its citizens or an individual.[15]

Having regard to the said matter, the fundamental recognition and protection of human rights should be implemented in the criminal procedure without any bias between the protection of the basic rights of a suspect and protecting the interests of the public, including the victim.

[15] Prof. Senoadji Oemar, LLM, Seminar Indonesia Negara Hukum/Seminar on Constitutional State of Indonesia, May 1966, Jakarta, Indonesia.

B. Protection for the Suspect/ Accused

Protection for the suspects has been adequately provided in the Criminal Procedure Code, even though in practice there are excesses taking place in its implementation, such as torture to obtain a confession from the suspect, manipulative interrogation, detention without basis, and others. The Criminal Procedure Code has made provisions for the rights of the suspect/accused to get immediate questioning. However, in practice there are possibilities of the suspect/accused not responding to questions, or just remaining silent, although actually the answers to questions of the suspect in court are reflective of his/her rights to defend him/herself. If the suspect/accused remains silent (not answering) during questioning, that is seen to show that he/she purposely does not want to make use of his/her rights.

To avoid torture or manipulation, it is also necessary to provide in the Criminal Procedure Code the right to remain silent (not answering). It is also important to include the legal consequences for remaining silent, e.g., it is provided that the silence of the suspect/accused is indicative of his/her admission to having commited the alleged offences.

With such provisions, it is hoped that the torture of suspects/accused by interrogators can be avoided.

Not using the right to answer must also be provided so that said problem cannot invalidate the investigation report.

C. Protection for the Victim

In the Criminal Procedure Code, protection for the victim comes in term of claiming compensation against the offender and the right to reject the termination of investigation/prosecution through pre-trial review. The following aspects of victims to seek justice have yet to be provided:

- Complaint/report not immediately settled or acted upon by the investigator, and
- Dissatisfied with the prosecution carried out by the public prosecutor.

However, the right of appeal is still not being accorded to the victim because said right is against the system of the Criminal Procedure Code as the public prosecutor is said to represent the public interest which includes the victim's interest.

D. Legal Aid

Obtaining legal aid is the basic right of the suspect/accused so that he can defend himself against the alleged charge he is facing.

The Criminal Procedure Code has expressly provided that legal aid services can be accorded to a suspect/accused. However, there is no provision in respect of a suspect/accused who does not want use the services of legal aid (right to legal advisor). The suspect/accused can not latter adopt this as a ground in an apparent attempt to nullify the process of investigation and prosecution.

Under the circumstances, it has been decided that if it is clear that the suspect/accused does not wish to use the right of legal aid or legal advisor, then this cannot be a ground for the judge to invalidate the process of investigation. It is then important to provide for said legal aid solely for the suspect/accused in the interest of his/her defence counsel. As such, the legal advisor is not required to be by the witness's side during questioning, since the witness does not require any for his/her defence, but he/she has the obligation to give a true statement of he/she sees, hears and knows.

E. The Principle of a Free and Responsible Judiciary

1. Non-absolute Principle

The principle of a free judicature means that the power of the judiciary is free of any interference from another state power or free of any extraneous judicial influence. However, said freedom is not absolute in nature because the duty of the court or judge is to enforce the law and justice.

A free judiciary upholds the responsibility of creating legal certainties based on truth and justice. If the judge can not find a written law, he is required to delve into the unwritten law in order to arrive at a legal decision as a prudent person who is fully responsible towards the Almighty God, himself, society, fellow citizens and the nation.

2. Open Principle

This principle, apart from reflecting the principle of democracy, does reflect the principle of freedom and impartiality to facilitate the existence of social control. If there is an exception by having a hearing in camera for a certain case, there must also be a guarantee that the trial is still being conducted honestly.

3. Principle of Giving Preference to Justice and the Truth

In line with the principle of a free and responsible judiciary, therefore, legal consideration for the suspect/accused, victim and society must be given priority over legal certainties because not all court decisions containing legal certainties produce justice.

F. Principle of Legality

The principle of legality means that no act shall be liable to penal action unless it is based on the provisions of the law in force. In the Criminal Procedure Code, this legality principle is present in a situation where the public prosecutor shall be "obliged" to submit the case bundle to court after all requirements laid down by the law have been fulfilled.

An exception to this legality principle (case not referred to court) is confined to the Attorney General and it is limited because of public interest. In other words, this legality principle can only be excepted by the principle of opportunity.

Based on the legality principle, there is an obligation that every case referred to the court must have been asessed with enough evidence and that all the requirements have been fulfilled.

The principle behind referring cases with enough evidence and which have fulfilled the requirements shows the acknowledgement of human rights in that there is equal status for everyone under the law.

For that reason, the provision to allow the termination of investigation or prosecution must be prevented, regardless of whether the case is minor or serious.

If there is an exception, there must be a very strict limitation known as the principle of opportunity, i.e., the termination of the investigation or prosecution of a case which has fulfilled the requirements of proof can only be effected by the Attorney General on the ground of legal interest.

The legality principle pertaining to remand must reflect the spirit of the constitutional state and for that purpose the following shall be provided:

- The accused upon being detained has the right to be informed immediately of the alleged offence for which he is charged, and
- The accused shall have the right to contact his family members and legal advisor.

G. The Criminal Procedure Code Is Akin to the Principle of Expeditious, Simple and Affordable Justice

1. The National Criminal Procedure Code does not provide for any frame of time regarding the bundle of investigation papers of the civilian investigator to be in the hand of the investigator of the police for it to be handed to the public prosecutor. So, in terms of principle of benefit, not only does it prolong the bureaucratic tape but runs counter to the principle of expeditious, simple and affordable justice.

2. The Criminal Procedure Code does specify the frame of time by which the investigator should complete his investigation and what are the legal sanctions if he does not complete or is late in completing his investigation.

3. The principle of expeditious, simple and affordable justice must not only be applied at the prosecution/hearing stage, but also at the investigation stage. Thus, if the Criminal Procedure Code is to be streamlined in the future, this principle must be concretely impelemented.

4. In practice, it is shown that the criminal justice system does not cover the concept of supervision and administration.

5. The accountability concept from the outcome of investigation conducted by the public prosecutor forms a part of the integrated criminal justice system.[16] In implementing the principle of integrated criminal justice system, the outcome of investigation must be justified before an open court.

The public prosecutor shall be required to make justification because he is the one who appears in court as a public prosecutor and not the investigator.

The prosecutor shall be required to prove the act allegedly committed by the accused.

Consequences arising thereof are as follows:

- The investigator shall abide by the instruction of the public prosecutor.
- In cases where the investigator is unable to carry out the instruction of the public prosecutor, then it is necessary to introduce measures to extend the power for futher investigation by providing adequate time not only to question witnesses but also to question the suspect and to gather/seize case exhibits.

VII. INTERNATIONAL GUIDELINES AND INDONESIA JUDICIAL DOCTRINE

As guidelines to all Indonesian prosecutors in the course of their duties, the Indonesian Prosecution espouses a Judicial Doctrine known as Tri Krama Adhyaksa (The Three Principles of Conduct);[17] specifically, integrity, maturity and wisdom.

- Integrity: Loyalty originating from sense of sincerity towards the Almighty God, one's own self, family and all mankind.
- Maturity: Perfection in discharging duties coupled with the main element of sense of responsibility towards the Almighty God, family and among mankind.
- Wisdom: Wisdom in words and deeds especially in discharging one's duties and power.

In upholding said Judicial Doctrine, all prosecutors in the course of their duties must be aware that they form an inseparable part of the other prosecutors.

[16] Sujata Antonius, Master of Law, The Wisdom of Law Application and Enforcement Programme in the 7th Five-Year Development Plan, Law Development Workshop Programme 1999-2004, 20-26 November 1996, Jakarta, Indonesia.

[17] Judiciary Doctrine, Annexure to the Decree of the Attorney General of the Republic of Indonesia Number: KEP-030/3/1988 dated 23 March 1988.

They are interrelated with one another, representing one and the other, as well as reminding one another of their conduct and actions.

Every member of the prosecution must always upgrade his knowledge and capabilities. In addition, every member of the prosecution must propagate his initiative and cooperate with other law enforcement agencies.

When coming into contact with members of the public especially the seekers of justice, prosecutors must treat all men as the creation of God who have the same right and responsibility based on legal values, religion, custom, and courtesy honoured by the people of Indonesia.[18]

The Indonesian Judicial Doctrine is compatible with the international standards indicated in the United Nations Guidelines on the Role of Prosecutors.[19]

Among the important details adopted from the United Nations standard for prosecutors are the required qualifications to become a prosecutor, the status and job conditions of prosecutors, the freedom to express opinions and the right of association, the role of the prosecutors in the criminal process, prosecutor's discretion, prosecutor's relationship with other authorities and the process of investigation against a prosecutor who violates the rules.

(1) Those chosen to be prosecutors must be honest and efficient by getting the proper training and requirements.
(2) All prosecutors must always maintain the honour and status of their profession.
(3) The state must ensure that all prosecutors are able to function profesionally without unnecessary intimidation, impediment and intervention.
(4) All prosecutors have the right and freedom to voice out their opinions and put forth their unified confidence.
(5) Prosecutors are at liberty to form and join professional assemblies or other organizations which champion their interests, upgrade the profesional quality and protect their status.
(6) All prosecutors must play active roles in the criminal process by carrying out prosecution and in conducting investigation. They must also ensure the legality of said investigation, oversee the execution of the court's decision and carry out other functions expected of a protector of public interest.
(7) All prosecutors must perform their duties fairly, consistently and expeditiously and defend basic human rights.
(8) In performing their duties, all prosecutors cannot be partial and must avoid political, social, religious, racial and other kinds of discriminations.
(9) In protecting the public interest, they must be objective and give due regard to the suspects and all the victims.
(10) They must not commence and proceed with prosecution if there is no basis to frame the charge.
(11) All prosecutors are duly requested to be aware of matters concerning the prosecution of their fellow colleagues, corruptions and power abuse.
(12) In setting aside cases, prosecutor must fully appreciate the rights of the suspects and also the victims.
(13) Any complaints against prosecutors alleging deviations in profesional standard must be dealt with expeditiously and fairly. The decisions must be subject to independent review.

[18] Prakoso Djoko, LLM, The Existence of Prosecutor in the Midst of Society, Ghalia Indonesia, East Jakarta, 1985.

[19] Adopted by the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 1990.

THE CHARACTERISTICS OF THE KOREAN PROSECUTION SYSTEM AND THE PROSECUTOR'S DIRECT INVESTIGATION

*Lee, Jung-Soo**

I. PROLOGUE

Since the dawn of history, every civilized country has developed its own investigation system, exercised investigatory power, cracked down on criminals and indicated them. In other words, every country has been imposing upon criminals appropriate sanctions commensurate with their crime.

Every civilized country has invested its legal system derived from its national consensus. Under the system, each country has organized investigative and judicial authorities and enacted criminal procedure laws which govern the investigation process. Through such a system, each country has maintained national order and secured the human and welfare rights of its citizens.

Today, crime is being committed in more sophisticated methods and in a more organized form. In addition, new types of crime are continuously occurring. To effectively deal with such situations, investigative organizations are also getting systematized and scientific in terms of organization and investigation methods. Especially in the Republic of Korea, prosecutors play a main role in the investigation and judicial process. Prosecutors initiate investigation or direct the police regarding a specific crime. Prosecutors are the only authority in deciding whether to indict a specific suspect, participate in trial and execute judgements made by judges.

In connection with the topic of this training course, I would like to focus my presentation on special characteristics of the Korean prosecution system, the prosecutor's control of the police, and the prosecutor's discretionary power in deciding whether to indict a specific person, thereby explaining how investigation is conducted in Korea and human rights are protected.

Finally, I will try to help you understand the direct investigation activities and authorities of prosecutors by briefly explaining the corruption case of Roh Tae Woo, the former Korean president, and the illegal loans in the Hanbo Conglomerate case which caught the attention of the world.

II. CHARACTERISTICS OF THE KOREAN PROSECUTION SYSTEM

A. Two Faces of the Prosecutors' Organization

The authority of prosecutors is basically similar to the executive power because the ultimate purpose of the prosecutors' organization is the imposition of appropriate punishment upon criminals. On the other hand, it also has a judicial character since indictment and participation in the trial process has much to do with judgments. Therefore, these two are the most representative features of the Korea prosecution system.

Under the Korean laws, each prosecutor has independent authority free from any pressure in exercising his/her power, for example, in the investigation of crime, participation in the trial process and the execution of judgments. In this respect, prosecutors have the same independence in performing their works as judges have. On the other hand, to enable prosecutors to effectively achieve their purpose (which

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is to maintain national order and peace), prosecutors form a pyramid organization, at the top of which is the Prosecutor-General. In this respect, the Korean prosecution system has an executive character.

The Prosecutors' Office is under the Ministry of Justice which is one of the executive departments.

B. Leader of Criminal Investigation

The most remarkable characteristic of the Korean prosecution system is that prosecutors play a leading role in the criminal investigation. Prosecutors not only conduct direct investigation, but also give instructions to the police in connection with a criminal investigation. Prosecutors are legally entitled to control and supervise the police regarding criminal investigations. Accordingly, police obey prosecutors' instructions as far as criminal investigations are concerned. Thus, prosecutors are the supreme and ultimate authority in criminal investigation, and the police serve as assistants to the prosecutors. Our system differs from that of the United States of America in that American prosecutors have no authority to investigate crimes. It also differs from the Japanese prosecution system in that prosecutors and police in Japan are in a cooperative relationship, whereas Korean prosecutors and police are in an order-obeyance relationship. In this respect, the Korean prosecution system is similar to that of France or Germany.

C. Discretionary Power of Indictment

Another feature of the Korean prosecution system is that prosecutors have the discretionary power to decide whether or not to prosecute a suspect. Prosecutors can decide not to prosecute a suspect even if there is sufficient evidence for prosecution.

To my knowledge, prosecutors in most countries should, in principle, prosecute a suspect if there is enough evidence to prosecute that person, and only under exceptional circumstance can prosecutors decide not to prosecute such person. However, under Korean law, prosecutors have the general and broad authority not to prosecute a suspect. This discretionary power, if exercised well and fairly, helps prosecutors take into account criminal policy factors regarding a specific suspect at the pre-indictment stage. On the other hand, it is also possible that prosecutors might abuse such power. Thus, I believe that such power should be exercised carefully and appropriately. In addition, there should be certain kinds of control systems in order to prevent abuse of that power.

III. AUTHORITY OF KOREAN PUBLIC PROSECUTORS

A. Criminal Investigation

Korean prosecutors have the authority and duty to investigate all crimes.

Investigation authority is an inevitable premise of indictment and the starting point in imposing punishment upon criminals. Under Korean law, the authority to investigate crimes is vested in the prosecutors. Consequently, prosecutors, as the leaders or main players of criminal investigation, control and direct the police who are the assistants to the prosecutors.

B. Indictment and Maintenance of Indictment

As the only prosecuting authority, Korean prosecutors have the power to decide whether or not to prosecute a suspect.

In the case that a prosecutor chooses to indict a person, the prosecutor has the duty to participate in the trial and maintain indictment until a final court judgement

has been rendered. In an exceptional case, the prosecutor can remand the indictment.

Under the Korean Criminal Procedure Law, indictment by a private person is not allowed and only the government can indict a suspect. Of the many departments of our government, the prosecutors' office monopolizes the authority of prosecution.

In addition, as I have already mentioned, prosecutors have the discretionary power to suspend prosecution even if there is sufficient evidence to maintain prosecution. Prosecutors suspend prosecution when they think the benefit of non-prosecution is greater than the cost of prosecution. It enables prosecutors to take into account criminal policy factors when deciding whether to prosecute a suspect.

C. The Right to Direct and Supervise Judicial Police Officers

Korean prosecutors have the legal right to direct and supervise judicial police officers as far as criminal investigations are concerned. Under Korean law, prosecutors are the czars of criminal investigations. Consequently, judicial police officers are obliged to obey the prosecutors' orders which are issued based on the prosecutors' legal authority.

Generally speaking, judicial police officers serve as members of the executive. However, they are all under the control of the prosecutors when they perform judicial police work in connection with criminal investigations. This system is based on the belief that due process and individual rights will be best protected by enabling prosecutors to play a leading role in criminal investigation since they are legal experts and are guaranteed independence and a high status. It is also the best way to effectively indict a suspect and to maintain such an indictment.

D. The Right to Direct and Supervise the Execution of Judgments

In Korea, prosecutors direct and supervise the execution of all criminal judgments, e.g., direction and supervision of the execution of arrest warrants, search or seizure warrants and final criminal judgments. This was designed based upon the belief that the appropriateness of warrant execution and the protection of individual rights in connection with such execution could best be secured by entrusting those duties to the prosecutors who represent the public interest.

E. Authority and Duties as Representatives of the Public Interest

Korean prosecutors, as representatives of the public interest, directly participate or direct public officials to participate in civil suits in which the government is a party or in which the government has an interest. In these civil proceedings, the Korean Minister of Justice represents our government. Even though an executive department or its subsidiaries becomes a defendant in an administrative suit, the prosecutors direct public officials of the department or participates in the trial because the prosecutors are legal experts and representatives of the public interest.

IV. STATUS OF PROSECUTORS

A. Nature of Prosecutor's Office

1. Independent Office

The public prosecutor's office is under the Ministry of Justice, which is a department of the executive. In this respect, the nature of the public prosecutor's office is different from that of judges, who belong to the judiciary. The prosecutor's office is, however, an independent organization which makes its own decisions. In other words, the prosecutor's office is not an assistant to the

Prosecutor-General or the chief prosecutor of the district public prosecutor's office.

2. Status as Quasi-Judges

The duties which prosecutors exercise are basically executive ones. However, these duties should be exercised with the same fairness and strictness as required in exercising judicial power. In other words, the duties of prosecutors, consisting of criminal investigation, indictment, maintenance of indictments, and the execution of judgments, etc., has much to do with judicial responsibilities, and therefore need to be exercised very carefully to achieve justice. Accordingly, prosecutors not only have the status of executive officers but also that of quasi-judges.

B. Protection of Status of Public Prosecutors

To ensure the fair execution of the prosecutors' duties and prevent pressure from other persons, prosecutors are given the same protection as judges. Specifically, our laws provide that the term of the office of the Prosecutor-General is two years and that the prosecutor shall not be subjected to dismissal, suspension from office or reduction of salary, except by impeachment, judgment of imprisonments and disciplinary action. The number of prosecutors, the salary and disciplinary proceedings are also stipulated by law. The purpose of specifying such matters by law is to protect securely the status of prosecutors, and thereby enable prosecutors to perform their duties free from any unjust interference.

C. Independent Status of Public Prosecutors

Under Korean law, the aforesaid duties of prosecutors are vested in each individual prosecutor as an independent office. Therefore, it is not true that all the prosecutorial authority belongs to the chief prosecutor. The Prosecutors' Office is composed of many individual prosecutors and it coordinates the prosecutors' work. However, it does not itself exercise prosecutorial authority. Although the chief prosecutor of a specific prosecutors' office directs and supervises each prosecutor attached to it, the exerciser of prosecutorial authority is each individual prosecutor. Consequently, it is for the individual prosecutor to decide policy and exercise the prosecutorial authority.

D. Appointment, Rank and Assignment of Public Prosecutors

In Korea, the qualifications to become public prosecutor are identical to that of a judge and an attorney. Anyone who wants to be appointed as a public prosecutor must pass the Judicial Examination held by the Administrative Department and then complete the two-year training course at the Judicial Research and Training Institute, which is supervised by the Supreme Court.

The number of examinees who successfully passed the Examination in 1995 was 300. It was 500 in 1996 and will be 600 in 1997. As you can guess, the Korean government is increasing the number each year. Comprehensively taking into account the budget and work load, we draw up a plan regarding the number of prosecutors to be newly appointed each year. In fact, we appoint around eighty to ninety new prosecutors each year and assign them to each district public prosecutors' office. The total number of public prosecutors in Korea was 1,072 as of September 1, 1997.

The appointment and assignment of all prosecutors are made by the President upon the recommendation of the Ministry of Justice.

There are four ranks of public prosecutors: Prosecutor-General, Senior Chief Public Prosecutor, Chief Public Prosecutor, and Public Prosecutor.

Requirements for appointment and assignment to each rank are different.

E. Principle of Identity of Public Prosecutors

The Principle of Identity of Public Prosecutors means that all prosecutors, each of whom is an independent office, form a uniform and hierarchical organization, at the top of which is the Prosecutor-General. This principle was designed to have all prosecutors perform their work as one body and cooperate with each other. Accordingly, even if a specific prosecutor's work is done by another prosecutor, it does not make a difference in terms of legal effect.

F. Right of the Ministry of Justice to Direct and Supervise Public Prosecutors

Public prosecutors are executive officials belonging to the Ministry of Justice. Although the activities of the public prosecutors are judicial, the Minister of Justice, as the supreme supervisor of prosecutors, directs and supervises prosecutors in regard to the general prosecutorial work. However, the Minister can only direct and supervise the Prosecutor General with respect to specific cases. A specific case means one dealt with by a specific prosecutor. With respect to a specific case, only the Prosecutor-General can direct and supervise a prosecutor in terms of investigation, indictment, maintenance of indictment and execution of final judgments.

Since prosecutors are executive officers belonging to the Ministry of Justice and the Minister is the one who bears the political responsibility, prosecutors are generally under the supervision of the Minister. On the other hand, prosecutors should be free from any unjust pressure from political parties and other executive departments. This is the reason why we place restrictions on the Minister's right to direct or supervise prosecutors.

V. ORGANIZATION OF KOREAN PUBLIC PROSECUTOR'S OFFICE

A. Kind and Name of Public Prosecutors' Office

The public prosecutor's office consists of the Supreme Public Prosecutor's Office, five High Public Prosecutor's Offices, twelve District Public Prosecutor's Offices and forty branches as of January 1997.

The Supreme Public Prosecutor's Office is in Seoul, and it corresponds to the Supreme Court. The High Public Prosecutor's Offices are in five major cities, corresponding to the High Courts. The District Public Prosecutor's Offices are in forty cities and counties, and correspond to the District Courts or Family Courts (Figure 1).

B. Structure of the Prosecutor's Office

In each prosecutor's office, there is one chief prosecutor who generally controls the work of that office. Right below the chief prosecutor is the deputy chief prosecutor who assists the chief prosecutor or executes some of the chief prosecutor's work vicariously. Below the deputy chief prosecutor are several directors who are the chiefs of several divisions. All work of the office is divided into several parts and assigned to each division depending upon the character or nature of the work. Several prosecutors are assigned to every division.

In addition, there is support staff in each of the prosecutor's office, who assist prosecutors in investigation, in drawing up or keeping documents, trial, etc. The staff belong to each of the above divisions and the general affairs bureau. They sometimes even investigate cases based on the prosecutor's order or draw up documents.

VI. DIRECT INVESTIGATION BY PROSECUTORS

A. Necessity of Direct Investigation

When a crime is committed, the police officers that belong to the National Police Agency usually conduct the criminal investigation. However, public prosecutors themselves conduct criminal investigations in the case of special offenses such as corruption by public officials, tax evasion, offenses related to huge economic incidents, and intellectually and legally complicated offenses. To increase the efficiency of criminal investigation for such cases, the Supreme Public Prosecutor's Office established the Central Investigation Department and the District Public Prosecutor's Office established the Special Investigation Department.

B. Supreme Public Prosecutor's Office and Central Investigation Department

1. Organization

The Supreme Public Prosecutor's Office (hereinafter called SPPO) consists of the General Affairs Department, the Central Investigation Department (hereinafter called CID), the Criminal Department, the Violent Crime Department, the Public Security Department, the Inspection Department, the Criminal Trial and Civil Litigation Department, and the Administration Bureau. The Chief Public Prosecutor is in charge of each department, except the Administration Bureau, of which is headed by an administrative official.

The Director of the CID, the Chief Public Prosecutor, has under his control five senior public prosecutors who are the Director of the Investigation Planning Office, the Criminal Intelligence Management Officer, and the heads of Divisions I, II and III. The Director of the Investigation Planning Office is a veteran senior public prosecutor and has the same rank as the Deputy Chief Public Prosecutor in the District Public Prosecutor's Office. Senior public prosecutors are usually in charge of the Criminal Intelligence Management Office or Divisions I, II, and III. As of September 1, 1997, seventy officers were working in the CID.

2. Duties

The main duty of Divisions I, II, and III is to investigate special criminal cases, whereas the Criminal Intelligence Management Office collects and manages criminal information. In relation to the administrative service, the Investigation Planning Office makes plans of investigative operations, controls and supervises them, and cooperates with other institutions dealing with criminal investigation. Divisions I, II and III are under the control of the Investigation Planning Office. The CID mainly investigates corruption by high-ranking government officers such as ministers of the government, members of the National Assembly, presidents of banks, and other high-ranking officers in the central government. This Department also investigates criminal cases connected to huge economic incidents—e.g., tax evasion by a conglomerate.

C. Special Investigation Department in the District Public Prosecutor's Office

1. Organization

Special Investigation Departments have been established in eight District Public Prosecutor's Offices and consist of a senior public prosecutor, three or four public prosecutors and special agents. As an exception, there are three senior public prosecutors, eighteen public prosecutors, and 100 special agents in the Seoul District Public Prosecutor's Office. The special agents are public prosecutor's office personnel, but they are not police personnel.

2. Duties

These departments investigate special criminal cases including corruption by public officials and tax evasion. These departments also collect data and information related to special crimes.

D. Investigation Procedure

In criminal cases, the police and thirty-four special investigative agencies initiate the basic investigation. However, the Criminal Procedure Code vests the power of initiation and the conclusion of criminal investigation solely in the public prosecutors. Therefore, the police and special investigative agencies serve only as assistants to the public prosecutors and should conduct their investigations in accordance with the general standard and/or special directions issued by the public prosecutors and transfer all cases mandatorily to the public prosecutors for the conclusion of investigations.

Public prosecutors themselves directly investigate criminal cases related to nationally recognized high-profile incidents or intelligence cases.

1. Criminal Information Collection

One of the most important operations in criminal investigation is the collection and management of criminal information. As the society rapidly changes, criminal methods and types become manifold, organized and sophisticatedly intelligent. Under such circumstances, the necessity of a systematic management and collection of criminal information was raised by the public prosecutor's offices. Accordingly, the CID in the SPPO established the Criminal Intelligence Management Division on March 1, 1995. Since then, twelve District Public Prosecutor's Offices and forty branches established a Division. Division officials collect criminal information through diverse sources—especially through minute books of national and local assemblies, articles of journals and newspapers, and rumors in the stock markets.

2. Enforcement Group

In the Special Investigation Department of the Seoul District Public Prosecutor's Office, there are six enforcement groups consisting of two to three public prosecutors and about 10 special agents. They investigate criminal cases on the basis of their speciality. The head of each enforcement group is managed by a public prosecutor of varied experiences. Each group has its own specialized field such as the financial and economic field, the construction and scientific technology field, and the corruption field. However, the enforcement groups are not restricted to their corresponding specialized field. Each group can investigate other fields, if necessary.

Other District Public Prosecutor's Offices are planning to establish such an enforcement group.

3. Money Laundering and Its Trace

The most important factor in the investigation of corruption by public officials is tracing the source of the bribe that public officials received. Because the bribery of public officials takes several stages and because it is clandestine and intelligent, it becomes more and more difficult to trace the source.

In regards to money laundering, the Financial Action Task Force on Money Laundering (FATF) was established at the G7 Summit in 1987 to provide policies coping with money laundering. Twenty-six countries of the OECD are affiliated with the FATF. Korea is now considering joining it.

Korea does not have a "Money Laundering Control Act", which criminalizes money laundering itself. However, Korea enacted "The Special Act

against Illicit Drug Trafficking", which contains punishment provisions for money laundering related to drug crimes. Consequently, only money laundering related to drug crimes is criminalized and can be punished in Korea. Even though it is necessary to crimiminalize money laundering itself, it is difficult to do so because of the protection of confidentiality in financial transactions.

To trace illegal fund, the SPPO organized an investigation team consisting solely of officers of the Office. If necessary, the Office can request the dispatch of officers from the Bank Inspection Board and the National Tax Administration. The SPPO published the book, "The Reality of Financial Transaction and Its Trace," which speaks about money laundering and the investigations surrounding it.

4. Places of Investigation

In the past, public prosecutors used hotels or secret places to maintain confidentiality in the investigation of corruption by high-ranking government officials and tax evasion by a conglomerate. In principle, public prosecutors investigate such cases only inside the building of the public prosecutor's offices now. The SPPO and the Seoul District Office have special investigation rooms which only prosecutors in charge are admitted. Even other fellow prosecutors are restricted from entering.

F. Prosecutor's Investigation and the Mass Media

Because the effect of the prosecutor's investigation on the society is enormous, reporters always pay attention to prosecutors who are in charge of important cases in order to obtain important sources of information. Reporters also try to catch people who come to the Office in relation to the investigation and thereby attempt to cover all stories about the investigation. However, the Office does not provide them with any information about the people involved in order to protect their rights and the secrecy of the investigation before the trial. According to Korean Criminal Law, prosecutors, police officers and other personnel connected to the investigation can be punished when they release information before the trial. Sometimes, reporters discover the investigation information through the copy of arrest or search warrants obtained in court. This is because they have easy access to the warrant in court.

From the viewpoint of the mass media, the people have a right to know and thus the mass media, emphasizing freedom of the press, try to report the facts. The problem is that media agencies compete with each other to report unproven or unconfirmed information and rumors. Such reports themselves may interrupt the investigation and violate civil rights. Thus, prosecutors ask for the correction of news based on unproven information by the responsible media agency and prohibit the reporters from entering the Public Prosecutor's Office. Sometimes, the press club itself prohibits the reporters responsible for the news from gaining access to the press club room of the Office.

VII. THE CORRUPTION CASE OF FORMER PRESIDENT ROH TAE WOO

Since October 1995, the CID investigated the charges of bribery and graft cases of former President Roh Tae Woo, along with the then Defense Minister, presidents of banks, and the other high-ranking government officials. I introduce now the bribery and graft cases of former President Roh.

A. Background of Investigation

After the Real Name Financial Transaction Regulation came into effect in

August 12, 1993,[1] there was a rumor of a huge slush fund circulating in the stock markets and the private loan markets. In August 1995, the Government Management Minister Seo Seok-jai at that time reportedly told reporters under the condition of being "off the record" that close aides of one of the two former presidents had approached the ruling camp and asked whether the fund, amounting to 400 billion won (US$500 million dollars), could be converted to the former president's bank accounts using fake and borrowed names. This rumor was reported by the press.

Along with the increase in the national interest and suspicion of the slush fund, Congressman Park Kay-dong of the opposition Democratic Party announced at the National Assembly's plenary session in October 19, 1995 that the former President Roh had several bank accounts using borrowed names. Congressman Park presented bank account balances as evidence of the slush fund. Bank clerks confirmed the evidence on the same day. Accordingly, the prosecutorial authorities began to investigate the case, with a strong will, that although it was a historical bribery and graft case of a former president which had never happened in Korea before, prosecutorial authorities would convict him and, if found guilty, impose a severe sentence on the purpose of the improvement of justice in Korea, and in turn resolve the suspicion that people have about public officials.

B. Investigation Process

Holding the search warrant for Roh's bank accounts that Congressman Park revealed, the CID traced the slush fund and summoned the then Chief of Presidential Security Service. The CID confirmed that Roh had several bank accounts of the slush fund. The amount of total transactions in Roh's accounts was approximately 74 billion won (US$100 million) and the balance was 36.5 billion won (US$45 million dollars). These accounts had been managed by a presidential resident financial officer. It was revealed in the process of the investigation that the presidential financial officer followed the order of the Chief of the Presidential Security Service and opened several bank accounts using borrowed names in several banks. After this investigation, Roh announced in his apology speech that for five years during his presidency, he received about 500 billion won (about US$630 million) from business owners and that the remainder of the accounts was 170 billion won (US$212 million).

Roh was summoned on November 1, 1995 and became the first former president in Korean history to be arrested and detained in prison on November 16th for the violation of the special act on additional punishment for bribery. The next day, the former Chief of the Presidential Security Service was arrested and detained too.

Along with the arrest, more than sixty people related to the case of false name bank accounts, most of whom were high-ranking government officers and bankers, were summoned and investigated. In relation to the bribery, about 200 businessmen, including thirty-nine of the nation's major business owners, were brought in for interrogation. In relation to obtaining illegal real estate, about forty people including Roh's relatives by marriage and his close aids were investigated. In relation to the investigation of money laundering and the illegal purchase of real estate, 500 bank accounts were traced and investigated.

For the investigation of this huge slush fund case, the prosecutorial authority mobilize ninety-two officers, including the Investigation Planning Officer, public

1 Under the presidential decree on the mandatory use of real names in all financial transactions, no fund can be opened using either a false or borrowed name.

prosecutors of Divisions II and III in the CID, public prosecutors of the Seoul District Prosecutor's Office, officers from the Office of National Tax Administration, and officers from the Bank Supervision Office.

C. Indictment

Indictments were determined by the situation in which big business owners gave bribes in return for government favors, the size of the bribes, the criminal histories of the big business owners, and the effect of the indictment on the domestic and international economy. On December 5, 1995, the investigation was terminated with the indictment of Roh and his aides with confinement, twelve fund raisers and business owners without confinement, and three bankers with a summary order. In the meantime, the request of the Securance Order for Collection of Equivalent Value on all of Roh's properties was accepted by the court, based on the Special Case Act of Confiscation for Crime of Public Officials. All of Roh's property was preliminarily seized before the indictment.

D. Result of Trial

In the Seoul District Court, the court of original jurisdiction, Roh was sentenced to twenty-two years and six months in prison and was fined 283.8 billion won (about US$354.2 million) on August 26, 1996. According to the Special Act for Speedy Litigation, the sentence of the first trial should be passed within six months from the date of indictment, and that of the trial of appeal and the last trial should be passed within four months from the date of receiving the trial record.

In the High Court, the court of appellate jurisdiction, he was sentenced to seventeen years in prison and fined 262.89 billion won (US$328.6 million). The Supreme Court rendered a judgment dismissing Roh's appeal on April 17, 1997. Business owners who gave bribes to Roh were sentenced to imprisonment and suspension of execution of sentence in the appellate court.

VIII. CRIMINAL INVESTIGATION ORGANIZATIONS OF KOREA

A. Organizations

Criminal investigation organizations of Korea are divided into two categories. One is prosecutors and the other is judicial police officers. Judicial police officers are again divided into two groups, one of which is general judicial police officers and the other is special judicial police officers.

1. Prosecutors

Prosecutors are an investigation organization as well as an indictment organization. The legal status of a prosecutor as an indictment and that of a prosecutor as an investigation organization are different from each other.

In Korea, prosecutors play a leading role in criminal investigation and therefore they are the czars of investigation in reality as well as in name.

2. Judicial Police Officers

As I have already mentioned, judicial police officers are composed of general ones and special ones. Whereas the former can investigate any kind of crime, the latter's authority to investigate is limited in terms of subject matter or territory. In other words, special judicial police officers are basically members of the executive whose original work has little to do with criminal investigation. In order to take advantage of their expertise on a specific field, they are entitled to investigate specific crimes.

B. Relationship between Investigation Organizations

1. Relationship between Prosecutors

In principle, a prosecutor is obliged to investigate crimes over which he/she has territorial jurisdiction. However, a prosecutor can investigate outside of his/her territorial jurisdiction by requesting another prosecutor who has territorial jurisdiction over a specific crime. Sometimes, prosecutors go directly to a place outside of his/her territorial jurisdiction and investigate crimes in cooperation with the prosecutors assigned to that area.

2. Relationship between Prosecutors and Judicial Police Officers

Under the Korean Criminal Procedure Law, the relationship between the prosecutor and the judicial police officer is not one of cooperation, but one of order-obeyance.

Accordingly, the prosecutor directs and supervises the judicial police officers in connection with criminal investigation and the police should obey the prosecutor's official order.

These duties of the prosecutor are essential in realizing the spirit of the rule of law which requires the protection of human rights and due process in the investigation of crimes.

Judicial police officers should obey any official order issued by the prosecutors. (Article 53 of the Korean Public Prosecutors' Office Act.) Moreover, the judicial police officers, as assistants of the prosecutors, can investigate crimes only under the control of prosecutors.

In case a judicial police officer does not comply with a prosecutor's order or commits any unjust act in connection with performing his duty, that prosecutor can, through his chief prosecutor, request the officer to stop the investigation or request his superior officer to replace him. If necessary, prosecutors can request the police or other executive departments to dispatch some of their officers to the prosecutor's office. In order to ensure that prosecutors effectively control judicial police officers, Korean laws provide the following:

a) Prosecutors' authority to inspect the place of arrest or detention

To deter unlawful arrest or detention, the chief prosecutor of the district public prosecutors' office or its branch offices dispatches prosecutors once a month to the place of the investigation organizations where a suspect is being arrested or detained. The inspecting prosecutor examines relevant documents and questions the arrestee or detainee. If there is reasonable ground to believe that any suspect has been arrested or detained in violation of due process, the prosecutor should release the suspect or order the judicial police officer to refer the case to the prosecutors' office. (Article 198-2 of the Korean Criminal Law.) The purpose of this system is to protect individual rights from unlawful infringement. This provision emphasizes the prosecutor's role as an advocate of human rights.

b) Right to request to the judge to issue an arrest warrant

Under Korean law, the judicial police officer is not entitled to directly request to the judge to issue an arrest warrant. A judicial police officer should apply for an arrest warrant with the prosecutor. If such an application is made by a judicial police officer, the prosecutor examines the application documents and decides whether to request to the judge to issue the arrest warrant. The same is true of a warrant for search, seizure or inspection.

c) Right to approve urgent arrest made by a judicial police officer

Prosecutors or judicial police officers may arrest a suspect without an arrest warrant in cases where there is reasonable ground to believe that (1) the suspect has committed a crime punishable by death, life imprisonment or imprisonment for more than three years; (2) the suspect may destroy evidence or has escaped or may escape; and (3) it is practically impossible to obtain an arrest warrant from a district court judge because of urgency. Of course, prosecutors or judicial police officers should state the above reasons of urgency to the suspect before arresting him/her. When a judicial police officer urgently arrests a suspect, he should obtain the approval of a prosecutor immediately after the arrest. In reality, when a judicial police officer has made an urgent arrest, he immediately transmits the application documents of approval of arrest to the prosecutor by facsimile, Through this system, prosecutors can prevent judicial police officers from illegally arresting a person, thereby protecting human rights. This provision also serves as a tool which secures prosecutors' right to control judicial police officers.

d) Right to direct judicial police officers in connection with disposition of seized articles

When judicial police officers (1) sell the seized article and keep the proceeds in custody; (2) return the seized article to its owner; or (3) temporarily return it to its owner, they must obtain prior approval of the prosecutor.

e) Judicial police officer's duty to report to the prosecutor

When crimes happen which are related to national security or are socially important such as insurrection, foreign aggression, crimes related to explosives, murder, etc., judicial police officers should immediately report to the chief prosecutor of the district having jurisdiction over the investigation. Moreover, judicial police officers are also obliged to report to the prosecutor on the occurrence of riots and important affairs or movements of political parties or social groups. Based on such reports, prosecutors take appropriate measures and direct judicial police officers.

3. Relationship between Judicial Police Officers

a) Relationship between judicial police officers and judicial police staff

Judicial police officers investigate crimes under the control of the prosecutors, and the judicial police staff investigates crimes under the direction of the prosecutors and judicial police officers. In other words, judicial police officers may investigate in their own name and authority, whereas judicial police staff only assists in the investigation of the prosecutors or the judicial police officers. In practice, however, judicial police staff draws up various kinds of investigation documents as proxies for judicial police officers.

b) Relationship between judicial police officers

Judicial police officers who are the same in rank should perform their duty in cooperation with each other.

IX. INDICTMENT

In Korea, prosecutors have the sole authority to decide whether to prosecute a suspect, except in cases of the quasi-indictment process by the court and petty crime indictment made by the police. This is called the principle of Indictment Monopolization.

A. Presentation of Indictment

To prosecute a suspect, the prosecutor should present an indictment to the court. Prosecution can not be made verbally or by way of wire.

In practice, the prosecutor draws up the indictment and submits it to the court. In case of prosecution with detention, arrest warrant (or urgent arrest document, arrest document against a flagrant offender), the detention warrant and a certificate of detention are attached to the indictment.

B. Principle of Presentation of Indictment Only

In the indictment, neither documents nor things which can mislead the judge can be attached. Accordingly, prosecutors do not present documents or things such as complaints, inspection documents or expert's opinion at the time of prosecution.

X. DISCRETIONARY POWER OF PROSECUTORS (PRINCIPLE OF CONVENIENT PROSECUTION)

A. Introduction

Under Korean law, prosecutors have the discretionary power to suspend prosecution even if there is sufficient evidence to convict a suspect. This is called the Principle of Discretionary Prosecution. It is a concept contrary to the Principle of Compulsory Prosecution. Namely the Principle of Compulsory Prosecution means that the prosecutor should prosecute a suspect when there is sufficient evidence to convict that person in the prosecutor's opinion and the other requirements for prosecution are satisfied.

The purpose of the Principle of Discretionary Prosecution is to enable the prosecutor to take into consideration criminal policy in deciding whether to prosecutor a specific suspect. However, some lawyers are critical of this principle in that: (1) such principle can not effectively control prosecutors' arbitrary decision, and (2) it is possible that the exercise of the prosecution authority might be influenced by political pressure.

B. Discretionary Power and Its Criteria

Section 1 of Article 51 of the Korean Criminal Procedure Law provides that the prosecutor may decide to suspend prosecution considering the factors enumerated in Article 51 of the Korean Criminal Law. The prosecutor may decide not to prosecute a suspect taking into account the suspect's age, character, pattern of behavior, intelligence, circumstance, relationship to the victim, motive and method for commiting the crime, results and circumstances after the crime. However, the factors enumerated in Article 51 of the Criminal Law are not words of limitation, and therefore prosecutors may exercise their discretionary power considering factors other than those enumerated in the article.

C. Reasons for Suspension of Prosecution

Although it is up to the prosecutor to decide whether to suspend a prosecution, it is very difficult to definitely state the reasons for non-prosecution because the prosecutor must think about various factors relevant to a specific case in making the decision. For example, the prosecutor should consider whether non-prosecution would help the criminal's rehabilitation and not confuse social order. Although such criminal policy considerations have been materialized through a long period of practice, I can not deny the fact that the test for non-prosecution differs slightly from one prosecutor to another prosecutor. It is due to the different views of life of individual prosecutors. The test might also vary with the times or change in people's way of thinking. Accordingly, I can not definitely state the reasons for non-prosecution. However, Article 51 of the

Korean Criminal Law enumerates the following factors:

1. Factors Regarding the Suspect

a) Age

According to the age of the suspect, prosecution's disposition of the case might differ. Generally speaking, prosecutors deal leniently with juveniles, students and the aged.

b) Character and pattern of behavior

The character, pattern of behavior, hereditary diseases, habit, career, prior convictions, etc., of the suspect are usually considered in making a suspension-of-prosecution decision.

c) Intelligence

Intelligence refers to the suspect's sensibility. Sensibility is measured by the suspect's academic career or extent of knowledge.

d) Circumstances or environment

The suspect's circumstances such as family background, vocation, work place, living standard, relationship with classmates and parental guidance are considered in making the non-prosecution decision. In addition, the prosecutor also takes into account the effect of prosecution upon family members of the suspect.

2. Relationship to the Victim

Whether the suspect is a relative to the victim or collegue in the work place is also one of the factors.

3. Factors on the Crime

a) Motive for commiting the crime

Whether the crime is a premeditated or non-premeditated one, whether it was provoked by the victim, or whether the negligence of both the suspect and the victim has combined to cause the accident are also important factors in making a suspension-of-prosecution decision.

b) Method and result of the crime

The dangerousness of the method of commiting the crime, the profits the suspect has gained from the crime, the people's concerns on the crime, the effect of the crime on society, the extent of the damage and the degree of possible punishment are also considered by the prosecutor. In addition, the prosecutor considers whether there exist reasons to aggravate or mitigate punishment.

4. Circumstances after the Commission of the Crime

a) Factors related to the suspect

Whether the suspect repents the crime, has apologized to the victim, has tried to compensate for the damages inflicted on the victim, has escaped or has destroyed evidence are important factors in making a suspension-of-prosecution decision.

b) Factors related to the victim

Whether the damages inflicted on the victim have been recovered, and whether the victim wants the suspect to be punished are also considered.

c) Other factors

Other factors considered are social circumstances, change of people's sentiment, time period elapsed after the commission of the crime, repeal of law, change of the extent of punishment, etc.

D. Procedure for a Decision of Suspension of Prosecution

1. Written Oath

In practice, the prosecutor reprimands the suspect for commiting a crime and has him/her write an oath stating that he/she will not commit a crime again in the future. Irrespective of whether the suspect is detained or not, the prosecutor summoms, admonishes the suspect and has that person write an oath.

In reality, however, the prosecutor sends an admonishing letter to the suspect instead of having him/her write an oath when he/she is not detained. As you may have guesed, it is to reduce the prosecutor's work load.

When the suspect is a juvenaile or student, the prosecutor also has the suspect's parent or teacher submit a written oath to the prosecutor stating that he/she will supervise the suspect well so that the suspect will not commit a crime again in the future.

2. Arrangement for the Suspect's Protection

When making a suspension-of-prosecution decision, the prosecutor may entrust the suspect to his/her relative or a member of the Crime Prevention Volunteers Committee. In case there is no person to take the suspect or it is inappropriate in the prosecutor's opinion to entrust the suspect to the above-stated person, the prosecutor may request social organizations such as the Korean Rehabilitation and Protection Corporation to protect the suspect.

3. Disciplinary Action

In principle, when the prosecutor makes a decision of suspension of prosecution against a public official because the crime committed is a trivial one, the prosecutor should ascertain the result of the disciplinary process held by the organization to which such public official belongs. Moreover, within 10 days from the beginning of the investigation against a public official, the prosecutor is obliged to notify the organization to which that official belongs of the fact that investigation is going on. Generally speaking, such organization does not proceed with disciplinary action against the public official. Consequently, it is rare for the prosecutor to ascertain the results of disciplinary action before making a suspension-of-prosecution decision against a public official.

E. Suspension-of-Prosecution Decision for Juvenile Offenders on the Fatherly Guidance Condition

Suspension of prosecution for juvenile offenders on the fatherly guidance condition is the suspension of prosecution for juvenile offenders under the age of 18. It is a suspension-of-prosecution decision on the condition that the offender is subject to the protection and guidance of a member of the Crime Prevention Volunteers Committee for a period of six months to twelve months after the decision, depending on the possibility of commiting a crime again in the future. The volunteers are nominated by the chief prosecutor of the district public prosecutors' office. We have operated this system nationwide since January 1, 1981 to prevent juvenile offenders from being repeat offenders and to rehabilitate them into sound and reasonable citizen. To make this decision, the prosecutor should select the person to protect the offender among the members of the Crime Prevention Volunteers Committee, hand in a referral document to the person, receive from that person a certificate stating that he/she has received the custody of the offender and would bear the responsibility of protecting and guide the offender. Of course, the prosecutor should have the offender and his/her patron submit written oaths.

Even after the decision, at least once a month the prosecutor receives from the volunteer how he/she is instructing and guiding the offender. They also, continue to cooperate with each other.

If the offender does not comply with the volunteer's guidance or commits another crime, the prosecutor may remand the suspension-of-prosecution decision and prosecute the offender.

In light of the low rate of such offenders commiting another crime and the high rate of usage of this system, we can say that it has worked very effectively so far.

F. Suspension-of-Prosecution Decision on "the Protection and Surveillance Committee" Guidance Condition

This is for offenders who need protection and guidance by experts for a period of six to twelve months depending upon the possibility of the offenders commiting another crime in the future. Suspension of prosecution is made on the condition that the offender is subject to the protection and guidance of the Protection and Surveillance Committee.

The prosecutor entrusts the offender to a member of the committee. The procedure for this disposition is similar to the suspension-of-prosecution decision on the fartherly guidance condition. However, this system applies to adult offenders as well.

G. Limitation on the Prosecutor's Discretionary Power Not to Prosecute

The dangerousness of the principle of discretionary prosecution is that the prosecutor might abuse the power or that the decision will be affected by political pressure. Accordingly, Korean law places some restritions on such power:

1. Quasi-prosecution by the Court

When a complainant is notified that the prosecutor has made a non-prosecution decision, that person may apply for a ruling to the High Court corresponding to the High Public Prosecutor's Office to which the prosecutor concerned belongs. If the High Court holds that the prosecutor's decision of non-prosecution was inappropriate and refers the case of a district court judgment, prosecution is presumed to have been made to the district court. However, this system applies only to crimes regarding abuse of authority by public officials.

2. Appeal on the Prosecutor's Decision of Non-prosecution

When a complainant is notified that the prosecutor has decided not to prosecute a certain person, he/she may appeal to the competent chief prosecutor of the High Public Prosecutor's Office to which the prosecutor belongs. If the appeal is dismissed, the complainant may reappeal to the Supreme Public Prosecutor's Office.

3. Notification of Non-prosecution Decision and Reasons

Although this is not a direct limitation on the prosecutor's power of non-prosecution, it works as an indirect limitation on such power in that it places psychological pressure on the prosecutor.

XI. THE CASE OF ILLEGAL LOANS TO HANBO CONGLOMERATE

A. Motive of the Investigation

On January 23, 1997, the promisory notes and checks issued by Hanbo Steel Company, the main company of the Hanbo Conglomerate, were dishonored. After that the notes and checks issued by other companies belonging to and dealing with the Hanbo Group were also anticipated to be dishonored, and as a result, it gave rise to serious chaos in the national economy.

Hanbo Conglomerate took over Kumho Steel Company in Pusan and established Hanbo Steel Company in December 1984. It also proceeded with the construction of Steel Production Facilities at Dangjin with the credit award from banking facilities in December 1990 when the manufacturing capacity of Hanbo Steel Company faced its limit according to the boom of steel production.

There was a nationwide suspicion that President Jeong Tae Soo of Hanbo Group made a secret fund of an enormous amount in the course of the construction of the Dangjin Steel-Production Facilities, and that such embezzlement committed by Jeong was possible due to his connections with politicians, high-ranking officers and staff members of banking facilities.

The CID of the SPPO started the investigation of the cause of the Hanbo non-payment on January 27, 1997 under its own decision that the disclosure of the cause and result of the Hanbo case would be helpful for the recovery of the national economy stricken by the Hanbo non-payment.

B. Process of the Investigation

The CID at first conducted a secret investigation in order to clarify the nation-wide suspicion arising from newspaper reports of the Hanbo non-payment on January 23, 1997.

The Central Investigation Department prohibited all 36 persons including the ex-president of the Hanbo Group Jeong Tae Soo from going abroad on January 27, and searched 16 companies of the Hanbo Group including the headquarters of Hanbo and Hanbo Steel Company as well as the houses of Jeong Tae Soo and his sons.

On January 30, 1997, the CID summoned and questioned Jeong Tae Soo. It was found out that Jeong himself issued the dishonored notes and checks beyond the payment ability of Hanbo Group.

Jeong was also found to have received an enormous amount of credit funds from Hanbo Credit Union, one of the companies of Hanbo Group, which is forbidden by law. On January 31, 1997, the CID detained Jeong.

As our investigation went further, it was also found that Jeong made illegal requests to politicians and high-ranking officers of banking facilities in the course of credit awards and permission of authorization of business, and offered them a great sum of bribes in exchange.

From February 1 to 6, 1997, all seven chief persons of banking facilities who sponsored the credit funds supplied to Hanbo Steel Company had been summoned and interrogated about the process of the credit awards and the non-payment.

The present and ex-chief persons of banks who received bribes from Jeong Tae Soo, such as Shin Kwang Sik, Woo Chan Mok, and Lee Chol Soo, were arrested.

From Feburary 10 to 12, 1997, all five politicians—members of the National Assembly Hong In-Kil, Jeong Jae-Chol, and Whang Byung-Tae from the leading party (Shin-Han-Kook Party), another Assemblyman Kwon No Kap from the opposition party (Kuk-Min-Whoe-Eui Party), and the ex-Minister of Home Affairs, Kim Woo-Sok were summoned and interrogated. All of them were arrested as they were found to have received bribes amounting from 200 million to 1,000 million Won from Jeong Tae Soo in exchange for his illegal requests.

The CID tried very hard to find any evidence of embezzlement of the credit funds, on the one hand analyzing account books and computerized materials of Hanbo Group and on the other hand tracing 42 bank accounts of Hanbo Group with a search warrant.

However, these investigations were not easy because Hanbo Group, which had undergone the Sooso Scandal and the graft and embezzlement case of ex-President

Roh of my country, had already discarded many of its own account books.

The CID tried to the best of its ability to figure out the processes of the making and using of the funds accumulated by Hanbo Group by tracing the flow of the credit money on the basis of the account materials gathered through search and confiscations, the retrieval of erased data contained in computers, and the C.P.A.'s data.

The ex-Minister of Trade, Industry and Energy, the present and ex-chief Presidential Secretary of Economy, and many other high-ranking officials of the Ministry of Finance and Economy, the Ministry of Maritime Affairs and Fisheries, and the Bank Supervision Office were also summoned and questioned as to whether they gave unfair privileges to Hanbo Group through licensing and authorization of its business and credit awards.

In this case of nationwide concern and interest, over 300 persons were investigated by 108 persons under the control and supervision of the Chief of the CID. The 108 persons comprised the personnel of the Investigation Planning Officer, the 1st, the 2nd, the 3rd and the Criminal Intelligence Management Division of the CID, research officers of the SPPO, and officers of the Office of National Tax Administration and the Bank Supervision Office.

C. Keypoints of the Investigation

The prosecutorial authorities declared their strong will to make a thorough investigation of the case and set up some important factors that are fully examined as follows.

First, the background which enabled such a big credit award and the cause of non-payment, the use of credit money and any other criminal offence which might have been committed during the construction of the Dangjin Steel-Production Facilities were given priority.

In the investigation of high-ranking officers of banking facilities, we stressed the process of credit awards, possible bribes and the breach of trust relating to the credit awards.

In the investigation of politicians and high-ranking public officials, we concentrated our efforts on finding out any illegal privilege given by them to Hanbo Group, any receipt of illegal benefits as the price of such privileges, and any other betrayal of trust committed after the receipt of bribes.

D. Use and Embezzlement of the Funds

The prosecutorial authorities confirmed that Jeong Tae Soo made a fund of about US$562 billion (about 5,005,900 million Won) in total sum for the construction of the Dangjin Steel-Production Facilities: a US$319 billion (about 2,868,600 million Won) credit from the first banking facilities (banks) apart from guaranties, a US$147 billion (about 1,319,500 Won) credit from the second banking facilities (finance company and mutual savings bank, etc.), and a US$96 billion (about 867,800 Won) credit made of corporate bonds and personal debt.

The prosecutorial authorities also confirmed that Jeong used about US$399 billion (about 3,591,200 million Won) for facility equipment and US$133 billion (about 1,191,900 Won) for facility management, and embezzled the rest of the fund, about US$30 billion (about 272,800 million Won).

The rest of the fund amounting to about US$30 billion (about 272,800 million Won) which Jeong embezzled was found to have been mainly used for the establishment of affiliate companies, Jeong's personal tax payment, alimony for Jeong's ex-wife, the purchase of Jeong's private real estate, and illegal lobby money for politicians and chief persons for banking facilities.

We are still tracing about US$720 million (about 6,500 million Won), the use of which is still unknown.

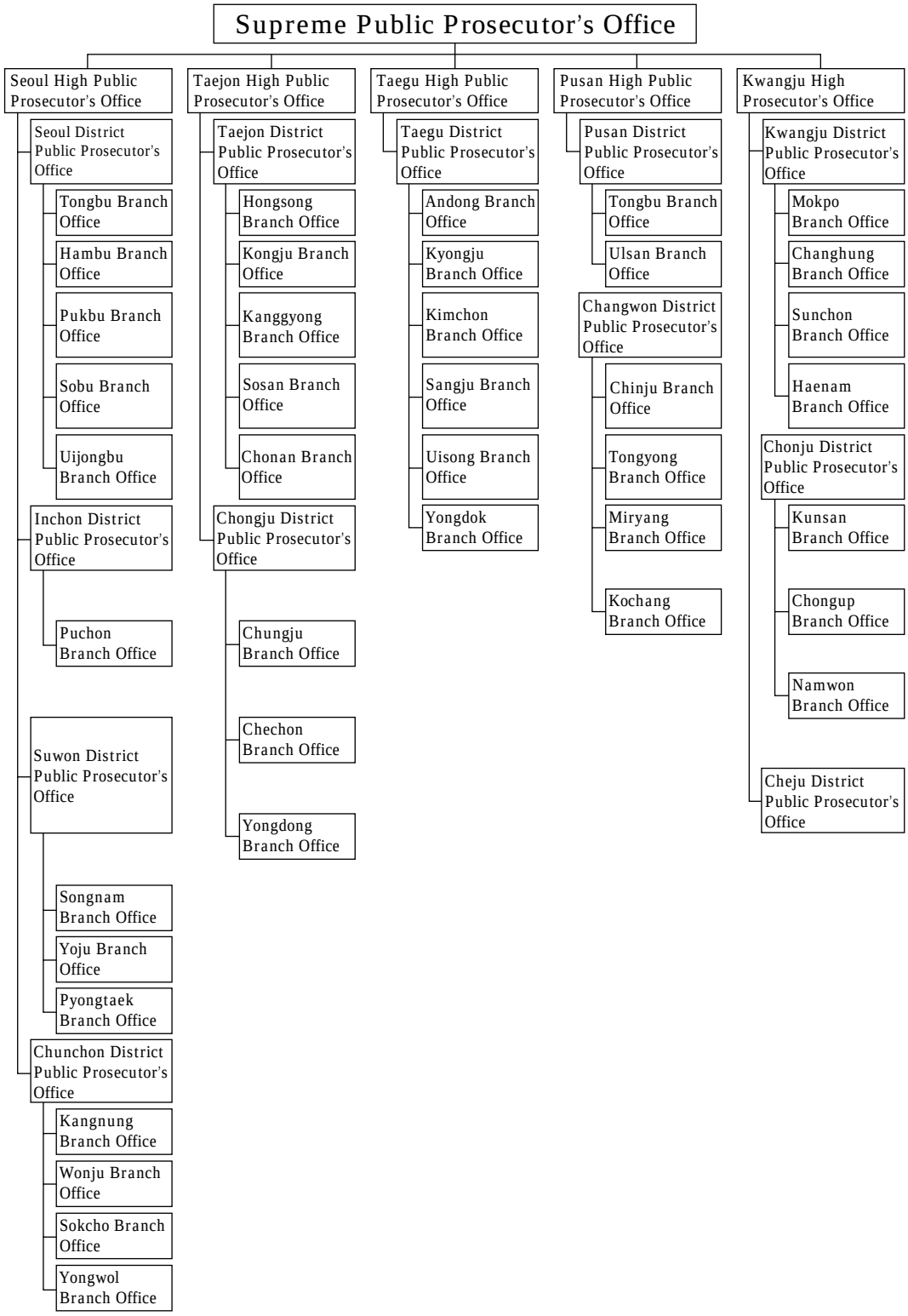
E. Result of the Investigation

On February 19, 1997, the prosecutorial authorities indicted all ten persons in detention, that is, two staff members of Hanbo Group, three high-ranking officers of banking facilities including the chief officer of Jaeil Bank, and five public officials including Congressman Hong In-Kil. Four other staff members of Hanbo Group including the Head of Hanbo Steel Company were suspended from prosecution under consideration that they could not but follow the directions of Jeong Tae Soo, who was the president of the whole Hanbo Group.

The ten persons in detention including Jeong Tae Soo were tried at the Seoul District Court, and nine persons were sentenced to 3 to 15 years, except for one person whose sentence was suspended.

The nine persons who were sentenced to imprisonment at the District Court appealed to the Seoul High Court. After a four-month trial, the Seoul High Court rendered suspended sentences to five persons including three congressmen, but rejected Jeong Tae Soo's appeal, on September 24, 1997. His 15-year imprisonment sentence was still upheld, and he appealed to the Supreme Court.

Figure 1


Supreme Public Prosecutor's Office
Seoul High Public Prosecutor's Office
Seoul District Public Prosecutor's Office
Tongbu Branch Office
Hambu Branch Office
Pukbu Branch Office
Sobu Branch Office
Uijongbu Branch Office
Inchon District Public Prosecutor's Office
Puchon Branch Office
Suwon District Public Prosecutor's Office
Songnam Branch Office
Yoju Branch Office
Pyongtaek Branch Office
Chunchon District Public Prosecutor's Office
Kangnung Branch Office
Wonju Branch Office
Sokcho Branch Office
Yongwol Branch Office
Taejon High Public Prosecutor's Office
Taejon District Public Prosecutor's Office
Hongsong Branch Office
Kongju Branch Office
Kanggyong Branch Office
Sosan Branch Office
Chonan Branch Office
Chongju District Public Prosecutor's Office
Chungju Branch Office
Chechon Branch Office
Yongdong Branch Office
Taegu High Public Prosecutor's Office
Taegu District Public Prosecutor's Office
Andong Branch Office
Kyongju Branch Office
Kimchon Branch Office
Sangju Branch Office
Uisong Branch Office
Yongdok Branch Office
Pusan High Public Prosecutor's Office
Pusan District Public Prosecutor's Office
Tongbu Branch Office
Ulsan Branch Office
Changwon District Public Prosecutor's Office
Chinju Branch Office
Tongyong Branch Office
Miryang Branch Office
Kochang Branch Office
Kwangju High Prosecutor's Office
Kwangju District Public Prosecutor's Office
Mokpo Branch Office
Changhung Branch Office
Sunchon Branch Office
Haenam Branch Office
Chonju District Public Prosecutor's Office
Kunsan Branch Office
Chongup Branch Office
Namwon Branch Office
Cheju District Public Prosecutor's Office

ENHANCEMENT OF THE RULE OF LAW AND PROMOTION OF THE PUBLIC INTEREST—THE ROLE AND FUNCTION OF THE PROSECUTION SYSTEM IN SINGAPORE

*Francis Tseng**

I. ORGANIZATION AND OVERVIEW

A. The Attorney-General as Public Prosecutor

All prosecutions in Singapore come under the control and direction of the Attorney-General, in his role as the Public Prosecutor.

2. The office of the Attorney-General is constituted by virtue of Article 35 of the Constitution of the Republic of Singapore, which also provides that the Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence. Section 336(1) of the Criminal Procedure Code of Singapore further provides that "[t]he Attorney-General shall be the Public Prosecutor and shall have the control and direction of criminal prosecutions and proceedings under this Code". The Criminal Procedure Code applies, by virtue of section 3, to all offences under the Penal Code and all offences under any other written law. The Attorney-General cannot be removed from office except by the President acting on the advice of the Prime Minister, and with the concurrence of a tribunal consisting of the Chief Justice and two other judges of the Supreme Court, and then only for the reason that he is unable to discharge the functions of his office or for misbehaviour.

3. The Attorney-General has secure tenure of office and is thus able to carry out his duties independently and without fear or favour, to ensure that law and justice are upheld impartially and without discrimination.

4. The structure of the Attorney-General's Chambers is shown at Appendix A.

B. Deputy Public Prosecutors

5. Section 336(3) of the Code empowers the Attorney-General to appoint any officers or persons to assist him or to act as his deputies in the performance of any of the functions or duties of the Public Prosecutor. Such appointments will be gazetted in the Government Gazette.

6. In practice, Deputy Public Prosecutors (DPPs) are appointed from legally qualified persons who are legal officers in the Legal Branch of the Singapore Legal Service. These legal officers are appointed by a constitutional commission, the Legal Service Commission under Article 111 of the Singapore Constitution. The Legal Service is made up of two branches, the Judicial Branch and the Legal Branch.

7. The legal officers assigned to perform the duties of Deputy Public Prosecutors are posted to the Criminal Justice Division of the Attorney-General's Chambers, where they undergo intensive initial training for three months, followed by training on the job as well as by way of in-house seminars and external or overseas training courses. All junior DPPs are attached to more senior

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DPPs who act as their mentors, advise them and closely supervise all their work.

8. Legal Officers of the Singapore Legal Service are liable to serve in any position in the Legal Branch or the Judicial Branch of the Legal Service. These include the subordinate judiciary, the registry of the Supreme Court, the Attorney-General's Chambers, the Legal Aid Bureau, the Registry of Land Titles and Deeds, the Registry of Trade Marks and Patents, the Registry of Companies and Businesses, the office of the Official Assignee and Public Trustee, and the legal departments of some Government Ministries. Legal Officers can be and are transferred from time to time to different postings to meet the exigencies of staffing the various appointments as well as for their career development.

C. Organizational Structure

9. The Criminal Justice Division of the Attorney-General's Chambers is the organizational extension of the Attorney-General's function as Public Prosecutor. The Head of the Division presently reports directly to the Attorney-General on any matters in connection with criminal prosecutions. The Head is assisted by a Deputy Head, who acts in his place whenever necessary. In ranking below the Deputy Head are the senior DPPs who are the "mentors" of the Division. The remainder of the DPPs are each directly supervised by one of these "mentors".

10. At present, apart from the Head and Deputy Head, there are 8 senior and 58 junior DPPs, making a total of 68 officers in the Criminal Justice Division. There are, however, 9 vacancies which can be expected to be filled when the new intake of legal officers come in from now till the end of this year.

11. There are also some DPPs who specialise in prosecuting commercial crime cases. They are attached to a unit called the Commercial Affairs Department which comes under the wing of the Ministry of Finance. These DPPs are also legal officers of the Singapore Legal Service and take instructions directly from the Attorney-General. The Commercial Affairs Department is headed by a Director, who is also a senior DPP.

12. The law also allows prosecutions of simple criminal cases to be undertaken by experienced police officers attached to the Prosecution Branch of the Police Force. When such officers conduct prosecutions, they function under the direction and control of the Public Prosecutor and his deputies, and independently of the Police Force insofar as their prosecutorial duties and responsibilities are concerned.

13. There also are lay prosecutors attached to Government departments and statutory bodies. These prosecutors may not be qualified in law. They are authorised by the Public Prosecutor to prosecute only in cases involving laws which their departments or bodies are charged under those laws with enforcing. Such cases are usually very simple ones, and where any complex question of law or fact is involved, the help of the Criminal Justice Division will be sought.

II. THE ROLE OF THE PROSECUTOR

A. Investigation

14. In Singapore, the Public Prosecutor is not involved in the investigation of offences, which is entirely within the province of the various investigation and enforcement agencies. He is, however, empowered to authorise investigations to be carried out in certain cases, e.g., he may authorise the Director of the Corrupt Practices

Investigation Bureau or any police officer to investigate the bank account, share account, expense account or any other account which may be relevant in a corruption case.

15. Since prosecutors do not conduct investigations, they do not interview suspects or accused persons at any stage. Such interviews are left entirely to the police or other law enforcement agency.

16. DPPs may, on occasion, interview witnesses prior to going for trial for the purpose of ascertaining their credibility or clarifying complicated matters. These interviews are not required under the law to be officially recorded, and any notes taken by the DPP are solely for his own use. Where the DPP feels it is necessary to do so, the investigating officer will be asked to record a statement or further statement as the case may be from the witness after the interview.

17. In order to secure the attendance of witnesses for such interviews, prosecutors have to fall back on the powers of the police to require witnesses to attend before them for the purpose of obtaining information. These powers are found in section 120 of the Criminal Procedure Code. The police will then arrange for a deputy public prosecutor to be present at the interview of the witness, and the interview may be carried out in the office of the DPP. In practice, however, very little resistance from witnesses in respect of such interviews is experienced.

B. Arrest

18. An arrest is made only where there is a reasonable suspicion of a seizable offence having been committed. Arrests made without good grounds may subject the arresting officer (and the Government, vicariously) to civil actions for false imprisonment (or wrongful arrest). Generally, if the police or other enforcement officers are in any doubt, they will seek the advice of a deputy public prosecutor before proceeding to effect an arrest. It is, however, only the enforcement agency and not the prosecution that has the power to effect an arrest under the law. It is also the enforcement agency (and not the prosecution) that applies for warrants from the Courts for the arrest of persons where these are required under the law.

19. Under Article 9(4) of the Singapore Constitution and section 36 of the Criminal Procedure Code, a person who is arrested has to be produced before a magistrate within 48 hours of the arrest. When that person is brought before the magistrate and if the investigations are incomplete or if the prosecution is otherwise not ready to proceed with the case, at least a holding charge has to be read to him. Where the investigation agency requires more time to investigate, and requires to have custody of the accused for that purpose, an application may be made by the prosecutor to the court for the accused to be remanded in the custody of the investigation agency. A magistrate may only remand a accused person for a period not exceeding 7 days at any one time, but a District Court, not being subject to this restriction, may remand the accused person (in theory at least) until the date of trial. In practice, even District Courts do not grant custody of accused persons to investigation agencies for more than 7 days at any one time, and applications for extension of periods of custody are closely scrutinised. Investigators have to provide good reasons for applications for custody and even more so or applications for extension of custody.

20. There are, of course, other reasons as well for detention of accused persons pending trial which have nothing to do with the prosecution. These include detention as a result of inability to raise bail, or in

capital cases or cases of offences punishable with life imprisonment, where no bail is allowed under the law.

C. Search and Seizure

21. Search and seizure, being part of the investigation process, are not within the domain of the prosecution. The investigation agencies use their own discretion as to when these should be carried out, and make the requisite applications to court for warrants where such are required. However, these agencies may seek legal advice from the Criminal Justice Division if necessary.

D. Advantages and Disadvantages of the System

22. The separation of investigative and prosecutorial functions involves to some extent a duplication of expertise. Investigators will need to know some law in order to know what to look for, and prosecutors will need to have some knowledge of investigation policies and procedures in order to explain such matters in court and to counter arguments put forward by the defence. Legal expertise is less accessible at the initial stages of investigation as the lawyers are only brought into the picture when the cases are almost ready to be brought to court.

23. With proper training and experience, investigators can easily acquire a working knowledge of law and legal procedures. Prosecutors also do not take long to obtain sufficient familiarity with investigative processes to enable them to function effectively. There has been a recent move in Singapore by enforcement agencies to get the Attorney-General's Chambers involved in the more serious or complex cases at an earlier stage so that legal advice and prosecution experience can be made available to assist the investigators in gathering evidence which can be used for the ultimate purpose of prosecution in court. This new approach helps to minimise last minute investigations to cover areas of inquiry which would be otherwise be raised by the prosecution only when the case is being prepared for trial.

24. The separation of investigative and prosecutorial functions, in my opinion, ensures that no one involved in the entire process is provided with any motivation whatsoever to achieve a conviction which is unjust or based on fabricated evidence. To the contrary, investigating officers will be wary of fabricating evidence or confessions because they know that their work will be closely scrutinised by an independent officer who will have to prosecute the case in court and will therefore be on the look-out for any weaknesses in the case he is going to present. The investigator's job is merely to obtain whatever evidence he can and place it before the prosecutor, who then has to assess whether that evidence will be sufficient to persuade a court to convict. Where the evidence gathered from the investigations is insufficient, the prosecutor will not prosecute but will withdraw the charges. He is under no duty whatsoever to prosecute every case that is investigated. On the other hand, being from a different branch of the government service, he is also not the administrative supervisor of the investigator and has no say in the investigator's promotions or career path. Accordingly, neither the investigator nor the prosecutor will be tempted to secure a conviction by unjust means.

25. The position could be very different if the prosecutor is put in charge of investigating as well as prosecuting the case. Unless adequate safeguards are built in, an officer put in overall charge of a case might be tempted, in the interest of furthering his own career, to secure as many convictions as he possibly can, and

might resort to achieving this at all costs, even to the extent of fabricating evidence or ordering this to be done by officers subordinate to himself. In systems in which prosecutorial and investigative functions are combined, safeguards will accordingly have to be put in place to protect against that. Prosecutors who do not act independently of the investigations may also lose their objectivity and become biased in their assessment of the evidence.

26. It has been suggested that having prosecutors take on investigative functions avoids subjecting suspects to unduly long detention and unwarranted trials, and that the success of such a system has been borne out by statistics of the conviction rates achieved. Under the Singapore model, there is no fear of any undue detention or unwarranted trial because the Public Prosecutor assumes control as soon as any prosecution is initiated. Caution must always to be exercised when relying on statistics, as the conclusions reached on the basis of statistics may not necessarily reflect the true position.

27. What may work well for one country may not, because of prevailing circumstances, work as well for another. I would like to suggest that it may be more meaningful to look at whether the people subject to a particular system of criminal justice live under fear of (a) becoming victims of crime and (b) being prosecuted for something they did not do. If they do not, then the system, however it operates, must be functioning well.

E. The Prosecution Process

28. Initiation of prosecution is done by the enforcement agency charged with investigating the offence, usually but not always with the prior concurrence of a deputy public prosecutor. In the case of private prosecutions, it is done of the application by a person aggrieved to a magistrate, who will, if an offence is made out on the face of the complaint, issue either a summons or a warrant of arrest to compel the attendance in court of the person complained against. Private prosecutions are permitted by law only in relatively minor offences, and the complainants will have either to prosecute their cases themselves or to engage private lawyers to do so on their behalves. Whatever the case, all prosecutions come under the control and supervision of the Public Prosecutor and his deputies upon commencement. The Public Prosecutor may, in the exercise of his discretion, step in and take over the conduct of any private prosecution, to either continue with the proceedings with one of his deputies in charge of it, or to discontinue it.

29. To ensure that the Public Prosecutor applies his mind before prosecutions for certain offences are initiated, the written sanction, consent or authorisation of the Public Prosecutor as the case may be is required before cognizance can be taken by a court of those types of offences. This prevents any enforcement agency or private person from using the criminal process for those offences without the knowledge of the Public Prosecutor. Examples of such offences are corruption, forgery, giving of false evidence or false information to a public officer, criminal conspiracy, and offences against the state. In addition, prosecutions for every offence tried in the High Court (which generally hears cases in which the penalty is capital punishment or life imprisonment) and all criminal appeals are required by law to be conducted by the Public Prosecutor or one of his deputies, and prosecution for every seizable offence before a District Court is required to be conducted by the Public Prosecutor, a deputy public prosecutor, or an advocate, officer or other person specially authorised by the Public Prosecutor.

F. Preliminary Inquiry

30. In the case of a prosecution before the High Court, there is an additional step which has to be taken before trial. A preliminary inquiry before a magistrate has to be conducted by a deputy public prosecutor or some other officer authorised. The evidence is produced before the magistrate, and only if the magistrate finds that there are sufficient grounds for committing the accused person for trial will the case be sent up to be heard before the High Court. If the magistrate finds that there are insufficient grounds to commit the accused person for trial, he will discharge him. This procedure provides yet another check before any person is prosecuted for a serious offence.

G. Advice and Directions of the Public Prosecutor's Office

31. When cases are referred by an investigating agency to a deputy public prosecutor for advice, the DPP may approve the initiation or continuance of the prosecution, instruct further investigations to be conducted, or direct that the charge be withdrawn or that no action is to be taken against the suspect. In seeking such advice, the enforcement agency will have to produce to the DPP all the investigation papers, including the statements of the various witnesses and the suspects, photographs and sketch-plans, medical and other reports, investigation diaries and summaries of the facts. On occasion, the DPP may also call for the investigation papers on his own motion or interview the witnesses before giving directions regarding the prosecution of any case.

32. In general, the Attorney-General's Chambers will normally proceed to direct that prosecution be proceeded with when there is a *reasonable prospect of securing a conviction*, given that the burden of proof in criminal cases is that the case must be proved *beyond reasonable doubt*. It should be borne in mind that in the vast majority of cases, the prosecution in an adversarial system such as the one we have in Singapore does not have the benefit of fully considering the defence case before trial. Neither does the prosecution have the benefit of interviewing the accused persons prior to the trial for the purpose of assessing their credibility or the merits of their defence. All that is available to the prosecution up to that stage are the statements recorded by the investigators from the accused persons, who may not have disclosed everything in their possession or knowledge to the investigators. The assessment whether there is "*a reasonable prospect of securing a conviction*" is, therefore, based on whatever reliable evidence there is access to.

33. We consider that unless there is a reasonable chance on the available evidence that a conviction will eventually result, it may not be fair to an accused person to put him or her through the rigours of a public trial. Being tried for an offence involves expense for the defendant, who may have to pay his lawyers' fees. A defendant also has to go through the inconvenience of appearing in court, and his reputation may also suffer from having to defend himself in public against a criminal charge. The mental torture of undergoing a trial also adds to the reasons why a person should not be put through a trial unless there are good grounds for believing that conviction would follow.

34. In order to ensure good and consistent decisions in capital and more serious cases, the Attorney-General's Chambers Criminal Justice Division has set up a system in which every such case is reported by the prosecuting DPPs to a panel consisting of three or more senior DPPs (or "mentors"), who have equal say in the recommendation made. The recommendation is passed

through the Head (or Deputy Head) of the Division, who adds his suggestion to the panel's and forwards the entire file to the Attorney-General for the final decision. In this way, the Attorney-General gets the assistance of the two most senior levels of officers before he reaches his decision. The decision is thus not left to a single officer to make, but is taken at the very highest level, with the combined assistance of the most experienced officers.

H. Exercise of the Discretion Not to Prosecute

35. It is not in every case where there is good evidence that the Public Prosecutor will direct that the offender be prosecuted. Mitigating factors are taken into consideration in deciding whether or not to proceed with prosecution, and not infrequently, warnings are issued in lieu of prosecution where there are good grounds for doing so. These grounds may include sympathetic considerations; the age or immaturity of the offender; the provocation or temptation provided by the victim; remorse or rehabilitation of the offender; low degrees of culpability, contribution to the offence or guilty intent; and voluntary disclosure of the offence and/or restitution on the part of the offender.

36. In addition to the cases which the prosecution does not proceed with, there is another category of offences which are listed as being compoundable under the Criminal Procedure Code. Such offences may be compounded by the victim with the consent of the court, and while any objection on the part of the prosecution will be taken into consideration by the court in deciding whether or not to give the requisite consent, the final say on whether an offence is to be compounded or not belongs to the court and not the prosecution. Composition of an offence has the effect of an acquittal, and the accused person is thereafter discharged from further having to attend the court proceedings. The composition of offences can be done only after the accused has been indicted. Only relatively minor offences mainly affecting particular victims individually are listed as compoundable in the Criminal Procedure Code.

I. Remedies Where the Public Prosecutor Decides Not to Prosecute

37. The discretion given to the Public Prosecutor regarding prosecution is a very wide one. In theory, it might be possible for a private person who is aggrieved by a decision of the Public Prosecutor to apply to the Supreme Court for a prerogative writ known as a *writ of mandamus* to compel the Public Prosecutor to prosecute. This has however never been tested in practice. It seems fairly likely that a court would generally be extremely reluctant, on grounds of public policy, to force the Public Prosecutor to disclose the reasons underlying the exercise of his discretion; and there is decided authority for the proposition that the courts will not interfere with the Public Prosecutor's choice of the charge to be proceeded on.

J. Plea Bargaining

38. This is done solely between the prosecution and the defence, and it usually involves negotiations for a reduced number of charges and/or an amendment to less serious charges in exchange for which the accused will agree to plead guilty. The court is never brought into the negotiations, and in fact the practice is to keep all such communications from the court in order to avoid prejudicing the judge. If, for example, the judge is asked to comment on the sentence an accused person may expect if he were to plead guilty, an impression may be given at that stage that the accused person is in fact guilty. If negotiations break down, another judge would have to hear the case, to avoid

any possibility of prejudice. If the judge is not brought into the negotiations in the first place, the parties can negotiate more freely, without fear that what they say may be used against them in the event that negotiations break down.

39. Where an accused person pleads guilty before the court to a non-capital charge, the proceedings will consist of the court ensuring that the accused person understands the nature and consequences of his plea. A statement of the relevant facts on which the prosecution relies is then read out and the accused person is asked whether he admits those facts. If the facts are admitted *without qualification*, the court will convict the accused person on his plea of guilty and proceed with the sentencing process. If the accused person pleads "not guilty" or qualifies the facts read out, the court will order the hearing of a trial. For capital cases, trial hearings will be conducted regardless of the pleas given by the accused persons.

40. The benefit to the State that accrues from plea bargaining lies in the fact that expensive court time is saved if an accused person pleads guilty. The savings in manpower, in paying the salaries of the judicial officers and court staff, and those of the prosecutors and their supporting staff may be considerable. The freeing of courts also results in other accused persons being able to have their cases heard earlier. At the same time, a plea of guilty is a mitigating factor in favour of the accused.

41. However, the prosecution is always mindful of the need for deterrence when it considers matters raised in plea bargaining, and always endeavours to see that a balance is struck between the benefits mentioned and the other objectives of the criminal justice system.

42. The Attorney-General's Chambers does not initiate plea bargaining with accused persons, especially those who are not represented, in order to avoid situations in which the prosecution may be accused for trying to intimidate suspects. All accused persons or their counsel are free however to write in making representations and all such representations will be accorded due consideration by a deputy public prosecutor.

K. Immunity from Prosecution

43. Offenders may, on every rare occasions, be offered immunity from prosecution if they agree to testify against their accomplices. Such offers are sometimes made where it would not otherwise be possible to obtain evidence against any person involved in the offence. Rather than let *all the* offenders get away scot-free, the prosecution may select one or more of those involved and offer immunity in exchange for their testimony against the others.

44. Generally, it is the investigator who initiates the move to offer immunity. In our experience, we have hardly ever come across any accused person offering in representations made to a deputy public prosecutor to testify for the prosecution in exchange for an assurance that he will not be prosecuted. More often, when an accused person offers to testify for the prosecution, what is asked in exchange is a reduced charge or a reduced number of charges. This demonstrates the attitude taken by the prosecution in Singapore—that wherever possible, it will insist on at least *some* punishment for every guilty person.

45. The investigator has no authority to make an offer of immunity, but may approach the accused persons with the suggestion and gauge their reactions. Thereafter, the investigator will refer to the Attorney-General's Chambers for approval

to make the promise to the person(s) chosen. The request by the investigator is dealt with at the highest level of the Criminal Justice Division, before it is referred to the Attorney-General for his decision.

46. Offers of immunity are made only on very rare occasions. More often than not, a deputy public prosecutor will prefer not to proceed at all than to offer immunity. Great care is taken by the Attorney-General's Chambers to ensure that the accused persons proceeded against are really guilty and that there is no possibility of any miscarriage of justice before a suggestion to offer immunity to any accomplice is agreed to.

L. Judicial System

47. The courts for the administration of criminal justice in Singapore consist of:

a. the High Court,
b. District Courts, and
c. Magistrates' Courts.

District Courts and Magistrates' Courts are collectively termed "Subordinate Courts".

48. In addition, there are two levels of appeal courts. The High Court in the exercise of its appellate jurisdiction hears appeals from District Courts and Magistrates' Courts, while the Court of Appeal hears appeals from the original jurisdiction of the High Court.

49. At the bottom of the ladder, Magistrates' Courts have power to hear and determine prosecutions for offences for which the maximum term of imprisonment provided by law does not exceed 3 years. District Courts have jurisdiction to try all offences for which the maximum term of imprisonment does not exceed 10 years, and the High Court has unlimited jurisdiction to hear any offence punishable by the laws of Singapore.

50. The structure of the Judiciary is set out in Appendix B.

M. Trial Statistics

51. The numbers of trial hearings prosecuted by the Attorney-General's Chambers for 1995 and 1996 are shown in Appendix C. In 1996, the number of 2504 trials in the Subordinate Courts was handled by an average of 31 DPPs, making a total of about 6 to 7 trials per DPP per month. This includes time for preparation for the trials, interviews of witnesses, familiarisation with the facts of the cases and research on the law. In contrast, 38 DPPs dealt with only 67 cases in the High Court during the same period of time. The stark difference is accounted for by the fact that 2 DPPs are assigned to prosecute each High Court case, and the 38 DPPs also handled 247 Magistrates' Appeals, 23 appeals to the Court of Criminal Appeal, 25 Criminal Revision proceedings and 19 Criminal Motions. The cases handled by these 38 DPPs involve much more work per cases, and generally the more senior DPPs are assigned to do this type of work. In addition, most of the other work listed in Appendix C is also done by these 38 DPPs.

N. Fixing of Trial Dates

52. After accused persons are charged in court, there usually follows a period when matters preliminary to trial have to be attended to. Investigations may have to be completed, advice may have to be sought by enforcement agencies from a deputy public prosecutor, plea bargaining may be attempted, and counsel may need time to take instructions from their clients. The progress of these matters is closely monitored by the court, and parties are required to return to report to the court periodically. When all such matters have been completed and the cases are ready for trial, the court will fix a pre-trial conference for each case. In the pre-trial conference, matters such as agreement on certain facts,

crystallization of issues, and the exchange of certain evidence, particularly documentary evidence are attended to before the judge. Dates are then allocated according to the time that the judge, assisted by the parties, estimates to be necessary for the hearing of each particular case.

O. Trial

53. At the commencement of the trial, the charge is read to the accused person. This is done even if it had been read out to him previously on other dates. The accused person is then asked whether he is guilty of the offence or whether he claims to be tried. If the accused person pleads guilty, the court will have to satisfy itself that he understands the nature and consequences of his plea, and if so, will convict him of the offence. If the accused claims to be tried, the court will proceed to hear the evidence.

54. The prosecution has to call its witnesses first. The discretion as to which witnesses to call and in what order lies solely with the prosecutor. Each witness is first examined in chief by the prosecution, meaning that the prosecution has to elicit the evidence from its witness by asking questions in such that the answer is not suggested to the witness. Thereafter, the witness may be cross-examined by the accused person or his counsel. Cross-examination is not subjected to the same restriction as examination in chief. When the cross-examination is concluded, the witness may be re-examined by the prosecutor. Re-examination is confined to clarifying matters raised in cross-examination, and, as in the case of examination in chief, leading questions may not be asked.

55. After the prosecution has called all its witnesses, the court has to determine whether a *prima facie* case has been made out, which if unrebutted would warrant the conviction of the accused. Before doing so, the court will hear submissions from both the prosecution and the defence. If the court finds that no such case has been made out, it will record an order to acquittal. Otherwise, the court will call upon the accused to give evidence in his own defence, and will explain to him the effect of not doing so.

56. If the accused person elects to give evidence, his testimony has to be taken before that of any other witness for the defence. All witnesses for the defence are examined in chief by the accused or his counsel, cross-examined by the prosecution, and re-examined in much the same manner as the prosecution witnesses before them. Where there is more than one accused person, each witness (including the accused persons themselves if they elect to testify) may be cross-examined on behalf of any other accused person jointly charged in the same trial.

57. At the close of the case, the prosecution and the defence may again address the court. If the court finds the accused not guilty, it will record an order of acquittal and discharge him provided no other charge is pending against him. If the court finds the accused guilty of the charge, it will convict him of the same and proceed to pass sentence.

P. Some Burdens of Proof

58. At the close of the case for the prosecution, the court is not required to weigh the evidence or the credibility of the witnesses, but only to determine whether on the evidence before it, if such evidence, not inherently incredible, be true, all the ingredients of the charge have been made out.

59. If the accused, after having been called upon by the court to give evidence in his own defence, refuses to testify, the court

may, in determining whether he is guilty of the offence, draw such inferences from that refusal as may appear proper, including inferences which may be adverse to the accused.

60. The burden at the conclusion of all the evidence is somewhat different from that at the close of the prosecution's case. In order that a conviction be recorded, the court has to find that the prosecution has proved it case *beyond reasonable doubt*.

Q. Sentencing

61. Before proceeding to pass sentence, the court will want to hear from the prosecution regarding the antecedents of the accused person. The prosecutor will read out the antecedents if any and the accused will be asked if he admits those antecedents. If he does, the antecedents will be taken as proved, otherwise a hearing will be conducted for the antecedents to be proved.

62. The defence will then be given a chance to make a plea in mitigation to the court. This plea must be confined to matters which do not call in question the legality or validity of the conviction. The prosecution may dispute any part of the plea in mitigation, and if not withdrawn by the defence, a hearing may be conducted for the disputed portion to be adjudicated upon. The prosecution may also in certain cases address the court on the sentence to be imposed. This is not a right as such prescribed in any statute, but is a practice which has developed. The courts generally take the attitude that it does not hurt to hear what the prosecution has to say. The judge can always disregard what the prosecutor says if he does not agree.

63. As a matter of practice, the prosecution's address on sentence does not touch on the *quantum* or tariff, only on the factors which may be seen to aggravate the offence, and in some cases on the *type* of sentence that the prosecution is asking the court to impose. The most common instance in which the prosecution will address the court on sentence is where a deterrent sentence is asked for on grounds of public policy or because of the circumstances of the case.

R. Victim Impact Statements

64. Of late, a practice has developed whereby after recording a conviction, the court may call for a statement from the victim in respect of the impact that the crime in question has had on him or her. This statement is used to assist the court in assessing sentence. In the past, only on rare occasions did the court ask to hear from the victim. Now this procedure has been formalized and judicial officers are actively encouraged to call for such statements in appropriate cases.

65. Although arrived at independently by the judiciary in Singapore, this practice of calling for such statements would meet with the approval of a rising school of thought known as "Victimology", which is currently gaining popularity, particularly in Europe, New Zealand and the U.S.A. This school urges that the rights of victims of crime should be taken seriously and treated as no less important than the rights of accused persons.

66. The prosecution has undertaken the task of assisting the court in obtaining such statements. Instructions will be given by a deputy public prosecutor to the investigating officer to contact the victim for this to be done. Sometimes, when the prosecution intends to address the court on sentence, instructions will be given in advance for a statement to be prepared, even without the court calling for it.

67. The investigating officer will contact the victim and inform him or her that it is

proposed that a statement setting out the impact the offence has had on the victim be tendered to assist the court in deciding on the appropriate sentence for the offender. The victim is informed that he or she is at liberty to refuse to mention anything which he or she does not want to be brought to the court's attention for this purpose, but any information given in the statement has to be true and correct, and any false information would render the victim liable to criminal prosecution. The victim is also told that a copy of the statement may be made available to other persons such as the accused, defence counsel, and the media, and that he or she may be cross-examined on any matter relevant to it.

68. After the statement is recorded, a deputy public prosecutor will tender it to the court for consideration before sentence is passed.

S. Appeals

69. The conviction rates in 1996 for some of the more serious offences tried in the High Court are set out in Appendix D. The rates of conviction and acquittal are consistent with the prosecution's policy of proceeding only where there is a reasonable prospect of securing a conviction.

70. Any person (including the Public Prosecutor) who is dissatisfied with any judgement, sentence or other order pronounced by a District or Magistrate's Court in a criminal matter to which he is a party may appeal to the High Court, subject to the following restrictions:

a. where an accused person has pleaded guilty, there can be no appeal except as to the extent or legality of the sentence; and
b. when an accused person has been acquitted, there shall be no appeal except by the Public Prosecutor.

71. The High Court may also on its own motion call for the record of proceedings of any case heard in a District or Magistrate's Court and deal with it as if an appeal had been field.

72. Appeals from judgements or sentences of the High Court may be made to the Court of Appeal in the exercise of its criminal jurisdiction. The Public Prosecutor may appeal against the acquittal of any person or on the ground of the inadequacy of any sentence passed.

73. In 1996, out of a total of 33 appeals to the High Court by the prosecution, 18 were allowed, 11 were dismissed and 4 were withdrawn. The High Court allowed a total of 50 appeals by accused persons and dismissed 93, and 19 were withdrawn during the same period. The figures show that accused persons filed about 5 times as many appeals as the prosecution.

74. The corresponding figures for appeals to the Court of Appeal decided in 1996 are as follows:

• Prosecution

Filed	Allowed	Dismissed	Withdrawn
4	1	3 (1 by dissenting judgement)	Nil

• Defence

Filed	Allowed	Dismissed	Withdrawn
44	2	32	10

75. It can be seen from the above figures that the prosecution files very few appeals to the Court of Appeal compared to the defence. The reason for this is that where there is a death sentence passed, an appeal will almost inevitably follow, although a person sentenced to death is not compelled by law to file an appeal.

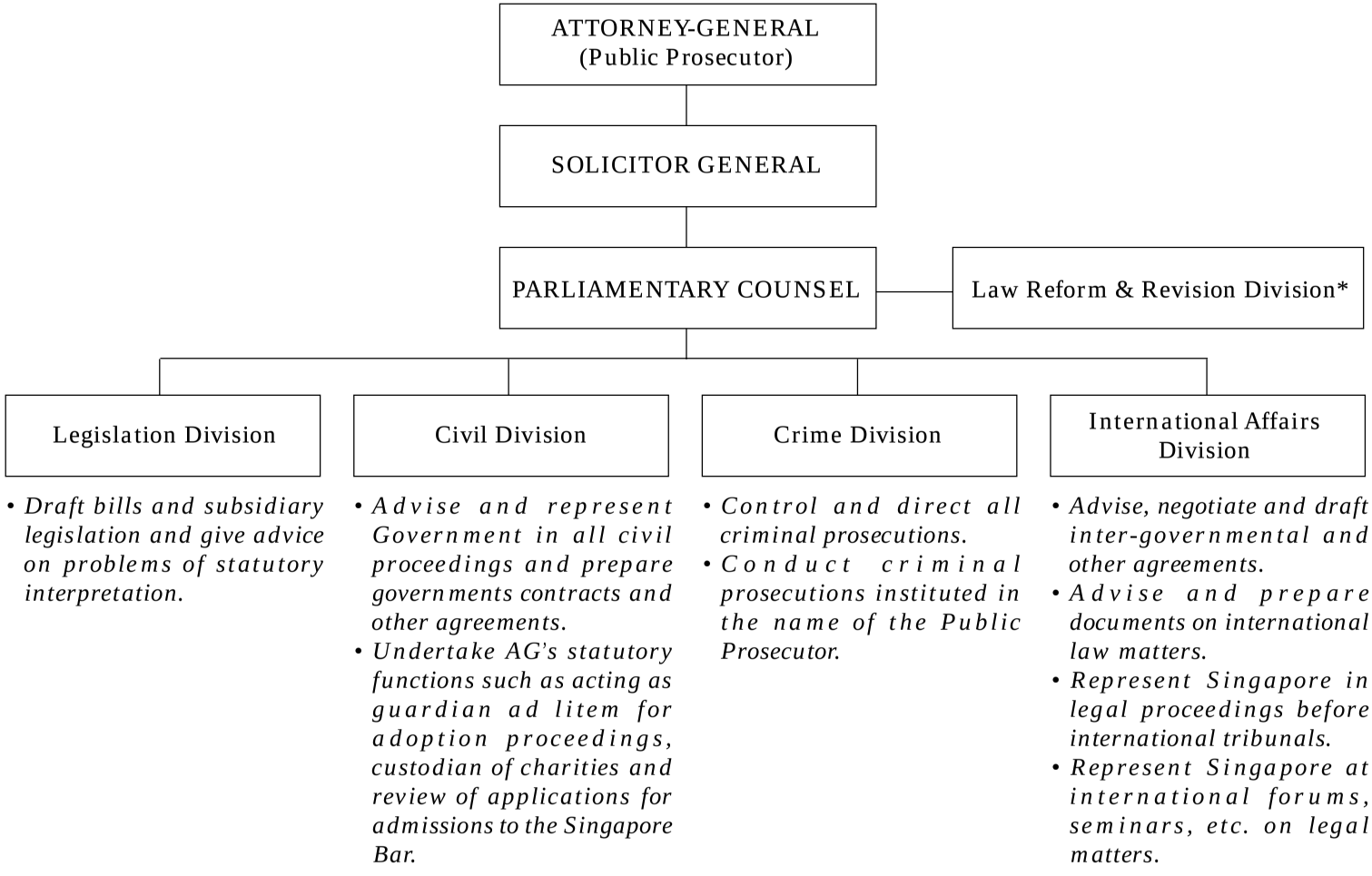
76. Appeals by the prosecution to the Court of Appeal against acquittals in capital cases have hardly ever been allowed. To the best of my memory, there have been only two such cases previously, in which acquittals in drug trafficking cases were overturned on appeal and the offenders were sentenced to death by the Court of Appeal. The case in 1996 which was dismissed with a dissenting judgement was the closest to which an acquittal in a murder case has ever come to being overturned on appeal. There has however been one murder case in the past in which the prosecution's appeal against an acquittal without the defence being called was allowed. The case was sent back to the High Court for the defence to be called upon, and the accused was convicted after the High Court heard the defence. There have, however, been several drug trafficking cases in which cases were similarly sent back to the High Court for the defence to be called. Some resulted in acquittals and one in a conviction after the defences were heard.

III. MISSION

77. The mission statement of the Attorney-General's Chambers Criminal Justice Division is: "To promote a just criminal justice system by pursuing a fair and impartial policy in the prosecution of offenders". Towards this end, the prosecution in Singapore seeks to give due consideration to, and to balance the rights of all those affected by the system—the social community, the accused and the victim—in supplementing the efforts and endeavours of the Judiciary in providing prompt, enlightened and transparently fair administration of criminal justice.

APPENDIX A

STRUCTURE OF ATTORNEY-GENERAL'S CHAMBERS



APPENDIX B

STRUCTURE OF THE JUDICIARY

CONTROL OF APPEAL
(Chief Justice & 2 Judges of Appeal)

- *Appellate civil jurisdiction for claims exceeding $30,000 or otherwise leave is required.*
- *Appellant criminal jurisdiction—appeals from High Court in exercise of its original criminal jurisdiction and question of law from a subordinate court appeal to the High Court.*

HIGH COURT
(Chief Justice, 12 Judges, 4 Judicial Commissioners)

- *Original civil jurisdiction for claims exceeding $250,000.*
- *Original criminal jurisdiction for all offences under Singapore law committed within Singapore and on board Singapore-registered ships and aircraft; offences committed by Singapore citizens on high seas aircraft and offences committed by any person amounting to piracy on the high seas and hijacking or aircraft.*
- *Appellate civil jurisdiction—appeals from the District and Magistrate's Courts for claims exceeding $5,000 or otherwise leave is required. Also appeals from other tribunals if the law so provides.*
- *Appellate criminal jurisdiction—appeals from the District and Magistrate's Courts and any points of law reserved by such a Court.*

SUBORDINATE COURTS

District Court

- *General civil jurisdiction for claims up to $250,000.*
- *General criminal jurisdiction for offences punishable with fine up to $10,000, imprisonment up to 7 years, or caning up to 12 strokes (for male offenders) or any lawful combination of these punishments.*

Magistrate's Court

- *General civil jurisdiction for claims up to $30,000.*
- *General criminal jurisdiction for offences punishable with fine up to $2,000, imprisonment up to 2 years, or caning up to 6 strokes (for male offenders) or any lawful combination of these punishments.*

Corner's Court

To ascertain causes and circumstances of all unnatural deaths.

Juvenile Court

Try offences committed by offenders below 16 years.

Family Court

Deal with family law matters and adoptions.

Small Claims Tribunals

Deal with claims up to $10,000 or $20,000 by consent of both parties.

Court Mediation Centre

Provide a forum for disputants to resolve disputes involving family and juvenile matters, small civil claims and Magistrate's complaints without adjudication.

APPENDIX C

CRIME DIVISION

Types of Files/Matters	Number of New Files	
	1995	**1996**
General Advice	600	590
Attending to Representations of Accused Persons or Their Counsel	4183	3967
Considering Requests from Private Parties for Fiats	220	262
Coroner's Inquiries	49	95
Preliminary Inquiries	70	49
Subordinate Court Trials	1613	2504
High Court Trials	108	67
Magistrate's Appeals	259	247
Criminal Appeals	73	23
Criminal References	3	0
Criminal Revisions	28	25
Criminal Motions	43	19

APPENDIX D

1996 CONVICTION RATES FOR SERIOUS OFFENCES

	Convicted after Trial	Plead Guilty	Convicted on Reduced Charge	Acquitted
Drugs	28	9	0	4
Rape	4	10	0	1
Unnatural Offences	1	1	0	1
Murder	7	0	2	3
Homicide	3	11	0	0
Arm Offences	1	2	0	1
Robbery	2	2	0	0

THE ROLE AND FUNCTION OF PROSECUTION IN SRI LANKA

*D.P. Kumarasingha**

I. WHERE AND HOW PROSECUTIONS ARE INSTITUTED

In Sri Lanka prosecutions are instituted in two original courts namely, the Magistrate's Court and the High Court. Proceedings are instituted in the Magistrate's Court in one of the following ways (Section 136 of the Code of Criminal Procedure Act):

(1) on a complaint being made orally or in writing to a magistrate of such Court that an offence has been committed which such Court has jurisdiction either to inquire into or try; (Such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant);

(2) on a written report to the like effect being made to a magistrate of such Court by an inquirer into sudden deaths or by a peace officer or a public servant or a servant of a municipal council or of an urban council or of a town council;

(3) upon the knowledge or suspicion of a magistrate of such Court to the like effect provided that when proceedings are instituted under this paragraph the accused or when there are several persons accused, any one of them shall be entitled to require that the case not be tried by the magistrate upon whose knowledge or suspicion the proceedings were instituted, but either be tried by another magistrate or committed for trial;

(4) on any person being brought before a magistrate of such Court in custody without process accused of having committed an offence which such Court has jurisdiction either to inquire into or try;

(5) upon a warrant under the hand of the Attorney-General requiring a magistrate of such Court to hold an inquiry in respect of an offence which such Court has jurisdiction to inquire into; or

(6) on a written complaint made by a court under section 135 (giving or fabricating false evidence and forgery).

Prosecutions in the High Court are instituted by the Attorney-General. The procedure is as follows:

(1) In serious crimes the police, under section 393 (5) and (6) of the Code of Criminal Procedure Act, send to the Attorney-General a file containing the notes of investigation and the statements of witnesses and the suspects, together with a report of the case and other relevant documents. The Attorney-General may forward an indictment to the High Court depending on the sufficiency of evidence.

(2) In cases where a magistrate is required to hold a preliminary inquiry under section 145 or section 136(e) of the Code of Criminal Procedure Act the Magistrate, if he is satisfied of the sufficiency of evidence, commits the accused to stand trial in the High Court and forwards to the Attorney-General a copy of the proceeding, together with other relevant documents.

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The Attorney-General, if he is satisfied of the sufficiency of evidence for committal, will forward an indictment to the High Court.

After an indictment is forwarded to the High Court in the manner aforementioned, the prosecution will invariably be conducted by a State Counsel. In important cases and in cases where difficult questions of law are likely to arise or cases which depend solely on circumstantial evidence, it is always the practice of the Attorney-General's Department to assign a senior officer to conduct the prosecution.

Every indictment forwarded to the High Court shall contain,

(1) a list of witnesses whom the prosecution intends to call.
(2) a list of documents and things intended to be produced at the trial. *(productions).*

The following documents should be attached to every indictment,

(1) where there was a preliminary inquiry, a certified copy of the record of the inquiry and of the documents and of the inquest proceedings if there had been an inquest;
(2) where there was no preliminary inquiry, copies of statements to the police made by the accused and the witnesses listed in the indictment;
(3) copies of all reports and sketches listed in the indictment;
(4) copies of the notes of any identification parades that may have been held during the investigation of the case;
(5) copies of any statements made to the magistrate under section 127[1] by:
    (a) the accused; and
    (b) any witness listed in the indictment; and
(6) copies of such portion of the notes, containing the observations of the scene of offence made during the investigation of the offence by a public officer.

The indictment shall be in the prescribed form and shall be brought in the name of the Attorney-General and shall be signed by the Attorney-General or the Solicitor-General or a State Counsel.

The proceedings do not abate or determine by reason of the death or removal from the office of the Attorney-General (Section 162 of the Code of Criminal Procedure Act).

II. ORGANISATION OF THE ATTORNEY-GENERAL'S DEPARTMENT AND ITS FUNCTIONS

At this stage, it would be appropriate to set out the structure of the Attorney-General's Department and discuss the internal working of the Department. At the apex is the Attorney-General who is the head of the Department. He is the principal law officer of the State and is accorded the first place among public servants at official functions. The next in command is the Solicitor-General followed by three Additional Solicitors-General. Additional Solicitors-General and above are also appointed as President's Counsel (equivalent of Queen's Counsel in England) by virtue of their office. Below them there are nine Deputy Solicitors-General followed by Senior State Counsel and State Counsel.

The Attorney-General's Department is divided into two divisions: the Criminal Division and the Civil Division. The Solicitor-General who is in charge of the administration of the Department is also the head of the Civil Division while the most senior Additional Solicitor-General is the head of the Criminal Division.

[1] Section 127(1): Any magistrate may record any statement made to him at any time before the commencement of any inquiry or trial.

In cases of murder, attempted murder and rape, it is mandatory that the prosecution be instituted in the High Court by the Attorney-General. In such cases the magistrate, after committal of the accused to stand trial in the High Court, forwards to the Attorney-General copies of proceedings of the preliminary inquiry together with other relevant documents. In other serious cases such as robberies, the police invariably forward the notes of the investigation and the statements of the witnesses and the suspects, together with other relevant documents, to the Attorney-General for advice.

Once a file reaches the Attorney-General's Department, it is registered and sent to an allocating officer who is a senior officer in the Department. He allocates it to a State Counsel for necessary action. The State Counsel studies the case and submits a report to his supervising officer who is invariably a Senior State Counsel. The report shall discuss the facts of the case, analyse the evidence available and make one of the following recommendations:

- In the case of committal by the magistrate:
  (1) To forward indictment to the High Court—if there is sufficient evidence;
  (2) To quash the committal and direct the magistrate to discharge the accused—if there is not sufficient evidence to make out a prima facie case; or
  (3) To direct the magistrate to record further evidence.

- In the case of files submitted by the police:
  (1) To indict the suspect or suspects—if there is sufficient evidence to make out a prima facie case;
  (2) To discharge the suspect or suspects—if there is no evidence or if the evidence available is unsatisfactory and cannot form the basis of an indictment; or
  (3) To order further investigations if the police have not done a proper investigation.

The supervising officer will study the report and decide on the course of action.

III. POWERS OF THE ATTORNEY-GENERAL

The Attorney-General possesses very wide powers in respect of criminal prosecutions. These powers are set out in section 393 of the Code of Criminal Procedure Act and are stated below:

A. Section 393(1): It shall be lawful for the Attorney-General to exhibit information, present indictments and to institute, undertake or carry on criminal proceedings in the following cases, that is to say,

(a) in the case of any offence where a preliminary inquiry under Chapter XV by a Magistrate is imperative or may be directed to be held by the Attorney-General; *(This chapter relates to inquiries by Magistrates into cases which appear not to be triable summarily by the Magistrate's Court but triable by the High Court. Such offences are set out in the Second Schedule to the Judicature Act).*

(b) in any case where the offence is not bailable; *(Non-bailable offences are set out in the Schedule to the Code of Criminal Procedure Act. There are also some offences which are made non-bailable by special statutes).*

(c) in any case referred to him by a State Department in which he considers that criminal proceedings should be instituted;

(d) in any case other than one filed under section 136(1)(a) of the Code which appears to him to be of importance or difficulty or which for any other reason requires his intervention;

(e) in any case where an indictment is presented or information exhibited in the High Court by him.

(2) The Attorney-General shall give advice, whether on application or on his own initiative to State Departments, public officers, officers of the police and officers in corporations, in any criminal matter of importance or difficulty.

(3) The Attorney-General shall be entitled to summon any officer of the State or of a corporation or of the police to attend his office with any books or documents and there interview him for the purpose of,

(a) Initiating or prosecuting any criminal proceeding, or

(b) Giving advice in any criminal matter of importance or difficulty.

The officer concerned shall comply with such summons and attend at the office of the Attorney-General with such books and documents as he may have been summoned to bring.

(4) The Attorney-General may nominate State Counsel or employ any attorney-at-law to conduct any prosecution in any court and determine the fees to be paid to such attorney-at-law.

(5) The Superintendent or Assistant Superintendent of Police in charge of any division shall report to the Attorney-General every offence committed within his area where,

(a) preliminary investigation under Chapter XV is imperative; or
(Chapter XV deals with inquiries into cases which appear not to be triable summarily by Magistrates' Courts but triable by the High Courts).

(b) for the institution of proceedings the consent or sanction of the Attorney-General is required; or

(c) a request for such report has been made by the Attorney-General; or

(d) such Superintendent or Assistant Superintendent considers the advice or assistance of the Attorney-General necessary or desirable; or

(e) the Magistrate so directs; or

(f) the offence was cognizable and the prosecution was withdrawn or cannot be proceeded with.

(6) When reporting in terms of subsection (5) the Superintendent or Assistant Superintendent of Police, as the case may be shall supply to the Attorney-General,

(a) a full statement of the circumstances;

(b) copies of the statements of all witnesses;

(c) such other information, documents or productions as may be relevant or as may be called for by the Attorney-General; and

(d) where an inquest has been held, a copy of the inquest proceedings.

(7) Notwithstanding any other provisions of the Criminal Procedure Code, it shall be lawful for the Attorney-General, having regard to the nature of the offence or any other circumstances, in respect of any summary offence,

(a) to forward an indictment directly to the High Court; or

(b) to direct the Magistrate to hold a preliminary inquiry in accordance with the procedure set out in Chapter XV in respect of any offence specified by him where he is of opinion that the evidence recorded at a preliminary inquiry will be necessary for preparing an indictment;

and thereupon such offence shall not be triable by a Magistrate's Court.

B. The Attorney-General is also vested with wide powers in respect of preliminary inquiries (also referred to as non-summary inquiries) held by the magistrates.

In all cases which are not triable summarily by the magistrate but triable by the High Court, a preliminary inquiry must be held by the magistrate. It is mandatory that preliminary inquiries should be held in the following cases:

(a) Where the offence or any one of them where there is more than one, falls within the list of offences set out in the Second Schedule to the Judicature Act. They are:
  (i) Offences punishable under section 296 (murder), section 297 (culpable homicide not amounting to murder), section 300 (attempted murder), and section 264 (rape) of the Penal Code.
  (ii) Offences punishable under section 4(2) of the Offensive Weapons Act, i.e., causing injury to any person with an offensive weapon—offensive weapon means a bomb or grenade or any other device or contrivance made for a use or purpose similar to that of a bomb or grenade) and section 4(2) read with section 6(1)—instigation to commit an offence under the Offensive Weapons Act or conspiracy to commit such an offence or intentionally aiding by any act or illegal omission the commission of such offence).
  (iii) Abetment and conspiracy for the abetment or commission of the offences described in Item (i) above and conspiracy for the commission of the offences described in Item (ii) above.

C. When the magistrate commits the accused for trial to the High Court, he is mandated under section 159 of the Code of Criminal Procedure Act to forthwith transmit,

(a) to the High Court:
  (i) the record of the inquiry together with all documents and things produced in evidence; and
  (ii) a copy certified under his hand of such record and of such documents; and
  (iii) one of the certified copies of the notes of investigation and of statements furnished by the officer in charge of the police station,
(b) to the Attorney-General:
  (i) a copy certified under his hand of the record of inquiry and of all the documents produced in evidence together with as many of such certified copies as there are accused; and
  (ii) one of the certified copies of the notes of investigation and of statements furnished by the Officer-in-Charge of the police station.

D. Under section 395, it is lawful for the Attorney-General after the receipt by him of the certified copy of the record of the inquiry, if he is of the opinion that such action is necessary for the proper consideration of the case by him, to call for the original record of the inquiry (together with any documents produced in evidence) from the court to which such record has been forwarded, and for any productions other than documentary evidence, from the Registrar.

It is the duty of the Registrar of the High Court to forward to the Attorney-General any record or production called for.

IV. ATTORNEY-GENERAL'S FUNCTIONS VIS-À-VIS NON-SUMMARY INQUIRIES

If after the receipt by him of the certified copy of the record of the inquiry, the Attorney-General is of the opinion that there is not sufficient evidence to warrant a commitment for trial, or if for any reason he is of the opinion that the accused should be discharged from the matter of the complaint, information or charge, and if the accused is in custody, from further detention, he may by order in writing quash the commitment made by the

magistrate and may direct the Registrar of the High Court to return the record of the inquiry to the Magistrate's Court. The Attorney-General shall in every such case issue to the magistrate such directions as to the disposal of the complaint, information or charge against the accused as to him may seem expedient, and it is the duty of the magistrate to comply with the directions so issued.

If the Attorney-General is of opinion that a criminal offence is disclosed by the proceedings against the accused but that the evidence already taken by reason of being in any particular or respect defective is not sufficient to afford a foundation for a full and proper trial, then he may make in writing an order requiring the Magistrate's Court to take such further evidence as may be specified or indicated in the order either in the way of examining anew witnesses who have already given their testimony or otherwise to continue the inquiry, and upon making such order the Attorney-General shall direct that the record of the inquiry be returned to the Magistrate's Court, and thereupon the Registrar of the High Court shall so return the record and the magistrate shall comply with the order of the Attorney-General. [Section 397(1) of the Code of Criminal Procedure Act.]

The Attorney-General may if he thinks it necessary, direct the Magistrate to record the evidence of any expert witness or police officer and the Magistrate shall then comply with such directions. [*Id*. section 397(2)].

A judge of the High Court and a magistrate shall whenever required in writing by the Attorney-General, forthwith transmit to the Attorney-General the proceedings in any criminal case in which an inquiry or trial has been or is being held before him and thereupon such inquiry or trial shall be suspended in the same and the like manner as upon adjournment thereof. [*Id*. section 398(1)].

It shall be competent for the Attorney-General upon the proceedings of any case being transmitted to him by a Magistrate to give instructions with regard to the inquiry to which such proceedings relate as he may consider requisite; and thereupon it shall he the duty of the Magistrate to carry into effect the instructions of the Attorney-General and to conduct and conclude such inquiry in accordance with the terms of such instructions. [*Id*. section 398(2)].

Whenever a Magistrate has discharged an accused after a Non-Summary Inquiry and the Attorney-General is of the opinion that such accused should not have been discharged, the Attorney-General may direct him to commit such accused to the High Court or order the Magistrate of such Court to re-open the inquiry and may give such instructions with regard thereto as to him shall appear requisite; and thereupon it shall be the duty of such Magistrate to carry into effect such instructions (*Id*. section 399).

V. WHO MAY CONDUCT THE PROSECUTION IN NON-SUMMARY INQUIRIES?

A person other than the Attorney-General, State Counsel, or a pleader generally or specially authorised by the Attorney-General shall not conduct the prosecution in any case into which the magistrate of a Magistrate's Court may be inquiring [*Id*. section 400(1)].

In the absence of the Attorney-General, the Solicitor-General, State Counsel and a pleader generally or specially authorised by the Attorney-General, the Magistrate has to conduct the prosecution, but there is nothing to preclude the Magistrate from availing himself, if he considers it so desirable, of the assistance of any pleader or public officer in the conduct of any inquiry [*Id*. section 400(2)].

VI. EXAMINATION OF WITNESSES AND ADMISSIBILITY OF DOCUMENTS

In all trials either in the High Court or in the Magistrate's Court, the witnesses for the prosecution as well as witnesses for the defence are first examined in chief, then if the adverse party so desires cross-examined, and then if the party calling him so desires re-examined (section 138 of the Evidence Ordinance).

A person summoned to produce a document does not become a witness by the mere fact that he produces it and, therefore, cannot be cross-examined unless and until he is called as a witness (*Id*. section 139).

Leading questions are not generally permitted in examination in chief. However, such questions may be asked in cross-examination subject to the following qualifications:

(1) the question must not put into the mouth of the witness the very words which he is to echo back, and

(2) the question must not assume that facts have been proved which have not been proved, or that particular answers have been given contrary to the fact. (*Id*. section 143).

Oral evidence as to contents of documents cannot be led unless the document itself is produced. If the document is not available, secondary evidence may be given. (*Id*. section 144).

VII. WHO MAY PROSECUTE IN TRIALS BEFORE THE MAGISTRATES' COURTS?

In the case of trials before a Magistrate's Court, the Attorney-General, the Solicitor-General, a State Counsel or a pleader generally or specially authorised by the Attorney-General shall be entitled to appear and conduct the prosecution. In the absence of any of the officers from the Attorney-General's Department, the complainant or any officer of any Government Department or any officer of any local authority may appear in person or by pleader to prosecute in any case in which such complainant or Government Department or local authority is interested. In the absence of any of the officers mentioned above, the magistrate many permit any attorney-at-law to appear and conduct the prosecution on behalf of the person against whom or in respect of whom the accused is alleged to have committed the offence. If the complaint is one filed under paragraph (a) of subsection (1) of section 136 of the Code of Criminal Procedure Act, that is a private plaint, the Attorney-General, Solicitor-General, a State Counsel or pleader generally or specially authorised by the Attorney-General shall, except where such complaint has been filed against an officer or employee of the State in respect of a matter connected with or relating to the discharge of the official duties of such officer or employee, not have the right to appear for the complainant without his consent.

VIII. CONDITIONS NECESSARY FOR INITIATING PROCEEDINGS

In certain types of cases, the law provides safeguards to persons accused of those offences. In these cases, the Attorney-General is required to bring his mind to bear on the facts before a prosecution is instituted. Below are the conditions necessary for initiating proceedings in those cases.

Section 135(1) of the Code of Criminal Procedure Act stipulates that any Court shall not take cognizance of,

(a) any offence punishable under sections 170 to 185 (contempts of lawful authority of public servants) of the Penal Code except with the sanction of the Attorney-General or on the complaint of the public servant concerned or of some public servant to whom he is subordinate;

(b) any offence punishable under sections 158, 159, 160, 161, 210, 211 and 212 of the Penal Code (offences by or relating to public servants) except with the previous sanction of the Attorney-General;

(c) any offence punishable under sections 190, 193, 196, 197, 202, 203, 204, 205, 206, 207 and 223 of the Penal Code *(fabricating false evidence and perjury, etc.)* when such offence is committed in or in relation to any proceeding in any Court except with the previous sanction of the Attorney-General or on the complaint of such court;

(d) any offence described in section 452 or punishable under sections 459, 463 and 464 of the Penal Code *(forgery, etc.)* when such offence has been committed by a party to any proceeding in any Court in respect of a document given in evidence in such proceeding except with the previous sanction of the Attorney-General or on the complaint of such Court;

(e) any offence punishable under section 290A or section 291B of the Penal Code *(offences relating to religion)* unless upon complaint made by the Attorney-General or by some other person with the previous sanction of the Attorney-General;

(f) any offence falling under Chapter XIX of the Penal Code *(criminal defamation)* unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction; and

(g) any offence punishable under section 291A of the Penal Code *(uttering words, etc. with deliberate intent to wound religious feelings)* unless upon complaint made with the previous sanction of the Attorney-General by some person aggrieved by such offence or by some other person with the like sanction.

IX. SUPPLEMENTARY POWER OF THE ATTORNEY-GENERAL

In Sri Lanka like in any other country, it is the State that is responsible for the administration of justice in the country. All criminal prosecutions (except private plaints) are instituted in the name of the State and the Attorney-General as the principal law officer of the State has supervisory control over all prosecutions. He can take over any prosecution at any time or intervene in any criminal matter at any time. Thus he can take over and offer no evidence in any criminal prosecution at any stage and secure the acquittal of the accused. This is usually done where a public officer is prosecuted for something which he has done bona fide in the execution of his official duties.

The Attorney-General also enjoys the following exclusive powers:

(1) The power to enter a nolle prosequi,

(2) The power of pardoning an accomplice, and

(3) The power of sanctioning an appeal from an acquittal.

A nolle prosequi is an order under the hand of the Attorney-General stopping any criminal case at any stage in any court of trial without assigning any reasons. This is rarely resorted to and is exercised only when public interest demands recourse to such cause of action. The Attorney-General has the right to offer a conditional pardon to an accomplice. This is done in serious cases where there is a severe dearth of evidence. In practice, a conditional pardon is offered to an accomplice whose involvement in the crime is minimal and whose evidence covers the most number of suspects.

An appeal from an acquittal cannot be preferred without the sanction of the Attorney-General. When an application is

made to the Attorney-General for his sanction, he calls for the record and examines the evidence carefully to see whether any substantial grounds of appeal exist. If he is satisfied that there are sufficient grounds, he will give his sanction to appeal.

The Attorney-General appeals against acquittals only where there has been a serious miscarriage of justice. Appeals by the Attorney-General against sentences are more frequent.

The three powers of the Attorney-General stated above have to be exercised personally by him and the order should be made under his hand. No other officer of the Attorney-General's Department is entitled to make such order (Section 401 of the Code of Criminal Procedure Act).

The Attorney-General exercises supervisory powers over his Department in the matter of all prosecutions. Prosecutors are not subject to the supervisory control of any Minister or the Cabinet or the President in the matter of the discharge of their official duties as prosecutors. The Minister of Justice exercises supervision in administrative and financial matters only.

X. APPOINTMENT AND TRAINING OF PUBLIC PROSECUTORS AND THE GUARANTEE OF THEIR STATUS

The members of the Attorney-General's Department are appointed by the Public Service Commission and are thus governed by the rules laid down in the Establishments Code. Generally the status of these officers is guaranteed as long as they are of good behaviour while holding office. Their services could be terminated only after a disciplinary inquiry is held in terms of the provisions of the Establishments Code. Unequal treatment could give rise to the officers filing applications in the Supreme Court alleging violations of their fundamental rights guaranteed under the Constitution. This remedy is available to all public servants. The availability of this remedy has more or less secured the status of public servants.

State Counsel are appointed from among qualified attorneys-at-law. No period of service or training is insisted upon at the time of recruitment. After recruitment, they acquire on-the-job experience. In addition senior officers of the Department hold workshops at the end of every High Court session for the benefit of junior officers. At these workshops, presentations are made and discussions centre around the difficulties each prosecutor has faced in the course of carrying out his duties.

The Department generally follows a scheme of assigning duties to junior State Counsel with a view to assisting them in acquiring experience in a systematic way. The pattern generally followed is as follows:

A State Counsel as he joins the Department is sent to the Court of Appeal with appeals from the lowest court, which is the Magistrate's Court. After about one and a half years, they are posted to the High Courts to prosecute in criminal matters like murder, rape, etc. After about another one and a half to two years, they are usually brought into the "miscellaneous section" of the Head Office. In this section, they have to deal with very complicated cases such as bank frauds, cases involving circumstantial evidence, etc. They are also sent to the Court of Appeal with appeals from High Courts. After a year or so, they are considered for promotion to the Senior State Counsel grade depending on the availability of vacancies in the cadre. A Senior State Counsel becomes a supervising officer. He supervises the work of several junior State Counsel. Usually a Senior State Counsel appears in the Court of Appeal and the Supreme Court in appeals from the High Courts. They appear in High Courts to prosecute only in important cases. Above Senior State

Counsel, there are several Deputy Solicitors-General who are also in charge of various subjects and supervise several State Counsel. Above them there are Additional Solicitors-General. The most senior Additional Solicitor-General is in charge of the Criminal Division of the Attorney-General's Department.

The above-stated system of graded assignments ensures a high degree of quality training for the officers of the Attorney-General's Department.

XI. RELATIONSHIP BETWEEN THE HIERARCHY OF THE COURTS AND THE ATTORNEY-GENERAL'S DEPARTMENT (OFFICIAL BAR)

Prosecutors of the Attorney-General's Department are eligible to be appointed to higher grades in the Judicial Service. Senior State Counsel are elevated to the High Courts, Deputy Solicitors-General to the Court of Appeal, the Solicitor-General to the Supreme Court, and Additional Solicitors-General, who are also appointed as President's Counsel by virtue of their office, could also be elevated to the Supreme Court. The Attorney-General ranks above the Judges of the Supreme Court and is second only to the Chief Justice in the hierarchical order. As such, the Attorney-General is elevated to the rank of Chief Justice.

Appointments to the higher judiciary, namely, the High Court, the Court of Appeal and the Supreme Court, are made by the President of the Democratic Socialist Republic of Sri Lanka. The President has the power to appoint suitable officers from the judiciary or the Attorney-General's Department, or a member of the unofficial bar.

XII. PROFESSIONAL ETHICS OF PROSECUTORS

The general code of ethics for attorneys-at-law would apply to any prosecutor of the Attorney-General's Department. The prosecutor is an officer of the court and his role is to assist the court to dispense justice. Thus it is not for a prosecutor to ensure a conviction at any cost, but to see that the truth is elicited and justice is meted out. A prosecutor is not expected to keep relevant facts either from the court or from the accused. If the investigation has revealed matters which are favourable to the accused and the accused is unaware of the existence of such facts, it is the bounden duty of the prosecutor to make those facts available to the court and to the defence.

XIII. ROLE OF THE PUBLIC PROSECUTOR IN ARRESTING AND DETAINING A SUSPECT

Public prosecutors of the Attorney-General's Department do not play a role in the arrest and detention of suspects. It is the function of the police to arrest suspects and produce them in court in accordance with the law. However, it becomes necessary sometimes to advise the police that there is a prime facie case against the suspect, and the police arrest the suspect thereafter. When a person in remand custody applies for bail to the High Court or to the Court of Appeal, the Attorney-General is consulted before bail is granted.

XIV. INTERROGATIVE AUTHORITY AND METHODOLOGY

In criminal cases falling under the Penal Code or other acts creating criminal offences, such as the Offensive Weapons Act and the Firearms Ordinance, the power of interrogation is entrusted to the police. The procedure to be adopted in conducting a criminal investigation is laid down in the Code of Criminal Procedure Act, No. 15 of 1979.

Generally an investigation is commenced with the reception of information relating to the commission of an offence. If upon information, the officer

in charge of the police station has reason to suspect the commission of a cognizable offence or he apprehends a breach of the peace, he shall either himself or through another officer commence the investigation. The interrogator is given powers to question witnesses to the incident and arrest any suspects whose names have transpired. It is the duty of the investigating officer to produce the suspects, if any, before a magistrate within a period of 24 hours, together with a report setting out the facts of the case and a summary of the statements of the witnesses and the suspects. It is up to the magistrate to decide whether to grant bail to the suspect. In minor offences police many themselves release the suspect if they can ensure his attendance in court if necessary. In cases of waging war against the State, giving or fabricating false evidence with intent to procure conviction for a capital offence and murder, the magistrate has no power to grant bail. However, a suspect accused of such an offence shall be released on bail by the magistrate if proceedings are not instituted against him in a Magistrate's Court or a High Court before the expiration of a period of three months from the date he has surrendered to the court or is arrested, unless the High Court, on application made by the Attorney-General, directs otherwise. The High Court in special circumstances may release such person on bail before or after the expiration of the period of three months. [Section 115(3) of the Code of Criminal Procedure Act].

XIX. INSTRUCTION AND SUPERVISION OF THE POLICE AND CO-OPERATION BETWEEN PUBLIC PROSECUTORS AND THE POLICE

It is the role of the police to conduct investigations into criminal offences. As stated above, the Attorney-General has wide statutory powers over prosecutions. The Attorney-General also has the power to give appropriate directions to the police in the course of the investigations. It is also open to the police to seek instructions from the Attorney-General in regard to any criminal offence. In practice, the police seek the advice of the Attorney-General in complex and difficult cases, and the Attorney-General usually exercises some degree of supervision over the investigations thereafter. There are also instances of representations being made on behalf of suspects complaining of police irregularities and the Attorney-General is entitled in such instances to step in and ensure that investigations are done properly and impartially. Generally the police and the public prosecutors co-operate with each other to ensure that justice is done.

XVI. EXERCISE OF DISCRETION IN PROSECUTING

The Attorney-General has the discretionary power to:

A. Enter a Nolle Prosequi

The Attorney-General has the power of stopping any prosecution in any court at any stage without giving any reasons. This device is resorted to only in extreme cases in order to secure justice or where it is necessary in the interests of the public and the State.

B. Withdraw an Indictment

At any stage of a trial in the High Court before the return of the verdict, the Attorney-General may if he thinks fit, inform the Court that he will not further prosecute the accused upon the indictment or any charge therein. Thereupon, all proceedings on such indictment or charge as the case may be against the accused shall be stayed and the accused shall be discharged of and from the same.

XVII. SUSPENSION OF PROSECUTIONS

The concept of suspension of prosecutions is not known to the legal system of Sri Lanka. However, considering the background of an accused, the circumstances under which the offence was committed and the social implications of any case, a suspended sentence may be given by a judge. When a suspended sentence is imposed, the suspect should be of good behaviour during the operational period of the sentence. If he commits another offence during the operational period and is convicted by a court of law, the suspended sentence would begin to operate after the sentence imposed for the subsequent offence.

XVIII. PLEA BARGAINING AND SENTENCE

Plea bargaining is an accepted practice in Sri Lankan courts. For example, where a suspect has been indicted for murder and he wishes to plead guilty to the lesser offence of culpable homicide not amounting to murder, the court may accept such plea with the consent of the prosecutor, provided sufficient grounds exist. The trial judge has the sole discretion to impose any sentence laid down by law. Sentence bargaining is not permitted.

However, a prosecutor is entitled to place before the court facts relevant to determining an adequate sentence. It is open to the Attorney-General to move in revision of any sentence passed by any judge. In recent times, the Attorney-General has resorted to this practice very successfully in several cases.

XIX. PROOF OF CRIMINAL FACTS

It is an accepted principle of law in Sri Lanka that an accused is presumed innocent until proven guilty. This is enshrined in Article 13(5) of the Constitution as well. The standard required is proof beyond reasonable doubt. It is the duty of the prosecutor to prove the case beyond reasonable doubt. If the evidence adduced by the prosecution falls below this standard, the accused is entitled to be acquitted.

XX. CO-OPERATION FOR A SPEEDY TRIAL

The subject of law delays has been the topic of discussion in Sri Lanka for many years. The prosecutor and the police always work towards ensuring a speedy trial, as inordinate delay is always detrimental to the prosecution. The prosecutors also make it a point not to make applications for postponements unless they are compelled to do so. Trial dates are fixed in consultation with counsel for the prosecution as well as counsel for the defence, to suit the convenience of the court.

XXI. SUPERVISION OF THE FAIR APPLICATION OF THE LAW

It is the duty of the prosecuting counsel to see that the law is applied correctly by the trial judge. Whenever a trial judge errs, the prosecutor is entitled to point out such errors. The Attorney-General is entitled to move in revision to correct wrong interim orders made in the course of a trial. The Attorney-General is also entitled to appeal from wrongful or unreasonable acquittal. State prosecutors are required to submit all files relating to concluded cases, to the supervising officer to enable him to see whether an appeal should be lodged or whether revisionary action should be taken.

THE THAI PROSECUTORS AND INTERNATIONAL COOPERATION IN COMBATING TRANSNATIONAL CRIME

*Dr. Kanit Nanakorn**

I. INTRODUCTION

For this issue, I will lecture on the prosecutors' role in providing the mutual legal assistance and then would move on further to the extradition and the restraint and forfeiture of proceeds of crime.

II. MUTUAL ASSISTANCE IN LEGAL MATTERS

According to the Thailand-U.S. Treaty of 1986, which is the first of its kind in Thailand, Central Authorities are established to have direct responsibility in providing and requesting assistance in criminal matters in the two countries without having to go through a diplomatic channel. For Thailand, the Central Authority in accordance with the Mutual Assistance Act implementing the treaty is the Attorney General through the Office of International Affairs. The treaties on Mutual Assistance in Criminal Matters between Thailand and Canada, and between Thailand and Great Britain and Northern Ireland also contain similar provisions. One main function of the Attorney General on behalf of the Central Authority is to be the coordinator in providing assistance to a foreign state or seeking assistance from a foreign state. All diplomatic formalities are deliberately set aside so as to facilitate and expedite the process of request consideration and also to lessen excessive bureaucracy.

The reason why the Attorney General as a representative of the Prosecution Service of Thailand is nominated as the Central Authority, rather than other heads of criminal justice agencies (namely either the Minister of Interior or the Director-General of the Police Department, or the Supreme Court President) is that the scope of the types of assistance as stipulated in the Treaties and the Mutual Assistance Act corresponds with the current responsibilities of the prosecutors under the supervision of the Attorney General. Such types of assistance include but are not limited to the following:

(1) taking the testimony and statements of persons;
(2) providing documents, records and evidence;
(3) serving documents;
(4) executing request for searches and seizures;
(5) transferring persons in custody for testimonial purposes;
(6) locating persons;
(7) initiating proceedings upon request; and
(8) initiating forfeiture proceedings.

To compare with the other duties of prosecutors, even though prosecutors can neither initiate a criminal charge nor investigate a case, if they receive the file of inquiry submitted to them by the police and find it incomplete, they still can direct the police to conduct additional investigation. After acquiring the complete dossier, the prosecutors will then make a decision as to whether to initiate the court proceedings. Structurally viewed, prosecutors practically act as middlemen between the factions of the police and of the court, defense counsel and corrections. With its quasi-judicial nature of responsibility plus such a unique role, the

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Office of the Attorney General therefore gains a superior position in coordinating with all criminal justice agencies as well as other bodies involved. As a result, the Attorney General is deemed most well-suited to perform as the Central Authority.

By virtue of the Mutual Assistance Act, the Central Authority has the following authority and functions:

(1) to receive the request for assistance from the requesting State and transmit it to the Competent Authorities;
(2) to receive the request seeking for assistance presented by the agency of the Thai government and deliver it to the requested State;
(3) to consider and determine whether to provide or seek assistance;
(4) to follow and expedite the performance of the Competent Authorities in providing assistance to a foreign State for the purpose of expeditious conclusion;
(5) to issue regulations and announcement for the implementation of the Mutual Assistance Act; and
(6) to carry out other acts necessary for the success of providing or seeking assistance under the Act.

Upon receipt of a request for assistance from a foreign State, the Central Authority will take into account and determine whether such request is eligible for the providing of assistance under the Mutual Assistance Act and has followed the process correctly as well as accompanied by all appropriate supporting documents. If so, the Central Authority will submit the said request to the Competent Authorities for further execution. However, if not, the Central Authority will refuse to provide assistance and notify the requesting State the reasons thereof, or indicate the required conditions, or the causes of impossibility to execute the request. If the Central Authority is of the opinion that the execution of the request may interfere with the investigation, inquiry, prosecution or other criminal proceedings pending its handling in Thailand, he may postpone the execution or may execute it under certain conditions set by him and notify the requesting State about that. A determination of the Central Authority with regard to the providing of assistance will be final, unless otherwise altered by the Prime Minister.

The providing of assistance will be subject to the following conditions:

(1) assistance may be provided even though there exists no mutual assistance treaty between Thailand and the requesting State, provided that such State commits to assist Thailand under the similar manner when requested;
(2) the conduct which is the basis for the assistance requested must be punishable under Thai law unless Thailand and the requesting country have a mutual assistance treaty and the treaty provides otherwise;
(3) the request may be rejected if it will affect national sovereignty, security or other crucial public interests of Thailand, or relate to a political offense; and
(4) the providing of assistance will not be concerned with a military offense.

The Central Authority will transmit the request from a foreign State to the following Competent Authorities for execution:

(1) requests for taking statement of persons, or providing documents, articles and evidence out of court, or serving documents, or searching, or seizing documents and articles, or locating persons will be forwarded to the Director General of the Police Department;

(2) requests for taking testimony of persons and witnesses, or adducing documents and evidence in court will be dispatched to the court;
(3) requests for transferring persons in custody for testimonial purposes will be transmitted to the Director General of the Correctional Department; and
(4) requests for initiating criminal proceedings will be conveyed to the Director General of the Police Department and the Chief Public Prosecutor for Litigation.

Upon obtaining the said request, the Competent Authorities will execute it and, after completion, submit a report together with all documents and articles concerned to the Central Authority, who will then notify the result thereof as well as deliver such documents and articles to the requesting State.

It should be noted that with regard to assistance in forfeiting the fruits and instrumentalities of crime located in Thailand, after the court having jurisdiction over the property is conveyed the request, it is empowered to confiscate the property if the final judgment from a foreign court allows such action and the property is forfeitable under Thai law. In order to solve the problem concerning jurisdiction and competence of the court, the forfeiture is deemed effective, even though the cause of such forfeiture may not happen in Thailand. A request for legal assistance will normally be executed in accordance with Thai law. Nonetheless, the Thai government, with the spirit of cooperation, aspires to follow the method of execution specified in the request insofar as it is not incompatible with domestic laws.

III. EXTRADITION

The issue of prosecutors' role in providing extradition is another aspect of international cooperation in criminal matters.

As stated earlier, the Extradition Act is only a general rule of extradition, and it will be applicable unless the treaty to which Thailand is a party provides otherwise. The Act requires that the crime committed be illegal and punishable under Thai law (double criminality rule); not be a political offense; and the penalty for the offense must be at least one year's imprisonment. The request for extradition must be accompanied by:

(1) in the case of a person having been convicted of a crime, a duly authenticated copy of the judgment of the court which tried him; and
(2) in case of a person charged with a crime, a warrant of arrest issued by the Competent Authorities of the requesting country, or a duly authenticated copy thereof.

Regarding the process of providing extradition, the request thereof, as opposed to the request for mutual legal assistance, must be submitted through the diplomatic channel. After that, unless the Thai government decides otherwise, the request together with the accompanying documents will be transmitted to the Ministry of Interior, which may order the accused to be arrested or may apply to the court for a warrant of arrest. Further, the request and the accompanying documents will be conveyed to the Office of the Attorney General which, under the extradition scheme, will be responsible for the execution of the request by working with the police and the court. The prosecutors in the Office of International Affairs will then demand of the court of competent jurisdiction the warrant of arrest. In the case that the accused has been arrested, the prosecutors without

unnecessary delay will bring the case before such court and a preliminary investigation will be made in accordance as far as possible with the Thai criminal procedure law.

The court may order a remand from time to time on the request of either party and for good and sufficient reasons, but the court should not allow bail in these cases. It is worth stressing that the prosecutors, and representatives of the requested Thai government, associate with the court hearings merely to establish, by means of witness testimony or depositions, that:

(1) the identity of the accused matches with the person wanted;
(2) there is sufficient evidence against him to commit him for trial, if the offense had been committed in Thailand; and
(3) the offense is extraditable and is not one of a political character.

Under the general extradition rule, the prosecutors are not required to prove up to the extent that the accused ever committed the offense as stated in the request. In reverse, the accused is not permitted to rebut the prosecutors' affirmations except upon the following points:

(1) that he is not the person wanted;
(2) that the offense is not extraditable or is of a political character;
(3) that his extradition is in fact being asked for with a view to punishing him for an offense of a political character; and
(4) his nationality.

If the court is satisfied with the establishments, it will make an order authorizing the accused to be detained with a view to being surrendered. The accused will not be sent out of Thailand for fifteen days and within that period, he is granted a right to appeal to the Court of Appeals, whose decision upon all questions both of fact and of law will be final. Notwithstanding, if the court is not satisfied with the evidence presented, it will order the accused to be discharged at the end of forty-eight hours after reading its decision unless within that period the prosecutors notify the court of an intention to appeal. The prosecutors likewise are entitled to file an appeal within fifteen days and the court will order the accused to be detained pending the hearing of such appeal. If the accused has not been surrendered within three months from the date when the order of the court becomes final or within such further time as the court for sufficient reason direct, the accused will be set at liberty.

As the Extradition Act is only a general rule of extradition, it will be applicable unless the treaty to which Thailand is a party provides otherwise. For this reason, the practice on extradition in Thailand may vary from one country to the others. For instance, while the Extradition Act allows the extradition of nationals, the treaties with the United States, the Great Britain, Indonesia, and the Philippines subject the extradition thereof to the discretion of executive branch, the treaty with Belgium explicitly prohibits it. Such phenomenon will inevitably make extradition procedure too complicated and difficult for practitioners, including prosecutors.

Additionally, the Act is now obsolete in that it lacks simplified extradition in cases where the accused agrees to be extradited without the extradition proceedings. Also, handling requests through the diplomatic channel is very time-consuming and a strict obedience to the principle of double criminality is rather impractical for Thailand, which still lacks a number of legislation to combat transnational crime, for example an anti-money laundering law. Thus, it is very likely that there will be more extradition treaties in the future because procedures adopted by negotiating parties will normally be better and provide more benefit to the parties than those found in the Extradition Act. Realizing that, the

Thai government has, in March 1997, set up the committee for the reform of the extradition law.

IV. ASSET FORFEITURE

According to the 1991 Act on Measures for the Suppression of Narcotics Offense, the Properties Examination Committee has been established for the administration of asset forfeiture procedure. The Committee consists of high-ranking government officials involved in the process, including the Attorney General. The Committee has the power to issue an order for examination of the alleged offender's property where there are reasonable grounds for suspicion that it is the proceeds of a drug offense. In addition, the Committee in such a situation also has the power to make a seizure or restraining order thereof. In carrying out the execution of the law, the Committee has appointed a sub-committee called the Sub-Committee Attached to the Properties Examination Committee to take into consideration all information and evidence in connection with the property, to give opinion to the Committee, and to supervise and control the competent officials to carry out the designated task. Prosecutors are also installed in this sub-committee.

I will give a brief overview on the forfeiture procedure under the Act. When a significant drug trafficker is charged with a drug offense and becomes the alleged offender, the Secretary of the Narcotics Control Board (NCB), as a member and a secretary of the Committee, will take into consideration whether there are reasonable grounds for suspicion that any property of the alleged offender is the proceeds of a drug offense. If yes, the Secretary-General will propose examination by the Sub-Committee which, if it agrees, will give its opinion to the Committee for consideration. The Committee will then make an order for examination of property. In addition, if there are reasonable grounds to believe that the property of the alleged offender is likely to be transferred, removed or concealed, the Committee will give a provisional order for seizure or restraint of property.

The Committee will contemplate all information, evidence and documents in connect with the property from the competent officials and the owner of property, if any, before making a decision concerning the property. If the Committee decides that such property is the proceeds of a drug offense, the seizure and restraining order will be issued. Its decision together with documents and evidence concerned will be submitted to the prosecutors. However if the Committee decides otherwise, the property seized or restrained temporarily will be returned to the owner. When prosecution has been instituted against the alleged offender, the prosecutors will, after agreeing with the Committee that the property of the alleged offender is believed to be the proceeds of a drug offense, make an application with the court for a confiscation order. If there are circumstances that the defendant or the examinee has carried on the commission of an offense, it shall be presumed that the property possessed or derived by him beyond the living status or his capability for occupation is the proceeds of a drug offense. In cases where there is a final non-prosecution order or where there is a final judgment dismissing the charge against the alleged offender or the accused, the property seized or restrained by the Committee will be returned to the defendant or the owner of property.

Since its first enforcement in April 1992 to the end of July 1997, there have been a total of 365 alleged offenders whose property has been examined by order of the Committee, and the total value of property temporarily seized or restrained is approximately US$19.8 million. Out of these, there is property worth around

US$18.5 million of 236 alleged offenders that the Committee considered to be the proceeds of drug offenses. Up to now, the court has passed judgment for the confiscation of 13 cases, the total value of which is around US$260,000.

Even though the asset forfeiture measure is one of the most powerful tools for fighting organized crime, its application in Thailand is still far from satisfactory. First, the measure is only available in drug offenses. Moreover, unlike the civil forfeiture procedure of the United States, the confiscation of property under the law is conviction-based. This means that the government needs to prove that the alleged offender is guilty before the court will hand down the confiscation order. If the court acquits the defendant, then the seizure or restrait of property will terminate. In addition, the lack of understanding of this new concept of law among judicial officers is also another important reason why such measure has not been effectively utilized. Lastly, Thailand still lacks an anti-money laundering law to penalize those who assist in the transfer or concealment of the proceeds of drug offenses. This has made it more difficult for the government to track down the proceeds of crime that have been transferred or concealed to avoid detection.

V. CONCLUSION

As international criminals, unlike law enforcement officials, are not subject to any limitations in their cross-border operations, it is, therefore, vital that we join hands in an attempt to increase cooperation and coordination. As there is a rapid increase in transnational organized crime, there is a great need for a collective response by the international community and greater cooperation and coordination among responsible officials in order to fight more effectively. From my point of view, I am of the opinion that more international training and conference among criminal justice officials, like this UNAFEI International Training Course, should be encouraged so that those who are in the same career network will have an opportunity to share experiences and to get acquainted with each other and with the legal system of other countries. This will not only enhance smooth cooperation, but will also improve the standard of criminal justice and the efficiency in law enforcement in the respective countries.

THE ROLE OF THE PROSECUTOR IN THE AMERICAN FEDERAL CRIMINAL JUSTICE SYSTEM

*Nora M. Manella**

I. AN OVERVIEW OF PRE-INDICTMENT, INDICTMENT AND TRIAL PROCEEDINGS

A. Pre-indictment Proceedings

Prior to the return of an indictment by a Federal Grand Jury, a defendant may be arraigned and held pursuant to the filing of a criminal complaint issued by a United States Magistrate Judge. The complaint is a statement of the essential facts constituting the charge. It must be supported by an affidavit sworn to under oath by a federal law enforcement officer. The affidavit must set forth facts to establish "probable cause;" that is, reasonable cause to believe that a crime has been committed and that the defendant committed the crime. The affidavit must be sufficiently detailed to establish the source of the officer's information and the reliability of the information.

A complaint may be issued by a Magistrate Judge before or after a defendant has been arrested. If the complaint is issued before the defendant has been arrested, the Magistrate Judge also issues an arrest warrant authorizing the arrest of the defendant. A federal officer may arrest a defendant for any federal offense pursuant to an arrest warrant issued by a Magistrate Judge. The officer may also arrest a defendant for a felony offense without an arrest warrant if the officer has probable cause to believe the defendant committed the felony offense. However, the officer may arrest a defendant for a misdemeanor offense without a warrant only if the misdemeanor offense was committed in the officer's presence.

A defendant who has been arrested for a federal offense must be arraigned before the nearest Magistrate Judge without unnecessary delay, usually the same day as the arrest and no more than 48 hours after the arrest. At the initial arraignment, the defendant is informed by the Magistrate Judge of the charges and of his or her right to counsel. If the defendant is unable to afford counsel, the Magistrate Judge appoints counsel paid by the government to represent the defendant.

At the initial appearance, the Magistrate Judge sets bail for the defendant's release from custody while the criminal proceedings are pending. The Magistrate Judge determines the amount of bail necessary to secure the defendant's appearance at future court appearances, including trial and sentencing if the defendant is convicted, taking into consideration the danger to the community and the likelihood the defendant will return to court if released. The Magistrate Judge can order the defendant to post an appearance bond—which is a promise by the defendant to pay a specified amount if he or she fails to appear in court—or a secured bond, which is cash or property that may be forfeited to the government if the defendant fails to appear. A defendant may be detained pending criminal proceedings, if the Magistrate Judge determines that no amount of money or other conditions can assure the defendant's return to court or can adequately protect the safety of the community if the defendant is at large.

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A defendant is entitled to a preliminary hearing before a Magistrate Judge to determine if there is probable cause to continue to charge the defendant. The preliminary hearing must be held within 10 days of the defendant's initial arraignment if the defendant is still in custody, or within 20 days if the defendant has posted bail and been released from custody. The defendant is not entitled to a preliminary hearing if an indictment is returned by a grand jury prior to the date set for the preliminary hearing. Because under the Fifth Amendment of the United States Constitution, all serious federal crimes must be charged by an indictment. Indictments are almost always returned prior to the date set for the preliminary hearing. As a result, preliminary hearings are rarely held in federal court.

B. Plea Bargaining

Under the Federal Rules of Criminal Procedure, the government and the defendant can engage in negotiations, sometimes referred to a "plea bargaining," to resolve criminal charges that may be filed or are pending against the defendant. The rules expressly prohibit the trial judge from participating in these negotiations.

The rules permit the parties to negotiate over the charges to which the defendant will plead guilty, known as "charge bargaining," and the sentence that will be imposed, referred to as "sentencing bargaining." Charge bargaining may involve negotiations over what specific charges the government will file, the reduction of pending charges to lesser charges, or the dismissal of some of the pending charges. The defendant then pleads guilty to the agreed upon charges.

Sentencing bargaining may result in an agreement by the government to recommend a particular sentence. This recommendation is not, however, binding on the judge, who may impose any lawful sentence consistent with the Federal Sentencing Guidelines that the judge determines to be appropriate. Sentencing bargaining may also result in a firm agreement by the government and the defendant as to what the appropriate sentence should be. In this circumstance, the judge must either impose the agreed-upon sentence or reject the plea agreement entirely. Finally, sentencing bargaining may result in an agreement by the defendant and the government regarding certain factors relevant to sentencing—such as the defendant's role in the offense or the amount of the monetary loss—that the judge will consider in determining the appropriate sentencing under the Federal Sentencing Guidelines. The judge is not, however, required to agree to these factors and may make his or her independent determination of the sentencing factors.

C. Post-indictment Proceedings

1. Post-indictment Arraignment

Following an indictment, the defendant is arraigned before a United States District Judge. At the arraignment, the defendant enters a plea, usually "Not Guilty" unless there is a pre-indictment plea bargain whereby the defendant has agreed to plead guilty. The judge also appoints counsel paid for by the government if the defendant is not already represented by counsel and cannot afford counsel. The judge also sets the case for trial, usually within 70 days of the earlier of the date of the indictment or the defendant's first appearance before a judge. The judge may also set a schedule for pre-trial motions.

2. Pre-trial Motions

Prior to trial, the parties, usually the defendant, may file certain motions seeking relief from the judge. The defendant may file a motion seeking discovery from the government's files, including information that tends to exculpate the defendant, any statements the government contends the defendant made about the offense,

documents and items the government intends to introduce into evidence at trial, reports of examinations or tests the government intends to introduce at trial, information about the government's expert witnesses and informants, and statements of the government's witnesses. The government may also file a motion seeking reciprocal discovery of the defendant's evidence, including reports, names of experts, examination results, and witness statements. The government may also require the defendant to give notice of an intention to offer an alibi defense, a defense of insanity, or any other defense based upon the defendant's mental condition.

The defendant may also file motions prior to trial seeking to have the indictment dismissed. These include motions to dismiss because the court lacks jurisdiction, the indictment fails to allege an offense, the prosecutors engaged in misconduct before the grand jury, the prosecutors selected the defendant for prosecution based upon an impermissible reason, such as the defendant's race, religion, or ethnic origins, the prosecutor filed the charges in retaliation for the defendant's exercise of a constitutional right, the prosecutor waited too long before filing the charges, or the court took too long to bring the case to trial after the defendant was charged.

The defendant may also file motions prior to trial seeking to have the government's evidence "suppressed," that is, to bar the government from introducing certain evidence at the trial. Thus, a defendant may seek to suppress documents and tangible items based upon an illegal search or seizure, evidence obtained by an illegal wiretap, or the defendant's statements to a law enforcement officer if the officer failed to advise the defendant of his or her right to remain silent and to consult with an attorney after being arrested.

Both the government and the defendant may file "in limine" motions prior to trial seeking to preclude the other side from introducing certain evidence on the grounds that it is not relevant, is unduly prejudicial, or is otherwise inadmissible under the Federal Rules of Evidence. The government may seek to preclude a defendant from offering evidence of "duress" unless the evidence to be offered by the defense meets the legal standards of a duress defense. A defendant may seek to preclude introduction by the government of the defendant's prior criminal convictions on the grounds that such evidence would be unduly prejudicial.

3. Trial Proceedings

Every defendant has a right to a speedy and public trial under the Sixth Amendment to the United States Constitution and the Federal Speedy Trial Act. Based upon the length of the delay between the filing of the charges and the start of the trial, the reasons for the delay, and the prejudice to the defendant resulting from the delay, the District Judge may dismiss the charges against the defendant with prejudice for a violation of the Sixth Amendment's right to a speedy trial. The judge may also dismiss the charges with or without prejudice under the Speedy Trial Act if the trial is not held within the earlier of 70 days from the indictment or the defendant's initial appearance, unless the court finds that the case is complex, motions need to be resolved, or the attorneys need additional time to prepare for the trial.

The questioning of jurors to determine if they are qualified to sit as jurors in a particular case is known as "voir dire." In federal court, the judge usually conducts the voir dire, although the judge may permit the prosecutor and defense counsel to question the jurors. Both the prosecution and defense may challenge a prospective juror for "cause," that is, based upon

evidence that the juror is biased in favor of one side or the other. Each side has an unlimited number of challenges for cause. Each side also has a limited number of "peremptory" challenges which a party may exercise to excuse a juror for any reason. The reason need not be stated in open court. However, no party may exercise a peremptory challenge to excuse a juror based upon impermissible discrimination, such as the juror's race, religion, national origins, or gender.

The trial begins with the prosecutor making an "opening statement"—a summary of what the prosecutor expects the evidence to prove. The defense attorney may also make an opening statement following the prosecutor's, or wait until the prosecution completes its case before making an opening statement. The judge commonly advises the jury that opening statements are not evidence, but merely the attorneys' opportunity to summarize what they expect the evidence will show.

The prosecution, which has the burden of proving the defendant's guilt beyond a reasonable doubt, presents its case first. The prosecution may present witnesses with knowledge of the crime as well as documents and tangible evidence. The prosecution may also offer opinion testimony from experts qualified in specialized areas such as fingerprint analysis and forensic accountants. The prosecution may also offer statements made by the defendant to law enforcement officers, provided that the judge finds that the statements were voluntarily made after the defendant had been advised of his or her rights to remain silent and to consult with an attorney. Each of the prosecution's witnesses is subject to cross-examination by the defense attorney, who may seek to establish that the witnesses are biased or honestly mistaken, or may seek to elicit from the government's witnesses information helpful to the defense.

After the prosecution presents its evidence, the defendant may offer evidence on his or her behalf. However, the defendant has no obligation to present evidence or to testify at trial, and the prosecutor cannot comment to the jury on the defendant's failure to present evidence or to testify. Following the defendant's presentation of evidence, the prosecution may offer additional evidence to rebut any evidence offered by the defendant.

Following the presentation of the evidence, the prosecutor and defense attorney give their "closing arguments". Because the prosecution has the burden of proof, the prosecution gives an "opening summation" before and a "rebuttal argument" after the defense attorney's closing argument. Although closing arguments, like opening statements, are not evidence, both sides have greater leeway in closing arguments to argue to the jury that the evidence previously introduced in the trial supports their respective positions.

Following the lawyers' closing arguments, the judge instructs the jury on the law, and the jury retires to deliberate and render its verdict. Jury instructions are submitted by the parties to the court, and usually agreed upon before the judge reads them to the jury. Any disputes as to the applicable law are resolved by the judge. For most federal offenses, there are standard jury instructions explaining the elements of the offense, though parties often submit instructions tailored to the facts of a particular case to facilitate the jurors' application of the law to those facts. Any questions the jurors may have about the meaning of the instructions are directed to the judge. The role of the jury is to decide the facts and to apply the law—as instructed by the judge—to those facts.

4. Jury's Return of Verdicts

A jury's guilty verdict in a federal criminal trial must be unanimous, i.e., all

twelve jurors must agree that the defendant is guilty of the crime charged beyond a reasonable doubt. If even a single juror is not convinced of the defendant's guilt, no guilty verdict can be returned. Similarly, if only a single juror is convinced of the defendant's guilt beyond a reasonable doubt, but the remaining 11 jurors are not, no verdict may be returned. The failure of a jury to reach a unanimous decision is commonly called a "hung jury." Where the jury fails to reach a unanimous verdict of guilty or not guilty, the government may retry the case.

If the defendant is acquitted at trial—i.e., all 12 jurors agree the government has failed to prove the defendant's guilt beyond a reasonable doubt—the defendant is released, and the government may not bring the same charges again. If the defendant is found guilty by all 12 jurors, he or she may appeal the conviction to the U.S. Court of Appeals in the district where the case was tried.

II. PROSECUTORIAL DECISION-MAKING

A. Whom to Charge

1. Charging Individuals

Federal prosecutors seek to charge the leaders and organizers of criminal activity whenever possible. Stated otherwise, prosecutors seek to prosecute the ultimate source of the criminal activity, whether it is a corporate president who initiates or approves fraudulent activity for the benefit of the corporation, or the head of a narcotics manufacturing and distribution organization. This fundamental principle guides prosecutive decisions regarding whom to charge, what to charge, and to whom to grant immunity.

In a corporate or business context, federal prosecutors seek to identify and charge managers who have knowledge of the criminal conduct and discretionary authority over the subject matter of the criminal conduct or supervisory responsibility over the employees engaged in the criminal conduct. Mere knowledge of the illegal activity is not sufficient to warrant the filing of criminal charges; the corporate officer must have either directed the illegal activity or had the authority or responsibility to prevent it. Ultimately, federal prosecutors seek to hold criminally responsible the highest level managers with both knowledge of and authority over the criminal conduct.

In pursuit of these managers, prosecutors seek the cooperation of lower level individuals or employees who have knowledge of illegal activity or participate in or carry out the criminal conduct. With respect to these employees who have criminal culpability, such cooperation usually results from plea agreements or grants of immunity from prosecution. Lower-level employees who are prosecuted for their criminal activities may enter into plea agreements whereby they agree to plead guilty to certain charges and cooperate with the government's investigation in exchange for immunity from further prosecution or favorable sentencing recommendations by the prosecutor. On occasion, the employee agrees to cooperate in exchange for such consideration at sentencing after the employee has been prosecuted and convicted at trial.

Based upon the nature of the employee's knowledge and information about the criminal conduct and the nature and scope of his or her own criminal conduct, prosecutors may decide to provide the employee with immunity rather than file criminal charges against the employee. The immunity can be in the form of an agreement not to prosecute the employee for certain criminal conduct. This immunity, which is known as "transactional immunity," is generally disfavored by federal prosecutors. Accordingly, prosecutors usually provide employees with "use immunity," which bars

the government from using the employee's statements against the employee if the employee is ever prosecuted ("direct" use immunity). Significantly, "use" immunity also bars the prosecution from using the employee's statements to develop evidence against the employee ("derivative" use immunity). "Use" immunity does not, however, bar the prosecution from introducing the statements into evidence against the employee if the employee is ever prosecuted for making a false statement or for perjury based upon the immunized statement. Because the courts have placed a high burden on the prosecution to prove that evidence against a defendant who has received use immunity was not derived, directly or indirectly, from the defendant's statements, "use" immunity is almost always tantamount to "transactional" immunity from prosecution. Further, such limitations on prosecutorial use of the statements apply to any future prosecution, not just one based upon the subject matter of the investigation that resulted in the "use" immunity. Accordingly, defense attorneys almost always recommend that their clients accept "use" immunity in lieu of transactional immunity.

"Use" immunity can be provided informally though a letter agreement or formally through a court order. Informal "use" immunity generally results from negotiations between the prosecutor and the employee's counsel, in which the employee's counsel initially "proffers" (orally or in writing) what the employees could testify to if provided immunity. If the prosecutor indicates a willingness to provide immunity based upon the proffer, the prosecutor may then interview the employee, subject to an agreement that the prosecutor will not directly use the interview against the employee, before deciding whether to enter into a letter agreement providing for full use immunity.

If a lower level employee is unwilling to accept informal use immunity, the prosecutor can compel the employee to testify by obtaining statutory use immunity. Title 18 of the United States Code § 6001, et. seq., provides that the United States Attorney, with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, can obtain an order from a District Court Judge compelling the employee to testify. As a result of the "compulsion" order, the employee is afforded full use immunity (direct and derivative) for his or her testimony. If the employee refuses to testify after having been compelled by a court order, the employee may be held in contempt by the court. This may subject the employee to imprisonment or a fine.

2. Charging Corporations

Under federal criminal law, a corporation may be held criminally liable for any acts of its officers, employees, or agents done in the course and scope of their employment that are for the benefit of the corporation. Under this broad doctrine of corporate liability, the corporation may be held liable even if the acts are contrary to the corporation's policies. For example, a corporation may be held liable for the actions of an employee who illegally disposes of hazardous waste that the corporation must dispose of, even if the corporation specifically requires its employees to comply with all applicable laws and regulations in disposing of the waste. The theory is that the employee is intending to benefit the corporation because the corporation needs to dispose of the waste.

In prosecuting a corporation, the government need not prove that a single corporate officer or agent had the required knowledge and intent to violate the law. Rather, the prosecution can rely on the "collective knowledge" of the officers and

employees. This collective knowledge doctrine is useful when the corporate responsibility is divided among several individuals, such that no one individual has knowledge of all the relevant facts and law. For example, certain corporate employees may be responsible for testing products being supplied to the government, while other employees may be responsible for certifying to the government that all the required tests were performed. If the latter were unaware that the former had failed to perform the required tests, they may have falsely certified that the tests had been performed, but lacked the knowledge and intent to commit a criminal violation. Similarly, if the former did not know that certifications would be made claiming the tests had been performed, they too would lack the necessary knowledge and intent to be guilty of a criminal offense. Under these circumstances, no individual employees would be criminally responsible, but a criminal violation would nonetheless have occurred when the employees of the corporation submitted a certification to the government falsely representing that the required tests had been performed.

B. What to Charge

Federal prosecutors usually seek to file the most serious readily provable charge determined by the nature of the charge and the sentencing range for the particular charge. Prosecutors also seek to file charges that encompass the scope of the defendant's criminal conduct. Thus, they include multiple similar counts for identical or similar crimes committed by the defendant, such as multiple bank robbery charges for a series of robberies. They also include different offenses based upon the same act or transaction or series of acts or transactions that are parts of a common scheme or plan. For example, an indictment may include charges such as securities fraud, money laundering, and false statements to an agency of the government where defendants engaged in a scheme to defraud buyers of securities based upon the filing of false reports with the Securities and Exchange Commission.

Conspiracy charges are often filed to encompass the full scope of the criminal activity where two or more individuals agreed to commit offenses against the United States or to defraud the United States, and one or more of these individuals committed an overt act in furtherance of the conspiracy. Prosecutors may also file charges under the Racketeering Influenced Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, et. seq., where the defendants conducted the affairs of an enterprise—which may be either a formal entity such as a corporation or an informal association among individuals—through a pattern of illegal activity. The illegal activity may be violent crimes, narcotics activity, or white collar crime, such as mail and wire fraud. Both conspiracy and RICO charges enable prosecutors to include a series of crimes in a single indictment.

C. Department of Justice Standards and Procedures

Under United States Department of Justice standards set forth in the United States Attorneys Manual, a federal prosecutor must satisfy a two-part test before seeking an indictment from a federal grand jury. First, the prosecutor must personally believe the defendant is guilty. Second, the prosecutor must believe there is a reasonable likelihood of obtaining a conviction at trial before an impartial jury.

Within the Department of Justice, the authority for filing most criminal charges rests with the United States Attorney's Office in each district. Certain kinds of offenses, however, require approval of the divisions or sections in the Department with primary responsibility for specific substantive areas. Thus, the Civil Rights, Antitrust, Tax, and Lands and Natural Resources Divisions must approve

indictments in cases falling in these substantive areas. Similarly, the Organized Crime Section in the Criminal Division must approve organized crime and RICO cases, and the Public Integrity Sections must be consulted regarding corruption charges against elected public officials and election crimes.

Within the United States Attorney's Offices, individual prosecutors are responsible for recommending what charges to present to the grand jury. The recommendations are reviewed and approved (or on occasion disapproved) by a committee of prosecutors and supervisory attorneys. The prosecutive decision in most cases rests with the Chief of the Criminal Division in the U.S. Attorney's Office. The final prosecutive authority for all cases filed by the office rests with the United States Attorney, though as a practical matter, he or she generally makes the final decisions only in the most significant, controversial or difficult cases in the office.

III. PROSECUTORS' USE OF THE GRAND JURY IN CRIMINAL INVESTIGATIONS

A. Composition and Purpose of the Grand Jury

In many respects, the grand jury is the cornerstone of federal criminal investigations and federal criminal process. A grand jury comprises 23 ordinary citizens, selected at random, who sit for a term of one year (although the term may be extended). At least 16 members of the grand jury must be present for the panel to conduct business, and in order to return an indictment, at least 12 members of the grand jury must vote to indict.

The grand jury serves a dual function. First, it serves to protect innocent citizens from improper governmental action by having a panel of ordinary citizens determine whether there is "probable cause" to believe that a crime has been committed and that the accused committed the crime. The requirement that any person accused of a felony be indicted by the grand jury is set forth in the United States Constitution.

The grand jury serves a second, equally important, function of investigating whether crimes have been committed. The United States Supreme Court has repeatedly noted that the law provides the grand jury with broad powers in order to fulfill its investigatory function and "wide latitude" in exercising those powers.

To carry out its investigatory function, the grand jury is provided with subpoena power to compel the attendance of witnesses and the production of documents and records. The grand jury's subpoena power extends throughout the United States. In addition, the grand jury's power to investigate crimes is not restrained by the same technical, procedural and evidentiary rules that govern the conduct of criminal trials. Hence, in determining whether there is probable cause to believe a crime has been committed, the grand jury may consider any evidence, regardless of whether that evidence may ultimately be admissible at trial.

B. Interaction between Prosecutors and the Grand Jury

The grand jury functions as a separate entity, independent in large part from the court and the prosecution. This allows the grand jury to render an independent judgment as to whether an individual should be indicted.

Nevertheless, federal prosecutors play an integral role in the functioning of the grand jury. First, in addition to investigating whether crimes have occurred, prosecutors serve as "legal advisors" to the grand jury. In this capacity, a prosecutor serves to explain and answer questions pertaining to the law. For example, a prosecutor is responsible for advising the grand jury of the elements of

any crimes under investigation by the grand jury. Virtually all proceedings occurring before the grand jury are conducted by a prosecutor, including the questioning of witnesses who appear before the grand jury (although grand jurors are permitted to ask questions themselves). Prosecutors are also responsible for drafting and presenting any indictment the grand jury is asked to return. Thus, as a practical matter, until a prosecutor has concluded that there is probable cause to indict an individual, the grand jury will not be presented with an indictment. In short, although the grand jury is an independent entity, to carry out its investigative function, it works closely with government prosecutors and law enforcement investigators charged with serving subpoenas issued by the grand jury.

Because of the unique, and often close, relationship between prosecutors and the grand jury, courts have admonished prosecutors to remember that the object of any investigation is to see that justice is done. Likewise, the U.S. Department of Justice has issued regulations designed to ensure that prosecutors treat the grand jury as an independent body and to further ensure that prosecutors do nothing that would improperly inflame or influence the grand jury.

C. Grand Jury Secrecy

Federal law mandates that grand jury proceedings be conducted in secret. To ensure the secrecy of grand jury proceedings, federal law prohibits prosecutors, as well as grand jurors, from disclosing any matters occurring before the grand jury.[1]

The Supreme Court has articulated a number of reasons for requiring that grand jury proceedings be conducted in secret, including: (1) to prevent the escape of those whose indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations by preventing persons under investigation or their representatives from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information concerning the commission of crimes; (5) to protect the target of a grand jury investigation who is ultimately exonerated from disclosure of the fact that he or she was under investigation; and (6) to protect the target of a grand jury investigation from the expense of standing trial where there is insufficient evidence of guilt. Taken together, the rationales for grand jury secrecy reflect a balance between ensuring that the grand jury obtains all possible evidence, while at the same time protecting innocent citizens.

D. Grand Jury Subpoena Power

The grand jury's principal power lies in its subpoena authority, i.e., the ability to compel the attendance of witnesses and the production of documents and records. This power is quite broad, and includes the ability to require a target of an investigation to provide nontestimonial evidence, such as fingerprint and handwriting exemplars to assist the grand jury in determining whether a suspect has committed the crime under investigation.

The grand jury's ability to subpoena records and compel witness testimony is particularly vital to the proactive investigation of more complicated economic crimes. Most evidence in long-term investigations is obtained through the issuance of grand jury subpoenas. This is true for several reasons. First, the grand jury need not obtain court approval to issue a subpoena. In contrast, search warrants

[1] Under certain limited circumstances, prosecutors may obtain court orders allowing disclosure of grand jury proceedings as directed by a court.

require court approval and some showing to justify a belief that the documents sought are evidence of a crime and will be located at the premises to be searched. Second, much documentary evidence is obtained from innocent third parties who are not suspected of criminal wrongdoing and should be protected from the inevitable disruption occasioned by a search for records. For example, bank records that would permit the tracing of funds obtained and/or laundered by a target are virtually always obtained through the issuance of grand jury subpoenas, absent some reason to believe that the bank or its officials are in collusion with the target of the investigation.

E. Bases for Refusing to Comply with Grand Jury Subpoenas

In most instances, there is no basis to resist the production of records to the grand jury or to refuse to testify before the grand jury. The most notable exception, the privilege against self-incrimination, is rooted in the Fifth Amendment of the United States Constitution, which provides that no individual may "be compelled in any criminal case to be a witness against himself." Thus, an individual may refuse to testify before the grand jury if he/she honestly and truly believes that his/her answers would incriminate him/her or could lead to evidence of a crime for which he/she may be prosecuted. Because the privilege against self-incrimination is contained in the Fifth Amendment of the U.S. Constitution, invoking the privilege is commonly referred to as "taking the Fifth."

An individual may also refuse to produce records in response to a grand jury subpoena if he/she can demonstrate that the "act of producing" the documents would be tantamount to testifying against himself/herself. However, the Supreme Court has determined that the act of providing handwriting samples or fingerprint exemplars is not "testimonial" in nature, and, therefore, does not run afoul of the prohibition against compelling an individual to testify against himself/herself.

F. Prosecutors' Enforcement of Grand Jury Subpoenas

If the recipient of a subpoena refuses to comply, a prosecutor has two options. First, if the prosecutor believes the individual's refusal to comply is proper because of a valid privilege, such as the privilege against self-incrimination, the prosecutor may, nevertheless, seek to compel compliance with the subpoena by seeking an order granting the recipient immunity. Federal law provides that the government may seek an order compelling a witness to testify or produce records notwithstanding a valid privilege, provided the government agrees not to prosecute the individual for any crimes about which the witness is forced to testify. The authority to immunize a witness is a powerful tool available to prosecutors to assist them in investigating and prosecuting crimes. However, grants of immunity are sought sparingly, and only after careful consideration of a number of factors, including whether there is any alternative means available to obtain the evidence sought.

If the prosecutor does not believe the witness's refusal to comply with a subpoena is premised on a valid privilege, he/she may then apply to a court for an order compelling compliance. At that time, the recipient of the subpoena bears the burden of proving that he/she has a valid basis for refusing to comply with the subpoena. If the court orders the recipient to comply with the subpoena, and the recipient fails to do so, he/she may be held in contempt of court. A contempt citation carries penalties separate and apart from any crime under investigation by the grand jury. These penalties may include monetary fines and incarceration.

IV. SEARCH AND SEIZURE: WHAT EVERY PROSECUTOR MUST KNOW

A. Overview of the Fourth Amendment

The Fourth Amendment, like the Fifth Amendment mentioned above, is part of the Bill of Rights, the first ten amendments to the United States Constitution. Following the American Revolution, the newly independent colonies were determined to protect citizens against infringements of their individual rights. Thus, the First Amendment guaranteed citizens the freedom of speech, the freedom of assembly, and the freedom of religion. The Fourth Amendment guaranteed citizens freedom from indiscriminate searches and seizures by government agents.

The Fourth Amendment contains two basic requirements. The first is a prohibition against "unreasonable" searches and seizures. The second is the requirement that any warrant authorizing a search or seizure of persons or property be based upon "probable cause." In the case of a search, this has generally been interpreted to mean probable cause to believe evidence of a crime is to be found at the location to be searched. In the case of an arrest or seizure, this has generally been interpreted to mean probable cause to believe the person has committed a crime.

B. The Warrant Requirement

Though in practice many searches and seizures are conducted without a warrant, in the absence of one of the recognized exceptions to the warrant requirement (see infra), a search or seizure must be authorized by a warrant issued by a Magistrate Judge, based on a determination that probable cause exists to support the issuance of the warrant.

The failure to secure a warrant in the absence of any recognized exception to the warrant requirement will lead to the suppression, or exclusion, or any evidence obtained as the result of the unlawful search or seizure. This is commonly known as the "Exclusionary Rule." In contrast, evidence seized pursuant to a warrant that is later found to be defective may still be admissible, if a District Judge determines that officers acted in good faith in relying on the issuance of the warrant. This is known as the "good faith" exception to the Exclusionary Rule.

As noted above, even a warrant issued by a Magistrate may be found invalid. Common reasons for invalidating search warrants include a judicial determination that the warrant was overbroad or lacked specificity in naming the items to be searched for. A warrant may also be invalidated if the information upon which the Magistrate found probable cause was so old, or "stale" as to make the Magistrate's reliance on the information unreasonable. Finally, if it can be shown that the warrant was based on misinformation intentionally supplied by law enforcement officers, the "good faith" exception will not apply and the evidence will be excluded from trial.

Customarily, a warrant is obtained by a federal law enforcement agent, who swears out an affidavit, written in the first person, describing the information he/she is aware of and how he/she became aware of it. A federal prosecutor reviews the warrant to ensure the facts and sources meet the legal requirements for securing a warrant. The Magistrate reviews the affidavit to determine whether, in the Magistrate's judgment, the facts alleged in the complaint provide the requisite "probable cause." If so, the Magistrate issues the warrant to search the location and seize the items specified in the warrant or to arrest the person named.

C. Warrantless Searches

A prosecutor must be well versed in the law of search and seizure. Thousands of

cases by hundreds of federal courts have attempted to resolve recurring issues of search and seizure law by delineating the scope of Fourth Amendment protections and articulating the circumstances in which, despite the absence of a warrant, a search or seizure may nevertheless comply with the Fourth Amendment's "reasonableness" requirement. In assessing the validity of a warrantless search, courts have attempted to balance the highly valued privacy rights of individuals with the legitimate needs of law enforcement authorities to investigate, expose and prevent criminal activity. The following ten areas have been judicially recognized as exceptions to the warrant requirement of the Fourth Amendment.

1. Investigatory Detention of a Person

This exception permits a "brief detention," based upon reasonably articulable suspicion (general hunches are insufficient) of criminal activity. This reasonable suspicion should be based upon the officer's personal observations or upon the collective knowledge of several officers. The detention must be reasonable in scope and conducted for a legitimate investigatory purpose.

Example: Police briefly detain a woman with red hair, wearing a green dinner dress and a white fur coat moments after that hearing a police broadcast that a tall red-headed woman in a green dress has just stolen a white fur coat from a store in the mall. The detention is lawful.

2. Investigatory Detention of Property

An investigatory detention of property is subject to the same constraints as the detention of a person: the detention must be brief and reasonably related to a legitimate investigation.

Example: A passenger on a bus is waiting to have his luggage removed. As it is being lowered to the ground, the bag falls to the cement. A fine white powder is visible on the ground directly beneath the bag. Detectives may pick up the bag and detain it briefly to allow a drug dog to sniff the bag for the odor of narcotics.

3. Search Incident to Valid Arrest

Following a lawful arrest, officers may conduct a complete search of the defendant. As long as probable cause exists for the arrest, no additional probable cause is needed for the search. The post-arrest search must be conducted within a reasonably short time of the arrest itself in order to be found "incident" to the arrest. The search is not limited to a pat-down for weapons and may include any areas within the defendant's control.

Example: A defendant is arrested on a state arrest warrant for failing to appear in court for a traffic violation. The arresting officers conduct a search of the defendant's pockets and locate 10 counterfeit $100 bills. The counterfeit bills are admissible in a trial for possession of counterfeit currency, because they were seized during a search incident to lawful arrest.

4. Seizure of Items in Plain View

In certain situations, evidence in plain view may be seized without the necessity of obtaining a search warrant. The incriminating character of the evidence must be readily apparent, and the officer may not improperly place himself in a position to make the observation. In addition to plain view, courts have also applied the doctrine to the senses of smell, feel and hearing.

Example: Police officers respond to a complaint of loud music and disorderly conduct. They knock on the door to the apartment. As the door is opened, they see a stack of blank credit cards and a machine used to imprint bogus credit cards. The officers may enter the apartment and seize the evidence.

Example: Coast Guard officers board a boat headed for a U.S. port in order to determine that the boat's paperwork is in order. Once on board, the officers smell a strong odor of marijuana emanating from the hold. The officers may "follow their noses" to the source of the smell.

The marijuana may be introduced at trial charging the ship's crew with attempted narcotics importation because the evidence of the illegal drugs—the odor of it—was readily apparent.

5. Exigent Circumstances

A warrantless search and seizure may be justified when exigent circumstances exist. In order to conduct a search based upon exigent circumstances, the officers must possess probable cause to search, and at least one of the following additional factors must be present:

a. evidence is in imminent danger of destruction;
b. officers' safety or the safety of the public is threatened;
c. the suspect is likely to flee; or
d. the police are in hot pursuit of a fleeing fugitive.

In determining whether an exigency existed, courts will examine the totality of circumstances at the time immediately preceding the search. Courts will not allow the officers to create the exigency which allows them to conduct the search.

Example: An art theft suspect is tracked to his hideaway, a warehouse in downtown. Officers look through the windows and see the suspect loading identifiably stolen pictures into a truck. They may enter and seize both the suspect and the stolen property.

Example: A bank robber flees the bank and is identified by a series of eyewitnesses as he runs several blocks before leaping a fence to the backyard of a residence. Officers may enter the backyard of the private residence to apprehend the fleeing suspect and search the area for evidence of the robbery.

6. Consent Searches

Probable cause to search is not necessary if a person having custody or control of the dwelling voluntarily consents to a search. Courts will examine the totality of circumstances, including a person's knowledge of his/her right to refuse to consent, the person's age, intelligence and education, degree of cooperation with police, attitude about the likelihood of discovery of contraband, length of detention, nature of questioning, and the use of coercive behavior to induce the consent.

Example: Police arrive at the house of a suspected drug dealer and knock on the door. The suspect's wife answers the door, holding an infant. The officers ask to search the house and the wife refuses. The officers then tell her that, if necessary, they will get a warrant. They also tell her that they think she is a drug dealer and they will ensure that her baby is put in a foster home after her conviction. They continue that, if she cooperates and lets them search, they will talk to the judge and help her keep her baby. She relents and they find drugs inside. Based on this scenario, the court would likely suppress the evidence on the basis that the wife did not voluntarily consent to the search.

7. Vehicle Searches

Because of vehicles' configuration and inherent mobility, courts have held that there is a diminished expectation of privacy in the area of a vehicle. Accordingly, the search of an automobile requires only that there be probable cause to believe evidence is contained within the vehicle.

Example: A traffic officer stops a car after observing erratic driving. As he approaches, the driver takes a plastic

baggie with several small rocks and stuffs it in between the seats.

The driver appears glassy-eyed and disoriented. The officer reaches between the seats and removes a bag of what appears to be rock cocaine. The contraband is admissible in a trial charging the defendant with driving under the influence and possessing narcotics.

8. Inventory Searches

After lawfully seizing an item, such as an automobile, boat or piece of personal property such as a wallet, police may lawfully conduct an inventory of the contents. This warrantless search is permitted because it satisfies three legitimate purposes: protection of the owner's property while it is in police custody; protection of the police against claims of lost or stolen property; and protection of the police from potential danger. An inventory search may not be conducted solely for investigatory purposes.

Example: Police arrest a drunken driver, who is taken to the station and booked. The car is towed to the police impound lot, where the contents are inventoried. Inside the trunk is a machine gun. The machine gun is seized and bullets are compared with those taken from a recent murder. They match. The gun will be admissible because it was seized during a lawful inventory search.

9. Border Searches

During a routine Customs search at an international border, no search warrant is required. The traveler and any accompanying baggage are subject to a full and complete inspection. Detention beyond a routine Customs stop requires at least reasonable suspicion of smuggling or other wrongdoing.

Example: A passenger arrives on the midnight flight from a South American country known to be a source of cocaine. During routine questioning, the passenger claims to be coming to the U.S. as part of his shoe-selling business, but can produce no documents, samples, brochures or names of business contacts he intends to meet. He is nervous and perspiring. Customs officials may refer him to secondary inspection for further questioning.

10. Abandoned Property

Warrantless searches and seizures of abandoned property do not violate the Fourth Amendment because there is no reasonable expectation of privacy in abandoned property.

Example: A narcotics agent sees a traveler retrieve a suitcase from a baggage carousel and walk towards the exit. When he sees a police officer enter the area, he drops the suitcase and goes into a restroom. When the traveler emerges from the restroom, he ignores the suitcase and runs out the door. A later examination of the bag reveals no name or address tag. The luggage is subsequently opened and found to contain 10 pounds of heroin. The narcotics would be admissible in a trial because the suspect abandoned the suitcase and its contents.

D. Prosecutorial Expertise in Search and Seizure Issues

As the above discussion demonstrates, the ability to defeat a challenge to the validity of a search—with or without a warrant—is crucial to a prosecutor's ability to introduce what may be dispositive evidence of the defendant's guilt. In some cases, the search or seizure will have taken place before the prosecutor becomes involved. In such cases, the prosecutor's familiarity with controlling case authority will enable him/her to determine whether the search can be defended.

In many cases, however, the prosecutor is involved in an investigation at the earliest stages, when a decision to seek a search warrant is made. In these

instances, it is critical for the prosecutor to know what pitfalls to avoid to ensure a warrant will pass judicial scrutiny after the search has been conducted. A prosecutor must be able to make an informed decision whether the evidence marshalled by law enforcement agents will be sufficient to obtain a warrant or to defeat a challenge to the sufficiency of any warrant obtained. A prosecutor must also be sufficiently familiar with search and seizure law to advise law enforcement authorities of what additional information, if any, must be obtained to ensure the warrant will pass constitutional muster.

V. PROSECUTORS' USE OF WIRETAPS AND OTHER ELECTRONIC SURVEILLANCE

A. Legal Requirements for Wiretaps and Electronic Surveillance

Law enforcement has a wide range of tools available to conduct electronic surveillance of criminal activity. The term "electronic surveillance" includes techniques ranging from wiretaps to mobile tracking devices. Because electronic surveillance is highly intrusive, there are statutory as well as constitutional limits on such surveillance.

Wiretaps include live interceptions of wire communications (telephones, cordless telephones, cellular telephones, and electronic pagers), oral communications (uttered in a location where there is an expectation of privacy), and electronic communications (for example, facsimile machines and digital pagers).

Because of the highly intrusive nature of wiretaps, Congress enacted a statutory scheme requiring an application by a government lawyer, supported by a factual affidavit of a law enforcement officer, and an order by a Federal District Court Judge, to obtain a wiretap. In addition, except for digital pagers, all such applications must be approved by a high-level official of the United States Department of Justice. The affidavit must establish the following: (1) probable cause to believe an individual is committing, or is about to commit, a statutorily enumerated offense; (2) probable cause to believe the particular communications concerning that offense will be obtained through such interception; (3) a showing that normal investigative procedures have been tried and have failed, or appear to be unlikely to succeed if tried or to be too dangerous (also known as "necessity"); and (4) probable cause to believe that the facilities or location where the communications are to be intercepted are being used, or are about to be used, in connection with the commission of the specified offense. There is a 30-day maximum interception period, plus extensions, for each wiretap order, and the order must provide that the interception be conducted in a manner to minimize the interception of communications not subject to interception ("minimization").

The wiretap statute does not include silent video surveillance. Such video surveillance is regulated by the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures. If the video camera is in a location where there is no expectation of privacy (normally exterior premises), no court authorization is required to videotape activities within view of the camera. If the camera is directed to view an area where there is an expectation of privacy, such as behind closed curtains, over a fence, or in a room of a residence, a search warrant is required. There must be a showing of probable cause, necessity, a particular description of the activity to be videotaped, and a statement of the offense to which it relates. The 30-day interception period and minimization requirements apply.

Similarly, mobile tracking devices ("transponders" or "beepers") used to follow

a vehicle or package are not regulated by wiretap provisions, but by the Fourth Amendment. There is no privacy right in one's location on the high seas, in public airspace, or on a public road where a vehicle or package may be transported. Accordingly, government agents may use a transponder without a court order. However, if a vehicle or package goes inside an area which carries a legitimate expectation of privacy, or surreptitious entry is necessary to retrieve it, a court order signed by a Magistrate is necessary.

Other commonly used types of electronic surveillance are pen registers and trap and trace devices. A pen register is a device which records or decodes electronic (or other) impulses which identify the numbers dialed or transmitted on a telephone line. A trap and trace device is a device which captures the incoming electronic (or other) impulses which identify the originating number of an instrument (normally a telephone) from which a wire or electronic communication was transmitted. A pen register or trap and trace order can be obtained upon an ex parte application to a Magistrate Judge, with a certification to the court that the information likely to be obtained is relevant to an ongoing criminal investigation.

B. Electronic Surveillance Authorized by Consent of a Party

Not all intrusive electronic surveillance need be authorized in advance by a court. Under federal law, when one party consents to have a conversation or meeting monitored, it may be audiotaped or videotaped, regardless of the fact that other parties do not know they are being taped. Prosecutors often rely on such consensual recordings.

Thus, is it not uncommon to record phone conversations between a confidential informant and the target of an investigation when the former is working for the government and the latter is unaware of that fact. Similarly, when undercover law enforcement agents set up a "sting" operation in a hotel room, warehouse, or other location that has been wired to videotape and record meetings and conversations, undisclosed videotaping may take place with the consent of the law enforcement officers, even though the criminals doing business with the undercover officers are unaware of the hidden cameras, and unaware that their conversations are being recorded. However, such electronic taping can take place only when law enforcement agents or informants working for the government are present in the room and thus "consenting" to the electronic monitoring.

C. Prosecutors' Role in Securing and Monitoring Electronic Surveillance

In any type of electronic surveillance for which court approval is necessary, prosecutors are intimately involved in the process of obtaining the court order, monitoring the surveillance, and reporting to the court on the results of the surveillance. Indeed, in order to obtain a court order authorizing a wiretap, a federal prosecutor must obtain the approval of an Assistant Attorney General in the Department of Justice.

While the affidavit setting forth the requirements outlined above is signed by the law enforcement agent, the prosecutor is intimately involved in the drafting of the application, and it is the prosecutor who signs the application submitted to the District Court Judge. It is also the prosecutor who must report to the court every ten days on the results of the wiretap and must ensure that interceptions are being properly "minimized." Finally, it is the prosecutor who must apply to the court for additional extensions of the wiretap authorization order by demonstrating that the evidence obtained to date warrants continued interceptions.

VI. PROSECUTORS' OBLIGATION TO PROVIDE DISCOVERY

A. The Premise of Discovery in Criminal Cases

Discovery is based on the premise that pre-trial disclosure of evidence contributes to the accuracy and efficiency of criminal trials by avoiding unfair surprise and encouraging pre-trial resolution of important issues. The American criminal justice is an adversarial system, but certain concepts of fairness override the idea that each advocate is obligated solely to its own cause. For example, prosecutors are charged with seeking the truth, not just winning a conviction. In order to advance the pursuit of truth and fairness, courts and the Congress have developed disclosure requirements, called "discovery." In the discovery process, the defendant is effectively given access to much of the evidence the government intends to use to prove the defendant's guilt. The government is not expected to win its case through surprise, and the defendant is expected to have ample opportunity to challenge the evidence the government intends to present against him/her.

In addition to ensuring fairness by avoiding surprise, pre-trial disclosure of evidence can simplify or eliminate trials by permitting pretrial resolution of the admissibility of evidence, and by prompting guilty pleas in cases with very strong evidence. Disclosure of evidence may persuade a defendant to enter a guilty plea upon the realization that he cannot effectively defend against the government's case. Similarly, a pretrial ruling that certain evidence provided in discovery is or is not admissible will assist both the government and the defense in assessing the relative strengths and weaknesses of their respective cases. Suppression of evidence to be offered by the government may result in dismissal of the charges entirely, or a plea bargain to lesser charges. Conversely the trial court's rejection of a defendant's challenge to the admissibility of evidence may prompt a guilty plea that will save the court and the public the cost of a trial whose outcome appears obvious to both parties.

B. Prosecutors' Obligation to Provide Discovery

The prosecutor, as the government's representative, is responsible for what is known by all members of the prosecution team, including law enforcement officers and the agencies for which they work. Whether or not evidence is actually revealed to the individual prosecutor, the government is obligated to turn over discoverable evidence. With such a broad scope of responsibility, the prosecutor may accept the reports of law enforcement officers or undertake personally to review the files of any officer or agency participating in the investigation of the case, including personnel files of the officers.

Discovery concerns all evidence which the government intends to use in its case-in-chief or which is favorable to the defense, either because it might exculpate the defendant or because it might lead to the impeachment of a government witness. This includes evidence of relevant statements made by the defendant whether before or after arrest. Documents or other objects of tangible evidence must be made accessible to the defense if they will be used in the government's case-in-chief or if they concern a defense. The results of any tests or examinations of evidence, such as the comparison of fingerprints or handwriting, the review of accounting procedures, or the results of DNA testing must be disclosed. In addition, the identity of any expert who will testify to the tests and the conclusions reached by such expert must be provided the defense.

C. When Discovery Begins

Although there is no general constitutional right to discovery in criminal proceedings, the Supreme Court has established rules for the disclosure of certain types of evidence based on the defendant's right to due process found in the Fifth Amendment. The due process protection of the right to a fair trial has been interpreted to require similar protections in pre-trial proceedings, such as suppression hearings, and in post-trial proceedings, such as sentencings. Such rights do not apply before criminal charges have been made in the form of a complaint, indictment or information. Formal charges are generally recognized as the beginning of criminal proceedings and the point at which the government's discovery obligations begin.

D. When Discovery Ends

The obligation to give discovery continues through trial. For example, the government must give the defense any statements made by witnesses called by the government as soon as the witness has testified on direct examination. In practice, prosecutors often turn over such statements before the trial, in order to avoid the loss of time which would result from delaying the trial to permit defense counsel to review the material before cross-examining the witness.

Even after a trial or guilty plea, the government must disclose evidence which favors the defense if that evidence undermines confidence in the conviction. The prosecutor, no less than the court itself, is responsible for ensuring that no conviction is obtained on false, improper, or insufficient evidence.

E. Discovery from the Defendant

Because of the privilege against self-incrimination, the defendant cannot be compelled to disclose his defense. Certain defenses, however, involve a high risk of unfair surprise to the government. In order to allow the government a fair opportunity to prepare to respond to defenses of alibi or insanity, the Federal Rules of Criminal Procedure require the defense to give notice of an intention to assert such a defense and of the witnesses who will testify in support of that defense. Such notice is made meaningful by the disclosure of the names of witnesses and the substance of their testimony.

In contrast to compelled disclosure, a defendant may agree to reveal some or all evidence as part of an exchange with the prosecution. For example, in lengthy and complex cases, the government may offer to make some or all of its disclosures by a specific date in advance of trial, if the defense also commits to disclose its evidence before trial.

F. Court Supervision of Discovery

The court has authority to control discovery by denying, restricting, or deferring any discovery based on the request of either the government or the defense, as long as the request is supported by sufficient good cause. The request can be made without disclosure to the opposing party, if the court permits. The judge's decision may include any appropriate order, but the entire submission must be preserved so that it can be reviewed by a Court of Appeals.

Judges frequently become involved in enforcing discovery requirements. If one party demonstrates that the other has violated its discovery obligations, the court has the power to compel the discovery or to preclude use at trial of the withheld evidence. Some judges issue standardized orders for the government to provide discovery within a specified schedule, to confer with the defense about disputed discovery matters, and to then report in writing and in person to the court. Even judges who do not maintain such a practice also have to resolve disputed discovery

matters. Occasionally, the defense will contend that the government is deliberately withholding discoverable material or that the government has not undertaken a thorough enough review of the evidence. When the parties cannot agree, that contention is presented to the court for decision.

The government, in answering allegations concerning its compliance with discovery requirements, may respond in open court, in a publicly filed pleading, or ex parte and in camera (that is, without notice to the defense, for the judge to consider exclusively) or under seal (that is, a matter of record with the court that is not accessible to the public, but is accessible to the defense), depending upon the sensitivity of the subject. For example, the defense may wish to know the identity of a confidential informant, but the government may assert its privilege not to reveal the identity of informants who merely supplied information, as opposed to those who dealt directly with the defendant in an undercover capacity. In that case, the government might submit a pleading ex parte, in camera and under seal, in which the informant is identified, the limits of the informant's participation in any charged criminal conduct are detailed, and the court is apprised of any reasons the informant might have for fearing retaliation if his/her identity were revealed to the defense. The court will then have a full record on which to decide whether the defense's claims have merit.

VII. FEDERAL SENTENCING

A. General Sentencing Procedures and Provisions

Federal sentencing is governed both by statutory provisions and by a body of rules known as the "Sentencing Guidelines." In most instances, the federal statutes defining particular violations of federal law specify the maximum term of imprisonment that the sentencing court can impose following a defendant's conviction of that offense. On rare occasion, a statute might also provide for a mandatory minimum term of imprisonment. These minimum terms of imprisonment are more common in the context of narcotics offenses and violent felonies.

The sentencing guidelines establish a sentencing range, in months, within which the sentence must be imposed absent some legal ground for departure upward or downward from that range. The use of the term "guidelines" is somewhat of a misnomer; these provisions are mandatory in nature.

The statutory penalty always "trumps" the guidelines; in other words, whenever the guideline range is more than the statutory maximum or less than the statutorily proscribed minimum sentence, the statutory penalty governs.

Federal sentencing can include some (or all) of the following penalties following the commission of a crime:

- Imprisonment: Required for most federal offenses under the sentencing guidelines. Only minor offenses in the lowest guideline ranges are eligible for the imposition of a term of imprisonment in lieu of imprisonment.
- Fines: Many federal sentences include the payment of a monetary "fine" or penalty to the federal government as part of the overall punishment for the commission of the crime.
- Restitution: In those instances where the federal offense resulted in monetary injury to a victim, the sentence will include mandatory restitution repayments to the aggrieved victim.

- Supervised Release and Probation: Most federal sentences include imposition of a term of either supervised release (imposed when prison time results) or probation (a substitute for a term of imprisonment for the more minor offenses). In short, these constitute periods during which defendants are under the supervision of the court and are required to abide by various terms and conditions. Violations of those terms can result in additional sanctions.

B. The Sentencing Guidelines

1. Purposes and History Underlying the Guidelines

The sentencing guidelines were enacted to address three perceived deficiencies in federal sentencing practices. First, before the guidelines, sentencing was left entirely to the discretion of the judge, with no appellate review as long as the sentence did not run afoul of the statutory penalty. Not surprisingly, the sentence imposed depended, in large part, on which judge happened to be assigned the case. The guidelines sought to reduce this disparity by narrowing the possible sentencing range for similar criminal conduct committed by similar defendants, thereby rendering sentences more uniform and more predictable. The guidelines further seek proportionality in sentencing, by imposing "appropriately different sentences for criminal conduct of different severity."

Second, Congress sought to achieve "honesty" in federal sentencing. Before the guidelines, the sentence imposed by the judge rarely turned out to be the sentence the defendant served. Most defendants became eligible for parole after serving one-third of their sentence, and almost all had to be released after serving two-thirds. Concurrently with the creation of the guidelines, Congress abolished the Parole Commission, and declared that the sentence imposed was the sentence to be served with minor reductions for good behavior in prison. Thus, under the new regime, defendants who receive full credit for "good time" while incarcerated nonetheless serve 85 percent of the guidelines sentence. There is no parole under the guidelines.

Third, Congress felt that the prosecutor, like the judge, had too much discretion pre-guidelines. The prosecutor conceivably could charge one criminal act many different ways and, in so doing, could make the conduct appear comparatively more or less severe. In order to reduce the power of the prosecutor, the guidelines sought to link the punishment imposed to the underlying criminal conduct, not simply the counts of conviction.

As a result of these concerns, a uniquely bipartisan Congressional effort adopted in 1984 the Sentencing Reform Act (sometimes referred to as the "SRA"). The SRA generally provided for the development of a federal sentencing scheme that would further certain enumerated purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.

To that end, the SRA delegated broad authority to the Sentencing Commission (the "Commission")—an independent agency composed of seven voting members, at least three of whom must be federal judges—to establish sentencing policies and practices consistent with certain statutory directives. The Commission was also charged with periodic review and reform of the guidelines system over time.

The Commission's initial guidelines were submitted to Congress on April 13, 1987, and after a prescribed period of Congressional review, became effective on November 1, 1987. Thereafter, the Commission promulgated a steady stream of yearly amendments to the guidelines, that take effect automatically absent Congressional disapproval.

The initial reaction to the guidelines was mixed, at best. Hostility to the new guidelines scheme resulted in a host of legal challenges, including attacks on the constitutionality of the Commission itself. In 1989, the Supreme Court ended any uncertainty regarding the constitutionality of the guidelines, holding in *Mistretta v. United States*, 488 U.S. 361 (1989), that the composition and duties of the Commission did not violate the doctrine of separation of powers.

2. How the Guidelines Work

The guidelines are premised on the notion that federal sentencing should depend on two factors alone: the severity of the defendant's overall criminal conduct (not simply the count or counts of conviction) and the defendant's criminal past. In accordance with that approach, the guidelines set forth a litany of computations designed to determine: (a) the severity of the defendant's criminal conduct in the case in which he/she is to be sentenced (the "offense level"), and (b) the past criminal conduct of the defendant (the "criminal history category"). Those two factors are then plotted on a chart to determine a "sentencing range," a range of months within which the court must impose a sentence absent a specific and appropriate basis for departing from the range. The intersection of the offense level (the vertical axis of the chart) and the criminal history category (the horizontal axis) determines the applicable guideline range.

The guidelines employ what is referred to as a "modified real offense" system of sentencing. A defendant's sentence is not contingent on the offense of conviction alone; a sentencing judge is empowered to look at the totality of a defendant's "relevant" criminal conduct. However, the offense of conviction provides the starting point for the calculus. The guidelines' relevant conduct provision defines when the court can consider conduct beyond the count of conviction in determining the sentence.

It is well settled that facts at sentencing—unlike facts at trial—need only be proven by a preponderance of the evidence. Indeed, even conduct for which a defendant has been acquitted can be considered at sentencing, if the court finds proof of that conduct has been established by a preponderance of the evidence. The court may consider at sentencing evidence which does not comply with the Federal Rules of Evidence and which is not subject to confrontation, as long as the evidence meets minimal standards of reliability. Accordingly, sentencing hearings tend to be more relaxed than trials, and generally do not involve the presentation of witnesses. Evidence is proffered, if at all, through hearsay declarations.

3. Departures

The guidelines are designed to encompass almost all cases. Accordingly, sentences outside the applicable guideline range, known as "departures," should be rare.

In general, the court may depart from the guidelines if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately take into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The guidelines explain that departures are designed to account for cases outside the "heartland" of the proscribed guidelines.

The most common departure basis arises when a defendant cooperates with prosecutors in the investigation or prosecution of others. In those instances, the law empowers federal prosecutors to seek a reduction in sentence. The decision to seek a sentencing reduction based on a defendant's assistance to law enforcement rests solely with the prosecution.

VIII. PROSECUTORS' ETHICAL OBLIGATIONS

Federal prosecutors are entrusted with tremendous authority and responsibility, often at a relatively young age. The manner in which they exercise that authority has significant implications for individuals, institutions, and society at large. The decision to seek an indictment against an individual or organization will have far reaching consequences, regardless of the ultimate outcome of any criminal proceeding.

For all the limitations imposed by statute, the Constitution, and rules of court, it is a prosecutor's recognition of the importance of his/her role in the criminal justice system and of the need to exercise that role with the utmost integrity that guarantees the fairness of the criminal justice process. Unlike criminal defense counsel, who are obligated to defend the guilty as vigorously as the innocent, federal prosecutors have an independent obligation to see justice is done.

At any stage of the proceedings, the prosecutor must be receptive to evidence that may affect the reliability of witnesses or have a potential impact on the trier of fact's assessment of the defendant's probable guilt. Moreover, even before making a decision to pursue criminal charges, a prosecutor must examine all the facts and circumstances to determine what charges, if any, best reflect the defendant's criminal behavior and its consequences. Finally, at sentencing, a prosecutor's role is not to seek the heaviest possible penalty, but to urge the court to impost a sentence that best reflects the severity of the defendant's conduct, taking into account the nature of the offense, its consequences to the victim(s), the defendant's criminal history, and the defendant's cooperation with government authorities.

Ultimately, a prosecutor's credibility is his/her most valuable currency. A good prosecutor knows that he/she must earn the trust of the judge, the jury and opposing counsel.

A prosecutor who overstates his/her case, strains to interpret a precedent in a way that favors the government's case, or advocates unreasonable positions, squanders the precious commodity of credibility. When even one prosecutor loses that trust, all prosecutors are tarnished in the eyes of the court and the community.

Most citizens believe in their criminal justice system because years of experience have demonstrated that federal prosecutors use their authority judiciously and appropriately. Only by continuing to adhere to the highest standards of ethical behavior can prosecutors maintain that hard-earned trust.

PARTICIPANTS' PAPERS

THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

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I. INTRODUCTION

Cameroon is a country situated in central Africa which has a population of approximately 14 million people, spread over landscape with diverse physical features, on an area of about 475 square kilometres. There are about 250 tribes which communicate in different national languages. This diversity has earned the country the appellation "Africa in miniature".

Two official languages are spoken in Cameroon, i.e., French and English, which illustrate the country's bi-cultural historical background. The legal system is bi-jural with the modern law inherited from the British common law and the French civil law systems on the one hand and the customary law on the other.

The common law system is in practice in the English-speaking north-west and south-west provinces of what was West Cameroon, in the former federal republic. In the remaining provinces of French-speaking Cameroon, the civil law system prevails in what is about eighty percent of the country. For the purpose of this presentation, no further reference shall be made to the customary courts, as they have no criminal jurisdiction. The military tribunals and other special courts shall not be discussed as they concern specific categories of offences and offenders.

On 20 May 1972, the late A. Ahidjo, the former President of Cameroon, obtained popular consent by referendum to transform the country into a unitary state. One of the direct consequences of this re-unification would be the harmonisation of the common law and civil law systems and the integration therein of purely Cameroonian concepts and customs, so as to better meet the aspirations of the people. Needless to say, this has been a slow and difficult process, hampered by both technical and political considerations. Considerable efforts have been made, and the country can boast of several statues which reflect these pre-occupations. The organisation and functioning of the Judiciary is regulated by one ordinance. The laws which organise the professions of barrister, bailiff and notary public are all applied nationwide. Ordinance No. 72/4 of 26 August 1972 and its subsequent amendments have harmonised the administrative organisation and the attributions of the courts but, more especially, the legal department. There exist differences related to the mode of collection of evidence and the manner in which it is adduced in court. The personnel of investigative agencies, irrespective of the areas where they perform their functions, receive their training in the same national institutions. Likewise, judicial and legal officers undergo the same academic and professional training in both official languages and are initiated to the fundamental principles of the different legal systems. The National Assembly adopted the Cameroon Penal Code in 1967. The draft bill of a harmonised criminal procedure should be completed in the near future. Sustained efforts are made to adapt existing legislation to the ever evolving social and political context, by integrating therein different notions of human rights,

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democracy, environmental protection, gender equality, etc.

The adoption of Law No. 96/6 of 18 January 1996 to amend the constitution of June 1972, amongst other innovations, significantly modified the status of the Judiciary, which was elevated from the ranks of a mere authority, to a full power, thus becoming the third effective arm of government. A substantial judicial reform is currently underway at the Ministry of Justice to adapt existing legislation to this state of affairs, and to redefine the relationship between the Judiciary and the other powers, more especially with the Executive.

II. ORGANISATIONAL STRUCTURE

In Cameroon, judicial power is exercised by the Supreme Court and other ordinary courts. The basic statutes regulating the organisation and functioning of these courts are Ordinance No. 72/5 of 26 August 1972 and its subsequent amendments and Ordinance No. 72/4 of 26 August 1972d its subsequent amendments. Judicial and legal officers are governed by Decree no. 95/48 of 8 March 1995 on the status of magistracy, which regulates all issues relating to their respective careers.

It has already been stated that Cameroon has one penal code. The prosecutorial systems used to implement this code differ substantially. In the common law jurisdictional area where the adversary system prevails, the basic statutes used are cited as " 'The Criminal Procedure Ordinance' Cap. 43 of the Laws of the Federation of Nigeria" (CPO), and "The Evidence Ordinance Cap. 62 of the 1958 Laws of the Federation of Nigeria" ('Evidence Act). Under the civil law jurisdictional area, the system adapted in referred to as inquisitorial and the procedure code cited as "Code d'Instruction Criminelle' " (CIC).

The term legal department is used in the general sense to translate the French term "parquet" or "ministere public" i.e., the department of public prosecution. The legal department is an integral part of the court. It must be present during all criminal proceedings, its presence is optional in civil matters. Though the legal department is a party to proceedings initiated subsequent to the violation of criminal law, resulting in loss to one or more individuals and disrupting social order, it must exercise a fair amount of impartiality in the execution of its functions, so as to ensure a proper application of the law to all including the suspect. The objective of the prosecution must remain the fair application of the law. The State counsel must ensure that this policy is reflected at all stages of the administration of criminal justice.

A. Court Structure

The administrative set up of the courts is based on the organisation of the administrative units in the country. There is one Supreme Court, which functions as a "Cour de Cassation," ten Courts of Appeal at the provincial level, a High Court for each division, and a Court of First Instance at the level of the subdivision. In practice, however, some High Courts cover more than one division and some Courts of First Instance more than one subdivision.

B. Criminal Jurisdiction of Courts

The provisions of the penal code determine the penalties for different offences. The classification of these offences constitutes the basis for the determination of the competence of the courts in criminal proceedings. The Supreme Court is a court of law and does not go into the merits of the case, but verifies that there is no violation of the law, in the judgements from the Courts of Appeal. If it finds that there has been such violation, the judgement in issue is

quashed and the case referred to a different Court of Appeal to be tried afresh. A case may thus be referred to different appeal courts twice. If an appeal is lodged to the Supreme Court a third time, then the court will hear the case on the merits and its decision is final.

Appeals are filed at the Courts of Appeal directly from the High Courts and Courts of First Instance respectively. Under the CPO, the Court of Appeal does not judge facts. Its judgement on points of law rely on findings based on facts as decided by the trial court. Under the CIC, court proceedings are recorded differently. The Court of Appeal reviews both facts and law.

The High Court is competent to hear and determine felonies, i.e., offences for which the minimum term of imprisonment is more than ten years to the death penalty. The Court of First Instance is competent to hear and determine misdemeanours, i.e., offences for which the maximum term of imprisonment is ten years; and petty offences, i.e., offences for which the maximum term of imprisonment is ten days. Upon conviction, the Court of First Instance may award civil damages amounting to more than five million francs, which is the maximum award of damages in civil cases. In addition to imprisonment, the court may choose other sanctions from a wide array of other principal and accessory penalties.

Minors, i.e., persons aged below 18 years at the time of commission of an offence, are tried before the Court of First Instance. These trials are conducted in camera. However, where the offence was committed in the company of adults, all the suspects are tried before the High Court. In this case, the penalty imposed on the minor after conviction is less severe. Complex misdemeanours may also be tried in the High Court. Territorial competence is regulated by procedural rules.

C. The Characteristics of the Legal Department

Two fundamental principles influence the execution of prosecutorial functions by legal officers by the legal department namely:

- subordination to instructions from hierarchy; and
- indivisibility of action by the legal department.

1. Subordination to Instructions from Hierarchy

The legal officers in charge of prosecution at different levels of the court structure, direct and control all actions conducted by the officers in their respective chamber. They are accountable before hierarchy. Some or all of these functions may be delegated to other legal officers within the chambers under conditions set out in the ordinances on judicial organisation and the decree on the status of magistracy respectively. No legal officer may be appointed to functions which place a senior legal officer under his authority. A relationship of subordination exists amongst the legal officers in the same chambers, between the chambers of the Procureur General and all the State Counsel Chambers in the same province and between the Minister of Justice, keeper of the seals and all the legal departments. The Minister of Justice is a member of Cabinet.

2. Indivisibility of Action by the Legal Department

Legal officers appointed to different functions in the same chambers may execute the same concurrently or in succession, both in Chambers and before the different courts.

Legal officers appointed to functions at the legal department may assist or replace other legal officers in their prosecutorial functions in different State Counsel's Chambers in the same province.

D. Legal and Judicial Officers

Magistrates in Cameroon are referred to as judicial or legal officers, the former exercising their functions on the bench and the latter as prosecutors within the framework of the legal department. The term "legal department" in a strict sense refers to the office of the Procureur General who is the head of the prosecution department at the Court of Appeal. He is assisted by one or more Advocate-General, one or more Substitut-General and in some cases one or more Attaché. The different appellations reflect the seniority of the officers in decreasing order. They are of equal rank as members of the bench in corresponding functions in the courts. For purposes of protocol, the judicial officers take precedence. At the High Court and the Court of First Instance, the head of the prosecution department is the State Counsel who may be assisted by one or more deputy State Counsels. The number of officers in the legal department depends on the classificaiton of the courts according to criteria determined by the Ministry of Justice.

Magistrates working in the Ministry of Justice or on secondment in other organisations are assimilated to legal officers and are subjected to the same regime for promotions, transfers or disciplinary measures. The organ which processes such files is the National Classification Commission, while the organ which manages the careers of judicial officers is the Supreme Council of Magistracy presided over by the Head of State. The proposals and recommendations from these two bodies if met with approval are confirmed by Presidential decree. It is important to note that there are no clear cut demarcations within the magistracy; legal and judicial officers may be appointed to different functions on the bench or in the legal department indiscriminately and at any stage of their respective careers, depending on the exigencies of service.

E. Qualification of Prosecutors

To qualify as a judicial or legal officer, the holder of a postgraduate diploma (generally in private law though other disciplines are accepted), must pass a highly competitive examination into the National School of Administration and Magistracy (ENAM). The duration of the training is two years and consists of eight months theory on ethics, draftsmanship, court management, etc. The rest of the time is consecrated to practical training in the courts at the Ministry of Justice, the private bar, the investigative agencies and other services involved in the administration of justice. There is an examination at the end of the training, and, if successful, the pupil magistrate is integrated into the magistracy as a grade one legal or judicial officer. He is appointed to a function, which corresponds to his grade by presidential decree. Before assuming office, an oath is taken before the Supreme Court. Appointments and transfers are not made for a specified term, the periodicity of transfers depends on the exigencies of service.

III. THE ROLE OF THE PROSECUTION AT THE INVESTIGATION STAGE

The criminal process commences after the commission of the offence. The victim, witness, or any person having knowledge of the circumstances may report them orally or in writing either to the State Counsel, or any other investigative agency. When the report is lodged at the State Counsel's chambers, the State Counsel shall forward it to the competent investigative agency with specific instructions as to the manner in which investigations should be conducted.

Generally, the judicial police is competent to investigate felonies and complex misdemeanours nationwide and participates in international

investigations. The public security police investigates misdemeanours and petty offences in the major cities and towns. The gendarmerie conducts investigations in the rural areas, where police structures are in existence or inadequate. Specialised agencies conduct investigations in relation to special offences in specific sectors such as the customs or forestry departments.

In the conduct of investigations, the police and gendarmes act as judicial police officers, and assist the judiciary in the performance of some of their duties under the authority and control of the State Counsel. They are "auxiliaries of justice". For all other considerations such as promotion transfers, disciplinary measures and other purely administrative matters, they revert to the authority and control of their superiors within the police and gendarmerie respectively.

Under the Ordinance on Judicial Organisation, the State Counsel has absolute power to personally conduct investigations for all offences. However, in practice, he intervenes in relation to serious offences such as murder, assassination, particularly sensitive cases or those involving senior officials. If dissatisfied with the conduct of investigations, he may instruct the investigator to change his mode of investigation, as well as order fresh or complimentary measures. The investigative agencies are all under ministries other than the Ministry of Justice. The Prisons Department and Social Welfare Services, which are involved in the administration of criminal justice, also belong to different ministries. There is insufficient cooperation between these services and the Ministry of Justice, which lacks adequate resources to ensure effective coordination of different activities.

A. Arrest and Detention

A suspect may be arrested with or without a warrant, after which he must be taken to the place reserved for the reception of arrested persons and informed of the charges against him. He must be provided reasonable facilities to enable him obtain legal advice, bail where applicable, and to permit him to prepare his defence in view of his release. The police and gendarmes shall report to the State Counsel all persons arrested with or without warrants within the jurisdiction. When it is lawful or necessary, the judicial police officers may arrest any person suspected of having committed an offence. In principle, a person shall not be arrested without a warrant except in cases of "flagrant delit". The State Counsel may control the structures used by investigating agencies for the detention of suspects.

Basically, there are two types of investigations: preliminary investigations and flagrant delit investigations. Where a suspect is arrested in relation to a case of flagrant delit, the police shall conduct him to the nearest State Counsel within 24 hours; and, if the State Counsel is not available, before the nearest legal officer within the jurisdiction. The suspect may only be detained thereafter by order of the State Counsel or the said legal officers. The said order is valid for 24 hours and may be extended thrice. Thereafter, if investigations are not completed, the suspect must be released. This form of detention is called "garde à vue," or police custody. In the north-west and south-west provinces, a statement after the administration of the words of caution is recorded from the suspect, and if he presents sufficient surety he may be granted bail.

In the rest of the country, there is no police bail. In simple cases, the police may close the file and release the suspect in the face of insufficient evidence or where an alternative solution is preferred to eventual prosecution. Otherwise, the suspect is transferred to the State Counsel with his file, where he may either be remanded in

custody awaiting trial, (preventive detention) or allowed to appear for the rest of the proceedings as a free man.

When an offence is committed in the presence of a legal officer within his jurisdiction, he may arrest the suspect himself or order for his arrest and remand him in custody pending investigations preceding summary trial. The State Counsel may, if he deems it fit, by endorsement on the warrant direct that the person be released on bail, upon his entering into recognizance for his appearance as may be required on the endorsement. A person suspected of an offence punishable with death shall not be admitted into bail, except by the judge of the High Court. If he is in prison custody, the court shall issue an order of release to the officer in charge of the prison or other place of detention and such officer on receipt of the order shall release him.

The conditions under which the suspect may benefit from bail are specific by law. When admitted to bail, the suspect shall only appear before the State Counsel as directed. When the accused person is arraigned before the court, this bail is substituted with court bail. The prosecution may object to an accused person being released on bail by the court, even in respect of a bailable offence on serious grounds. Though this objection is not binding on the court, it is given due consideration and upheld where the circumstances so warrant.

B. Warrants

The State Counsel has wide powers to order any measures necessary during investigation to enable him obtain evidence which will contribute to the manifestation of the truth. It is in this regard that warrants of arrest, search warrants remand warrants, etc. are his prerogative. Investigating officers do not have the power to issue these warrants, which are however executed either by the investigative agencies or with their assistance, under the supervision and control of the State Counsel.

IV. THE INITIATION OF PROSECUTION

The provisions of section 23 (1) and (2) of the Ordinance on Judicial Organisation, authorise the State Counsel in criminal matters and without prejudice to the rights of the victim, to investigate and record offences, conduct judicial inquiries and investigation, institute proceedings and investigations, issue arrest and detention warrants, and refer cases to the competent courts.

A. Prosecutorial Discretion

The State Counsel has absolute discretion as regards initiation of criminal proceedings. Even where there is sufficient evidence, the State Counsel may refrain from prosecution, if this is not the most suitable solution or if prosecution may jeopardize other interests. This discretion is subject to an internal check to control abuses by the principle of subordination to hierarchy.

The evidentiary standard required to indict a suspect is a prima facie case. Under the CPO, when investigations are completed, the investigating officer forwards the file along with any exhibits to the State Counsel recommending what action should be taken in his report. The State Counsel determines the final outcome of investigations.

Under the CIC, the file is forwarded to the State Counsel with the suspect. The State Counsel may release him or remand him in custody awaiting trial. The complete case file is then transmitted to the competent court, so that the trial judge may take cognizance of its contents before the trial.

B. Preliminary Inquiry

Preliminary inquiry is the investigation of a criminal charge by an examining magistrate, with a view to the committal of the suspect before the appropriate court. This investigation is conducted in Cameroon, not by a judicial officer as is the case in most countries, but by the State Counsel. He is assisted throughout the inquiry by a court registrar, who records all statements and performs other clerical functions. The absence of the registrar during the inquiry renders the whole process null and void.

The conduct of the preliminary inquiry is regulated by the ordinance on judicial organisation. State Counsels, have the same attributions under both prosecutorial systems. Any differences, in the mode of implementation arise essentially from divergencies under procedural rules.

Preliminary inquiries are, save for contrary legal provisions, obligatory in cases of felonies, and optional for misdemeanours and simple offences. The objective of the inquiry is to ascertain that there is sufficient evidence to justify the accused person being put on trial. At the end of the inquiry, the State Counsel makes an order which either commits the accused person before the competent court or closes the file and discharges him. This discharge does not bar the prosecution from conducting another inquiry on account on the same facts.

V. THE ROLE OF THE PROSECUTION AT THE TRIAL STAGE

A. In the Common Law Jurisdictional Areas

The prosecution prefers charges for misdemeanours and petty offences, bills of indictment where the offence committed is a felony, or the accused person is indicted in the High Court. The charge sheet or bill of indictment is filed at the registry of the competent court, where the chief registrar ensures that it is registered. The case is enrolled on the cause list at the date suggested by the legal department and for which service has been effected on the parties.

When the matter is called in court for the first time, the accused person is arraigned and his plea recorded. In most cases, accused persons cannot afford legal assistance, which may be obtained under the conditions prescribed by law. When standing trial for a felony punishable with death, the court appoints defence counsel for the accused person from the private bar. The cost of his defence is borne by the State. When the accused person does not have counsel, it is the duty of the court to ascertain that the accused person understands the legal issues at each stage of the proceedings, and that his rights are protected.

Following a plea of guilty, the court calls on the State Counsel to present the facts of the case. All exhibits including the statement recorded from the defendant are then tendered in evidence with leave of the court. The accused person is given the opportunity to make an explanation. If the court is satisfied from his explanation that the accused person fully understood the implications of the plea, and that he is not putting up a defence, it shall make a ruling convicting the defendant. State Counsel then discloses the past criminal record of the convict to the court. The defendant is invited to make an allocutus, which is a plea for leniency before sentencing. If the court finds that the defendant did not intend to plead guilty, his plea is substituted with a plea of not guilty, and a full trial is conducted.

Where the accused person enters a plea of not guilty, the case is adjourned to a further date to enable the accused person to prepare his defence. At the hearing, the witnesses for the prosecution are called commencing with the complainant, and the

investigator is usually called as the last witness. They are led under examination in chief by the State Counsel, subjected to cross-examination by the accused person or his counsel, and re-examined by the State Counsel to clarify any issues which arose under cross-examination.

There is little or no consultation and close collaboration between the State Counsel and defence counsel. The two are engaged in a "legal battle" and disclose their intentions or strategies only when required to do so by the law or the court. All evidence is adduced during the trial with leave of court, and the other party may object to its admissibility in evidence. The court must make a ruling for every application. The conditions of admission, i.e., the weight to be attached to evidence, are determined by strict exclusionary evidential rules.

Great skill is necessary to be an efficient prosecutor or good defence counsel, and these skills can to a great extent influence the final outcome of the proceedings. At the end of the case for the prosecution, the court makes a finding as to whether or not a prima facie case has been made against the accused person. When a prima facie case has been made against the accused person, the court invites him to make a defence and remain silent. He may testify from the dock, or opt to testify on oath. The standard of proof necessary to secure a conviction is beyond a reasonable doubt and this onus rests on the prosecution and may only shift under specific circumstances provided by law.

Opening addresses may be made at the commencement of the trial. This practice is observed before the High Court, but often omitted in the Court of First Instance. The same applies to the closing address. In the address, both the defence counsel and the State Counsel summarize the facts of the case, analyse the evidence adduced and review the different legal issues raised in the course of the trial. It is at this stage, that the State Counsel may make recommendations relating to sentencing to the court. The order of addresses is established by rules of procedure, and the defence counsel has a right to reply. Thereafter, any further reply can only be made on point of law after leave of court. It is important to note that addresses are not part of the trial and their contents are not binding on the court.

In cases involving petty offences and misdemeanours, the court may pass a verdict and proceed with sentencing immediately after the trial. For felonies and serious midemeanours, the court usually adjourns to a further date for judgement and sentencing. The sentence is executed immediately by bailiffs under the control of the State Counsel. However, in the event of an appeal, execution of the sentence is suspended.

B. In the Civil Law Jurisdictional Areas

Upon indictment, the complete case file (and the past criminal record of the accused person) is sent to the court, so that the trial judge may take cognizance of its contents before hearing.

When the case is called for the first time the court proceeds to the verification of the identity of the accused person and records his plea. As is the case in the north-west and south-west provinces, accused persons usually plead not guilty. The evidentiary rules under the CIC are not strict. The trial is conducted in an inquisitorial manner, where the presiding judge has wide powers and plays an active role in the effort to arrive at the manifestation of the truth. The standard required for conviction is about that of a prima facie case. The intimate conviction of the judge determines the final verdict.

The defendant does not testify on oath, as he is under no obligation to tell the truth. He may choose to remain silent throughout the proceedings. The defendant is

presumed innocent until proved guilty but the onus seems to rest on him to prove that he did not commit the offence.

At the end of the trial, the State Counsel makes a submission to the court similar to the closing address under the CPO. The defence counsel replies thereto and the defendant is the last person to address the court, if he so wishes. The case is usually adjourned for the verdict and sentencing, and the judgement is often drafted subsequently. The sentence is not executed until the time allowed for appeal expires, unless the court orders otherwise. Judgements are executed by bailiffs under the control of the State Counsel.

C. Suspension of Prosecution

The State Counsel may suspend prosecution with leave of court, under various sections of the CPO. Section 284 refers to withdrawal by the State Counsel following an application by the victim to withdraw his complaint. The State Counsel may, under section 75 of the CPO and at any time before judgement, obtain leave of court to suspend prosecution. There are others, perhaps the most interesting is the Nolle Prosequi. This is an application made orally or in writing by the State Counsel to the court indicating that the prosecution does not intend that the proceedings continue, under section 73 of the Evidence Act. Unlike other applications for suspension of prosecution, the State Counsel need not offer the court an explanation, and the court is bound to grant the prayer.

The effect of suspension will vary depending on the stage at which the application was made to the court. In all cases, the court should specify whether the accused person is discharged or acquitted. Generally, where the accused person is not called upon to put up a defence, he is discharged; and if he is asked to make a defence, he is acquitted. The prosecution may subsequently prefer a fresh charge on account of the same facts following a discharge. An acquittal, operates as a bar to prefer a fresh charge on account of the same facts.

Under the CIC, once criminal proceedings have commenced, they must continue till completion. It is important to note, that contrary to the situation under the CPO, an accused person may be tried and convicted in absentia.

D. Plea Baragaining

There is no plea bargaining in Cameroon.

E. Private Prosecution

Private prosecution is possible both under the CIC and CPO for petty offences and some misdemeanours. In practice, this right is not exercised in the north-west and south-west provinces. Details of the procedure will not be discussed here. At the trial, however, the State Counsel is a party to the proceedings. His submissions are usually limited to an analysis of the legal issues and the impact of the offence committed, on public order.

The "constitution de partie civil", though a civil law notion, applies in the north-west and south-west provinces under the Ordinance on Judicial Organization. By this procedure, the victim of an offence may file a civil claim for damages for any loss resulting from the commission of an offence, at the same time as his complaint. It is not the duty of the State Counsel to establish the civil claim, he may, however, address the court on the issue in his submissions, where the claim is justified and make any recommendations as to the quantum of damages to be awarded to the victim.

VI. SENTENCING

The principles of sentencing are set out in Book One of the Penal Code. Sentencing is the prerogative of the Judge. The role of the State Counsel in sentencing is to assist the court in arriving at an appropriate sentence, by providing it with maximum information as to the circumstances under which the offence was committed and any previous criminal record that the convict may have. Any recommendations as to sentencing, general or detailed, are not binding on the court.

VII. THE RIGHT TO APPEAL

Where the State Counsel is dissatisfied with the judgement due to any violation of legal provisions or inappropriate sentencing, he may refer the judgement to the Court of Appeal for review.

VIII. CONCLUSION

The harmonisation of the legal systems and the judicial reform referred to earlier are both ambitious and by no means easy objectives to attain. There are numerous, political, social and legal considerations to address and sometimes divergent interests to reconcile. The political authorities at the highest level of the State have expressed their commitment to see the process through, and laudable efforts are being made to secure necessary funding.

While awaiting the successful completion of the process, the necessity for the effective and diligent execution of their respective duties by the personnel involved with prosecution at different levels cannot be overemphasized. Moral integrity should be a prerequisite for integration into the magistracy, and the violation of professional ethics should be severely sanctioned. Pecuniary and other professional incentives should be afforded to the personnel of the legal department and investigative agencies, so as to prevent and abate corruption as well as other forms of professional malpractice. There is a need for increased cooperation within the Magistracy and the investigative agencies and greater collaboration with other services involved in the different phases of the administration of criminal justice.

THE POSITION AND ROLE OF CHINESE PROCURATORIAL ORGANS IN CRIMINAL JUSTICE

*Guan Fujin**

I. PEOPLE'S PROCURATORATES ARE STATE ORGANS FOR LEGAL SUPERVISION AND EXERCISE PROCURATORIAL POWER INDEPENDENTLY

Article 129 of the Constitution of the People's Republic of China and Article 1 of the Organic Law of the People's Procuratorates of the People's Republic of China stipulate that "the people's procuratorates of the People's Republic of China are state organs for legal supervision." According to the law, the state makes it clear that people's procuratorates are state organs for legal supervision and exercise the right of legal supervision on behalf of the state. This is the legal position of the Chinese procuratorial organs.

The Chinese procuratorial organs shall exercise procuratorial power independently and shall not be subject to interference. Procuratorial organs perform their functions and powers independently according to the law. This is the most important principle for legal supervision defined by the Constitution of the People's Republic of China. Article 131 of the Constitution of the People's Republic of China clearly stipulates that "people's procuratorates shall, in accordance with the law, exercise procuratorial power independently and are not subject to interference by administrative organs, public organizations or individuals." The Criminal Procedure Law and the Organic Law of the People's Procuratorates of the People's Republic of China also have the same provisions. We can understand this principle in four aspects. First, procuratorial power is a state power exclusively exercised by procuratorial organs, and no administrative organs, public organizations and individuals have the right to exercise it. This is the requirement set by the particularity and seriousness of procuratorial power. Neither organs, public organizations and individuals which are not state organs nor state organs which are not procuratorial organs have the right to exercise procuratorial power. Second, when procuratorial organs exercise procuratorial power, they only obey the Constitution and state laws and are not subject to interference by administrative organs, public organizations and individuals. In practical procuratorial work, procuratorial organs shall not be subject to interference by other administrative organs' administrative orders which affect the exercise of procuratorial power and by other public organizations and some individuals with special privileges. This is the key to ensuring the fair and effective exercise of procuratorial power. Third, procuratorial organs must exercise procuratorial power according to their legal functions, powers and methods and cannot abuse it. The criminal, civil and administrative procedure laws and a series of internal regulations on procuratorial work formulated by the Supreme People's Procuratorate contain concrete provisions on the procuratorial functions and powers of procuratorial organs and the procedures and methods for exercising legal

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supervision. Violating these regulations and abusing procuratorial power will impair the socialist legal system, and legal responsibility will be investigated and affixed. Fourth, procuratorial organs exercise procuratorial power independently. This means that people's procuratorates at all levels exercise procuratorial power independently. This does not mean that chief procurators or other public procurators personally exercise procuratorial power independently. This shows that democratic centralism is applied in exercising legal supervision. This also ensures the correct exercise of procuratorial power and avoids the personal abuse of procuratorial power.

II. INVESTIGATING CRIMINAL CASES PERPETRATED BY TAKING ADVANTAGE OF THE OFFICE IS AN IMPORTANT DUTY OF PROCURATORIAL ORGANS

The filing of criminal cases of corruption and bribery perpetrated by taking advantage of an office for purposes of investigation and prosecution is a part of all the rights enjoyed by the Chinese procuratorial organs. Article 18 of the Criminal Procedure Law of the People's Republic of China, currently in effect, stipulates that "with regard to the crime of corruption and bribery, the crime of dereliction of duty committed by state personnel, the crime of illegal detention, extorting a confession by torture, retaliation and framing and illegal search to infringe on citizens' right of the person committed by state personnel who take advantage of their functions and powers and the crime of infringement on citizens' democratic rights, people's procuratorates shall file such criminal cases for investigation."

According to the provisions of the Constitution of the People's Republic of China and the Organic Law of the People's Procuratorates of the People's Republic of China, statically the legal supervision exercised by procuratorial organs is a system under which people's procuratorates exercise procuratorial supervision over the implementation and observance of state laws, and dynamically it is an activity in which people's procuratorates exercise procuratorial supervision with a view to ensuring the correct implementation and strict observance of state laws. The scope of legal supervision are as follows:

(1) Procuratorial organs exercise supervision to determine whether state organs and their personnel correctly apply and enforce the laws; and

(2) Procuratorial organs exercise supervision to determine whether ordinary citizens abide by state laws.

The first is the major task of legal supervision exercised by procuratorial organs. Of course, procuratorial organs exercise supervision over the crime committed by taking advantage of the office. Such supervision is an important component of legal supervision. There are three reasons for this. First, when state organs apply and enforce the laws, in fact state personnel do this. In other words, all activities to apply and enforce the laws cannot be conducted without the personnel in state organs.

Second, procuratorial organs exercise supervision over the application and enforcement of the laws by state organs and their personnel with a view to discovering, investigating and dealing with violations of state laws in the process of applying and enforcing the laws. The activities to apply and enforce the laws will be conducted through the acts of state personnel. Therefore, in investigating and dealing with violations of the laws in the process of applying and enforcing the laws, we focus on violations of state laws perpetrated by

state personnel in the process of applying and enforcing the laws. Some of the violations of the laws perpetrated by state personnel are ordinary acts in violation of the law, and some seriously impair the interests of the state, the collective and the citizens and constitute crime, that is, the crime committed by taking advantage of the office. Therefore, when procuratorial organs exercise supervision over the application and enforcement of the laws by state organs and their personnel, of course this supervision includes supervision over the crime committed by taking advantage of the office.

Third, state personnel administer the state and society on behalf of the masses and should exercise management in strict accordance with the law. However, some state personnel do not strictly abide by and carry out the Constitution and the laws in the process of performing their official duties, but wilfully violate the Constitution and the laws. People's procurorates exercise legal supervision to ensure the correct implementation of state laws. Therefore, people's procuratorates must control the crime committed by taking advantage of the office, which is seriously divorced from the legal system and rectify violations of the law. Such crime causes more serious harm to the correct application and enforcement of state laws than ordinary illegal acts perpetrated by taking advantage of the office. Therefore, supervision over the crime committed by taking advantage of the office is more important than supervision over ordinary illegal acts occurring in the application and enforcement of laws.

Supervision over the crime committed by taking advantage of the office is designed to determine whether or not such crime occurs, give proper punishment for it, prevent and reduce it, and ensure the correct application and enforcement of state laws. People's procuratorates exercise supervision over such crime which has occurred, which is a kind of subsequent supervision. This feature of supervision over the crime committed by taking advantage of the office determines that conducting investigation is the necessary means to supervise it.

First, we can discover the crime committed by taking advantage of the office only through investigation. Clues to the criminal cases perpetrated by taking advantage of the office come from various channels. However, clues only show that the criminal cases committed by taking advantage of the office may have occurred, but do not mean that they have occurred and that the offenders and the circumstances of such crimes are known to the public. Only by investigation can people's procuratorates finally determine whether or not such crimes have occurred, who the offenders are and what the circumstances of crimes are. In this way, such crimes can be exposed promptly and can be placed under the supervision of procuratorial organs.

Second, only by investigation can people's procuratorates discover and determine the crimes committed by taking advantage of the office and transfer the criminal cases perpetrated by taking advantage of the office to the adjudicatory organs for trial, so that offenders will be given due punishment. People's procuratorates cannot clarify the facts of the crime committed by taking advantage of the office without investigation and consequently cannot transfer the cases to the courts for trial. Prosecution of the crime committed by taking advantage of the office will become empty talk.

Third, supervision over the crime committed by taking advantage of the office is different from legal supervision over other ordinary crimes. Legal supervision over other ordinary crimes can be exercised by means of arrest and prosecution, and special investigative organs (public security organs) which conduct

investigation. However, public security organs cannot first investigate the crime committed by state personnel by taking advantage of the office and then transfering the criminal cases to procuratorial organs for handling. This is determined by the following features of the crime committed by taking advantage of the office:

(1) The subject of the crime committed by taking advantage of the office is state personnel. Most of the personnel have some administrative powers, and some are senior officials. They have close social relations in administrative organs, and they are protected by other officials. The organs for investigating their crimes can only be special organs which are not administrative organs. It would be futile for public security organs, which are administrative organs, to investigate the crime committed by state personnel who have administrative powers and take advantage of their office.

(2) Offenders have a high educational level and professional knowledge, make use of intelligence in criminal activities and often take advantage of their legal capacities. These criminal cases are more covert and cunning than other criminal cases.

(3) Unlike homicide, theft and other ordinary criminal cases, it is hard to differentiate between guilt and innocence concerning the crime committed by taking advantage of the office. Therefore, this sets high demands on the knowledge about law which the personnel for handling cases must master. In our country procuratorial organs, administrative organs and adjudicatory organs are equally important. Procuratorial organs exercise procuratorial power independently. According to the provisions of the Public Procurator Law, public procurators must be university graduates. Therefore, the power to investigate the crime of embezzlement and bribery committed by taking advantage of the office can only be exercised by procuratorial organs. Investigation of the criminal cases perpetrated by taking advantage of the office is the necessary means for procuratorial organs to exercise supervision over the such crime.

III. PROCURATORIAL ORGANS EXERCISE SUPERVISION OVER CRIMINAL PROCEEDINGS ACCORDING TO THE LAW

In criminal proceedings, people's procuratorates are special organs for legal supervision which perform the functions and powers of legal supervision.

Exercising legal supervision to determine whether litigation proceeds impartially according to the law is the special function and power entrusted to procuratorial organs by the law. According to the law, people's procuratorates exercise legal supervision over criminal proceedings in such concrete ways as reviewing a case to make a decision to approve arrest, examining prosecution, and appearing in court for public prosecution. In other words, people's procuratorates successfully exercise legal supervision by handling cases. Handling cases is the most effective means for procuratorial organs to exercise legal supervision. Procuratorial organs' functions and powers in litigation come from legal supervision, and legal supervision is successfully exercised in litigation.

A. Supervision over Filing Cases

The Criminal Procedure Law of the People's Republic of China stipulates that people's procuratorates exercise supervision over filing cases mainly in the following two aspects:

1. Article 87 of the Criminal Procedure Law stipulates that "if a people's procuratorate thinks that a public security organ does not file a case for investigation which should be filed for investigation or if a victim thinks that a public security organ does not file a case for investigation which should be filed for investigation and presents the case to the people's procuratorate, the people's procuratorate should require that the public security organ explain the reasons for not filing the case. If the people's procuratorate thinks that the reasons for not filing the case given by the public security organ are untenable, the former should send a notice of filing the case to the latter. After the public security organ receives the notice, it should file the case."

From this regulation, we can know the following things:

(1) In exercising supervision over filing cases, people's procuratorates should focus on the cases which public security organs should file for investigation, but do not file.

(2) A people's procuratorate has the right to require that a public security organ explain the reasons for not filing a case.

(3) If the public security organ's reasons for not filing the case are untenable, the people's procuratorate should send a notice of filing the case to the public security organ. The notice is mandatory, so the public security organ must carry it out.

(4) After the public security organ receives the notice, it must file the case which should be filed. This shows that procuratorial organs perform the function of prosecuting crimes on behalf of the state. This is also a necessary reflection of procuratorial organs' rights of supervision and public prosecution. In applying this regulation, people's procuratorates should focus on the cases which public security organs do not file for investigating and affixing legal responsibility for crimes. Such cases mainly come from those cases which are discovered by people's procuratorates in the process of reviewing cases to make decisions to approve arrest and prosecution, which are presented to people's procuratorates by victims and which are entrusted or transferred by the relevant departments under special circumstances.

2. Article 18 of the Criminal Procedure Law stipulates that "when people's procuratorates need to directly handle other major criminal cases perpetrated by the personnel in state organs who take advantage of their functions and powers, with the decision of people's procuratorates at and above the provincial level, people's procuratorates can file them for investigation and prosecution."

These cases mainly have the following three characteristics:

(1) The subject of crime is personnel in state organs.

(2) These cases must be major cases perpetrated by state personnel who take advantage of their functions and powers.

(3) The filing of these cases must be specially examined and approved, that is, with the decision of people's procuratorates at and above the provincial level. This regulation gives people's procuratorates the right to supervise cases in the process of filing and conducting investigation, with a view to giving full play to people's procuratorates' functions of legal supervision, solving the problems of not filing cases even if there are cases, not investigating and affixing legal responsibility for crimes and replacing penalty with fines in criminal judicial practice and

ensuring that the criminal responsibility of all criminals is investigated and affixed. By doing so, people's procuratorates exercise the right of prosecution for some cases. This does not mean that people's procuratorates exclusively exercise the right of investigation enjoyed by other organs. People's procuratorates exercise supervision with a view to tightening supervision over law enforcement, promoting strict law enforcement and ensuring the unified and correct implementation of state laws.

In light of judicial practice, such cases mainly include the following:

(1) Cases perpetrated by the personnel in state organs which the relevant organs do not file to investigate and affix legal responsibility and which the relevant organs still do not affix even if people's procuratorates send notices of filing cases for investigation;
(2) Cases in which fines replace penalty, which are handled too leniently and in which the relevant organs still do not rectify illegalities even if people's procuratorates urge the relevant organs to rectify them;
(3) Cases in which people do not reach a consensus on whether these cases constitute crimes and people's procuratorates think it necessary to investigate and affix legal responsibility according to the law;
(4) Cases involving several crimes, of which some crimes fall under the jurisdiction of people's procuratorates, and others fall under the jurisdiction of public security organs or other departments, over which people's procuratorates have proper jurisdiction or which the latter persist in not handling;
(5) Cases in which there are disputes over jurisdiction, or in which the organs with the right of jurisdiction refuse to investigate or do not file for investigation for a long time; and
(6) Cases in which specific organizations entrust the people's procuratorates directly to file for investigation and prosecution.

This last regulation is a flexible regulation on people's procuratorates' direct filing of cases for investigation and prosecution. People's procuratorates should strictly carry out this regulation and cannot arbitrarily increase cases directly handled by them. With regard to the ordinary cases in which public security organs should file for investigation, but do not file, people's procuratorates should require that public security organs explain the reasons for not filing them. If people's procuratorates think that the reasons for not filing cases given by public security organs are untenable, the former should notify the latter of filing cases and the latter should do so. In principle, public security organs should file such cases for investigation. If public security organs give up filed cases which indeed have great impact, cause serious consequences and conform to this regulation, people's procuratorates can file them for investigation and prosecution according to this regulation.

B. Supervision over Carrying out Arrest Decisions

Article 68 of the Criminal Procedure Law of the People's Republic of China stipulates that "after conducting a review of a case that a public security organ has submitted for approval of arrest, a people's procuratorate, according to the differing circumstances, shall make a decision to approve arrest or not to approve arrest. The public security organ should immediately carry out the decision to

approve arrest and should promptly notify the people's procuratorate to explain the reasons for not approving arrest. If there is a need to conduct supplementary investigation, the people's procuratorate should notify the public security organ for doing so." Article 69 stipulates that "in cases where the people's procuratorate does not approve the arrest, the public security organ shall, immediately after receiving the notice, release the detained person and should promptly notify the people's procuratorate of the circumstances of the release." Article 73 stipulates that "if a people's court, a people's procuratorate and a public security organ discover that improper coercive measures are taken to deal with a suspect or a defendant, they should promptly abandon or change them. If a public security organ releases the arrestee or changes the arrest measures, it should notify the people's procuratorate which originally approved the arrest."

According to these regulations, the people's procuratorates exercise supervision over carrying out arrest decisions in the following aspects:

(1) Public security organs must immediately carry out the decisions to approve the arrest made by people's procuratorates and should promptly notify people's procuratorates of the circumstances for carrying them out. The circumstances for carrying out these decisions include whether or not offenders have been seized and arrested, where they are detained, and the explanation of the reasons for failure to arrest offenders if they are not seized.

(2) Public security organs must immediately release detained persons if procuratorial organs decide not to approve arrest and should promptly notify people's procuratorates of the circumstances of the release, such as whether or not suspect is released and such coercive measures as allowing a suspect to obtain a guarantor and await trial out of custody and allowing him to live at home under surveillance should be taken.

(3) If public security organs discover that improper coercive arrest measures have been taken to deal with suspects and abandon and change coercive arrest measures, they should notify the people's procuratorates which originally approved the arrest. If people's procuratorates hold different views, they can urge public security organs to rectify improper coercive measures.

   (a) Reviewing cases and making decisions to approve arrest are the functions of procuratorial organs, and other organs cannot make such decisions arbitrarily;

   (b) The organs for executing arrest must immediately carry out arrest decisions; and

   (c) Efforts should be made to tighten supervision over carrying out arrest decisions. The circumstances for arrest, releasing detained persons and changing coercive measures should be reported to people's procuratorates promptly.

After people's procuratorates decide whether or not to approve an arrest, they should pay great attention to tightening supervision over the notices and activities concerning public security organs' carrying out arrest decisions, releasing arrested suspects or changing coercive measures. If people's procuratorates discover illegalities, they should request public security organs to rectify them. If public security organs improperly change arrest measures and release arrested suspects, or after people's procuratorates urge public security organs to rectify their mistakes

and public security organs do not do so, people's procuratorates should make arrest decisions and request public security organs to carry them out.

C. Supervision over Investigation

People's procuratorates exercise legal supervision according to the law to determine whether the criminal investigation conducted by public security organs is legal. They exercise supervision throughout the process of investigation conducted by public security organs, including collecting evidence and taking coercive measures to arrest criminal suspects. Such supervision seeks to identify mainly the following:

(a) Extorting a confession from a suspect and inducement leading to confession;
(b) Obtaining testimony and collecting evidence from victims and witnesses through such illegal means as physical punishment, threat and inducement;
(c) Falsifying, concealing, destroying, changing and obliterating evidence;
(d) Intentionally creating injustices;
(e) Engaging in misconduct to seek selfish ends, conniving with and harbouring offenders;
(f) Taking advantage of the office to seek illegal interests in the process of investigation and preliminary trial;
(g) Embezzling, misappropriating and changing illegally acquired money and goods and interest;
(h) Taking, carrying out, changing and invalidating measures and regulations in violation of the Criminal Procedure Law;
(i) Violating the regulations on the time-limit for handling cases; and
(j) Perpetrating other acts in violation of the relevant provisions of the Criminal Procedure Law.

People's procuratorates exercise supervision over investigation by reviewing cases to make decisions to approve arrest and examining prosecution. Meanwhile, in participating in the investigation conducted by public security organs, undertaking supplementary investigation of cases and handling offence-reporting and accusations, people's procuratorates can discover illegal acts perpetrated by public security organs in the process of investigation. People's procuratorates should conscientiously examine the applications for withdrawal of the responsible persons in public security organs and send personnel to participate in discussions of major cases held by public security organs, if necessary. If in reviewing cases people's procuratorates think it necessary to conduct reinspection and re-examination concerning the inspection and examination undertaken by public security organs, they can require that public security organs conduct reinspection and re-examination and can also send procuratorial staff to participate in reispection and re-examination. With regard to the illegal acts which have been discovered, people's procuratorates can orally notify public security organs to rectifying them or send *the Notices of Rectifying Illegal Acts*. If the circumstances are serious and the cases constitute crimes, people's procuratorates should investigate and affix criminal responsibility according to the law.

D. Supervision over Adjudication

Article 169 of the Criminal Procedure Law stipulates that "if people's procuratorates discover that people's courts violate the litigation procedure prescribed by the law in trying cases, they have the right to notify people's courts of rectifying the wrong acts." We should understand this regulation in two aspects.

First, the legal supervision over the people's courts' trial of criminal cases and over court hearings exercised by people's procuratorates is the function and power of people's procuratorates, which function as state organs for legal supervision. People's procuratorates should perform this function and power, and public procurators cannot simply exercise this function and power personally. Therefore, people's procuratorates should exercise this supervision according to some prescribed procedures and request people's courts to rectify the wrong acts.

Second, in court hearings, people's procuratorates should supervise the people's courts' violation of the relevant procedures prescribed by the Criminal Procedure Law in trying cases. When public procurators discover that people's courts violate the litigation procedure prescribed by the law in court hearing, they should promptly report this to their procuratorates and request people's courts to rectify mistakes in the name of people's procuratorates. People's courts should accept the opinions of people's procuratorates, promptly rectify their mistakes, and notify the people's procuratorates of the circumstances of the rectification.

It should be pointed out that the provisions of the law do not require that people's procuratorates exercise supervision over court hearings in written form after the court adjourns. If a public procurator who appears in court discovers that the court hearing seriously violates the litigation procedure prescribed by the law, in the court he can put forward his opinions to the court. If the court does not accept his opinions and the violation of the litigation procedure prescribed by the law may affect the fair trial, the public procurator can request for the adjournment of the hearing. After he reports this to the chief procurator (except for the case in which the chief procurator appears in court), he can request the court to rectify its mistakes in the name of the procuratorate. Supervision over court hearings is a component of the right of legal supervision, that is, procuratorial power. People's procuratorates should exercise this right, and individual public procurators should exercise legal supervision according to Article 6 of the Public Procurator Law. Public procurators perform their duties, thereby enabling people's procuratorates to perform their functions and powers of legal supervision. When public procurators appear in court, people's procuratorates entrust the task of supervision over court hearings to them. When public prosecutors appear in court, they can put forward their opinions about the violation of the procedure prescribed by the Criminal Procedure Law in the process of court hearing. If a collegiate bench is formed illegally or if a case which should not be tried in public is tried in public, the litigants have the right to apply for withdrawal and put forward their opinions about the relevant problems in the court trial. If public procurators discover that the procedures violate the provisions of the law in the court trial, they can put forward their opinions to the court. This is beneficial to rectifying mistakes promptly and ensuring a fair and legal court trial. This does not impair the dignity of the court.

E. Supervision over the Execution of Punishment

Article 215 of the Criminal Procedure Law stipulates that "the organ which approves temporary execution of a sentence outside prison should send a copy of the approved decision to a people's procuratorate. If the people's procuratorate thinks it improper to temporarily execute a sentence outside prison, it should give its written opinion to the organ which approves temporary execution of a sentence outside prison within one month from the

day it receives the notice. After the organ which approves temporary execution of a sentence outside prison receives the written opinion given by the people's procuratorate, it should immediately reexamine the decision."

Article 222 of the Criminal Procedure Law stipulates that "if a people's procuratorate thinks that a people's court improperly makes a decision on a reduction of sentence or parole, it should give its written opinion about rectifying mistakes to the people's court within 20 days after the former receives a copy of the decision. The people's court should form another collegiate bench to try the case within one month after it receives the written opinion about rectifying mistakes and gives final ruling."

Article 224 of the Criminal Procedure Law stipulates that "the people's procuratorate exercises supervision to determine whether or not the execution of punishment by the executing organ is legal. If the people's procuratorate discovers illegalities, it should notify the executing organ of rectifying them." According to the provisions of the law, the procuratorial organs supervise the execution of punishment by the executing organs, such as prisons and organs responsible for supervising and controlling offenders. The scope of supervision does not include the other activities of the organs responsible for supervision and controlling offenders, such as production and life. The procuratorial organs exercise procuratorial supervision over illegal acts which occur in execution of a sentence, control of the term of penalty, imprisonment management, change in the execution of a sentence, termination of the execution of a sentence and management of supervision and control of offenders exercised by the executing organs.

THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

*Patricia Cordero Vargas**

PREFACE

The main topic "The Role and Function of Prosecution in Criminal Justice", generates a big general interest, and in my particular case, I feel drawn to the chance to obtain valuable knowledge which will help me to better perform my duties.

I have been working in the criminal prosecution area for seventeen years. Sometimes I have felt very satisfied by having cooperated in serving justice. However, on other occasions, I have felt a sour taste in realizing that the system is insufficient and that some transgressors triumph because their crime is not proven.

I firmly believe that disappointments make us stronger, and also, that we never lose courage in our obligation to cooperate in punishing the offender, releasing the innocent and transforming our society into a better one each day.

Thanks to the Government of Japan, to the Japan International Cooperation Agency and to the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) for giving me—on behalf of my country—the opportunity of improving our knowledge in the hope that our criminal justice administration system could be a source of pride for Costa Ricans.

Patricia Cordero Vargas

I. INTRODUCTION

Modern societies observe with alarm and consternation an increase in crime, not only in quantity but also in quality. More and more, a greater degree of violence is evident in the offender's behavior. It is enough to open the newspapers pages and observe that more frequently than expected there is a youngster who kills an elderly woman just to steal a few coins, a bank guardian has been murdered during an assault, or a child abused by his teacher. Faced with this situation, state intervention becomes imperative. By means of the penalties foreseen in the laws, the state is trying discourage this damaging behavior from affecting the peaceful coexistence of society.

It is true that it is the state which possesses the function of detecting, prosecuting and judging crimes, because it is impossible nowadays to think in terms of private revenge. However, there must be a balance between the penalty or punishment imposed on the transgressor and the absence of abuse of public power. To avoid abuse, the state must have an instrument which is subject to the law (the Legality Principle). It is known as the Criminal Procedure Law. In order to find the origins of modern procedure law, we must go back to the French Revolution and the ideas of the thinkers who preceded it.

The Republican Movement was established at the end of the XVIII century during the French Revolution. This movement fought very hard in favor of the division of powers that prevented the establishment of an undesirable concentration of powers in the state.

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In relation to justice administration, the big change of that period was the abolition of cruel and abusive inquisitorial procedures in which an anonymous accusation was enough to start a procedure against any person, and could even finish in death. Basically, the judgement originated from apparent transgressions from moral or religious norms, and of course, this was a valuable instrument of political control allowing the king and his followers to eliminate anybody who disagreed with his dispositions.

The Compound (Mixed) System appeared in 1808, with the promulgation of the French "Code d'instruction criminelle". This system has elements from the accusatorial system, takes the most valuable part of the inquisitorial system, and has the objective of proceeding the process in two different stages: basically, one is written, and the other is oral and definite, i.e., the trial.

This system, which has been in force in the majority of the Latin American countries—is also ruling today in Costa Rica, and an examining judge (known as Juez de Instrucción) is in charge of the investigation.

The character of a judge in charge of the investigation is like a viceroy taken from the authoritarian ideology and the power concentration which ruled before the French Revolution. The modern tendencies have demonstrated the inconveniences of this procedure, since the investigation in the charge of a judge is rigid, slow and different in each jurisdiction.

The nature of today's crime requires a quick and effective procedure that responds to a uniform strategy, mainly to fight non-conventional crime—in which big criminal organizations are involved—which possesses many resources, and, therefore, is hard to fight.

We—those who fight against crime—cannot waste resources in pursuing irrelevant matters, and we must direct our efforts against behaviors that seriously injure society. It is desirable to find a unified strategy to fight crime in all modern societies, as in Italy which developed a unified front to attack the Mafia.

Besides the inconveniences mentioned about the investigation by the examining judge, it is pointed out that the confusion of duties performed by just one person is not so desirable. The judge has the obligation of watching over the individual's rights, and at the same time, he is obligated to gather evidence against the same individual. Consequently, it is very difficult to keep objective and impartial, and it is highly probable that in a certain moment of the investigation, the judge—as a human being—could take sides in one or another sense.

To avoid those kinds of situations, the new procedure law tries to entrust the investigation to an independent entity not subjected to the rigidity imposed by the jurisdiction, which also meets the expectations of efficiency in the preparation of the penal action. Moreover, this could facilitate achieving more control between investigators and judges where the system of checks and balances, taken from the republican system of government, resulting in the raising of the state "ius puniendi".

The investigation assigned to a prosecutor allows each person to assume their corresponding role in the process: the judge, watches out for the fulfillment of its legality and consequently, that the rights of the parties are protected, including, of course, the accused; and the prosecutor, acting on behalf of society, collects all evidence that links the accused to the crime and in general, fights crime. Criminal investigation strengthens the principles of oral and immediate evidence, because when appearing in court, the prosecutor knows each and every piece of evidence that will serve as a basis for the indictment; and the judge will know of them only when presented at trial.

Another advantage of the prosecutor's investigation is that it diminishes delays in the administration of justice by eliminating the obligation of a written and formal procedure, which on many occasions forced persons to face a long process: months or even years.

The flexibility in the investigation by prosecutors will allow them to focus their attention on the really damaging behaviors of social groups. As it is pointed out on many occasions, criminal activity surpasses the community's ability to fight. No punitive system can attack every crime committed against it. Consequently, there appears the necessity to create a selection system that permits the screening of the state punitive function, whereby serious offenses are punished, and alternatives are sought which discourage petty conduct that disrupts normal coexistence without requiring direct intervention from the state.

It is true that when we talk about an investigation entrusted to a prosecutor, we assume that he or she must be objective and neutral. He must respect all the rights and guarantees of the defendant and the parties must be recognized by the political constitution and international law.

Besides, it is necessary that the prosecutor keep excellent relations with the police, since prosecutors essentially link judges and police.

Another important relationship to be kept is the one between the prosecutor and the victim, given that the latter charges the prosecutor with the rescue of his rights. To achieve this, the prosecutor in charge of the case must make the best use of his human and material resources in order to locate the corresponding proof and present it to the court in an adequate way. Afterwards, the judge is responsible for the final judgement.

Costa Rica, a democratic republic located in the heart of Latin America, counts with a Public Ministry assigned to the Judiciary Power. It functions since 1973 with a mixed criminal procedure system, and it has two very distinct stages: the first one, almost totally written, encharged to an examining judge, and the second one, oral, realized at the public trial.

The Public Ministry is headed by the Prosecutor General and the Attached Prosecutor General, both appointed by the Supreme Court of Justice. The prosecution personnel is appointed by the Prosecutor General.

Only public prosecutors have the authority to initiate prosecution, and private prosecution is not allowed.

II. BRIEF VIEW OF THE CURRENT LEGISLATION

In Costa Rica, public prosecutors handle two types of offenses called "public action crimes". The first encompasses those offenses which are punishable by a fine or three years' imprisonment. The second consists of those offenses punishable by more than three years' imprisonment. At the trial stage, the former are handled by a single judge once the prosecutor has finished the investigation.

For those serious crimes punishable by three or more years of imprisonment, a different procedure called "formal instruction" in the charge of an examining judge is necessary. Specifically, when an offense is reported, all initial investigations must be done by the police. When they are finished, the file must be delivered to the prosecutor, who will make a "Requirement of Formal Instruction" to the examining judge in accordance with Article 170 of the Criminal Procedure Code. The examining judge will handle the matter by receiving the statements of the accused and the witnesses, and requesting that the technical proof and any other evidence that he deems necessary be provided. At this stage, the function of the prosecutor is just to be vigilant that all procedures are correct

and that the necessary evidence is included in the case file. If the prosecutor disagrees with the judge, he is allowed to appeal to a higher court. Once the investigation is concluded, the examining judge delivers the case file to the prosecutor, who will make the indictment (C.P.C. art. 338). A collegiate body of three judges then takes cognizance of the matter for trial.

The trial stage is basically the same for the two categories of crimes mentioned above. First the indictment is read to the defendant so that he or she can know the contents of the accusation. Then the statements of witnesses are received orally and the documentary evidence are also read (C.P.C. arts. 369 to 391). Once this procedure is concluded, the prosecutor and the defense counsel will make the final oral arguments, and then the final step is the sentence given by the tribunal.

III. THE NEW LEGISLATION

Starting January 1, 1998, the New Criminal Procedure Code will be in force. It is modern and inspired by the German procedure ordinance and the procedure codes of Guatemala, Italy and Portugal. Now, the preliminary investigation of a penal action will be entrusted to the Public Ministry.

This modern procedure law is structured into three well-defined parts:

1. Preparatory. The main objective is to collect the necessary elements for making the indictment.
2. Intermediate. This part is assigned to a judge who controls if the indictment is in order, it keeps the forms, and it contains enough fundamentals to be viable.
3. Trial. At this stage, the issue will definitely be resolved, concluding if the accusation of the prosecutor has or not the right to be.

From these three parts, the first and the last are the most important ones, and there is a big relation between them. This new change has also imposed a big change of minds of the members of the Public Ministry.

Many prosecutors who have been working behind a desk up to now, must leave their offices and investigate and work side by side with the police. The prosecutor will no longer be a spectator waiting for the evidence to be given by the police, rather he must personally direct the investigation, pointing out what could be a necessary proof to solve a case (New C.P.C. art. 62).

All of this ratifies the necessity—already mentioned—that the relations between the prosecutor and the police must be excellent and respectful, because this is the only way in which both could be efficient and worthy of mention.

The use of resources must be rational and oriented towards fighting the acts that actually injure the society. Also alternative solutions must be sought like imposing fines, community work or certain obligations for those who disturb the social peace, but who do not really commit offenses that require strong punishment by the state.

Undoubtedly, the new legislation poses new challenges. We know that all changes may present difficulties, but we have the hope that they will be surpassed. Also, we know that we will adapt to this new form of crime fighting successfully, since we are convinced that all human beings deserve a better place to live.

The new code will greatly strengthen the Public Ministry, and consequently, the Attorney General of Costa Rica, who is responsible for establishing criminal policy. Up to now, this office has taken an active role in criminal policy.

The fact that the Costa Rican Public Ministry is dependent of the Supreme Court of Justice has prevented a true development of the procedure to be followed in regard to criminal prosecution in the

heart of the entity in charge of it. There is much criticism about this dependence on the Judiciary Power. Many jurists have pointed out the necessity of giving a constitutional power to the Public Ministry, and, at the same time, its own budget and freedom to delineate the rules to be followed in the country against the daily increasing criminality, as it is in place in many parts of the world.

However, the present reform to which I refer above has not given the Public Ministry such independence. Nonetheless, we think that in the near future the imminent need of cutting the ties between the prosecution and the Supreme Court of Justice will come. It is probable that the next legal battle in our country will be about this aspect.

It is important to point out that the 1998 Code will provide the Public Ministry with certain powers previously not available. Nowadays, penal action is obligatory. This fact implies that there is no possibility of negotiation with the accused, and obviously, the investigation becomes difficult because it is impossible to count on the testimony of some persons who know criminal activity from the inside. The only exception to this rule found today is as to drug matters, in which it is possible to plea bargain when a subject who committed a certain kind of offence decides to give information in exchange for less severe treatment by the prosecutor.

Starting on January 1, 1998, it will be possible to make certain negotiations in other types of offences, not only in matters related to drugs. This will facilitate our work in the sense that the prosecution will have a tool with which to screen some important cases.

However, these negotiations are allowed as to all offenses. The law specifically delineates when such negotions are permissible. Nonetheless, we consider this a great advancement in regard to the administration of justice.

Any proceedings that lead to a penal prosecution will be subject to the supervision of a judge, called a "Guarantees Judge", whose role is to ensure that an individual's fundamental rights are respected. Similarly, some acts can only be performed by the prosecutor with the prior authorization of the Guarantees Judge, for example, the official entry into a house.

This is due to the fact that our judicial system is fairly protective of an individual's rights, and our Political Constitution clearly establishes that certain rights can only be altered by the intervention of a judge of the Republic.

Another example of constitutional protection is the obligation imposed on the State to prove, beyond a reasonable doubt, the guilt of the accused. The "Innocence Principle" prevents the inversion of the burden of the proof. However, as a consequence, certain types of complex investigations are difficult, like those related to money laundering, a prevalent crime nowadays.

Private property is very zealously protected in our juridical system, and thus, a judge's intervention is necessary to deprive somebody of his property.

Also, the deprivation of freedom is a very restricted field, which can be ordered only by a state judge. The Public Ministry may only detain an accused for the limited period of 24 hours, in addition to detention at the investigation stage. Additionally a judge's order is necessary to keep the accused in prison.

As can be seen, prosecutorial activity is not so flexible, and it is under the permanent control of the judicial authorities. However, I believe that much progress has been with the new legislation. I also believe that, after making some necessary adjustments during the first applications of the new procedure, the results will be seen next year.

IV. RELATIONSHIP WITH THE POLICE

A coordinated effort and good relations between prosecutors and police officers will allow success both in investigations and, in particular, in fighting crime. Both constitute the long arm of the law and how it is materialized.

Costa Rica has a judicial police force that also depends on the Judicial Power, but has administrative independence. Under the present system, it is very common for the police officers to have direct relations with judges, of whom they request different orders. Moreover, whom the police tends to occasionally inform first a judge, about an offense and thereby relegates the prosecutor.

However, once the new law takes effect, the police must first inform the prosecutor of all criminal acts, who will then set the guidelines to be followed in an investigation (N.C.P.C art. 283). Some police officers are worried about this, because suddenly Public Ministry officials would be assuming roles that have not had before and for which they may not be ready.

To address these concerns, prosecutors have been working very hard to inform the police that they will continue with its administrative role, and that the directions of prosecutors are just for cases under investigation. Moreover, it is necessary to strengthen the human relations between both groups in order for each to perform their duties under the best conditions of good fellowship and mutual cooperation.

V. RELATIONSHIP WITH THE VICTIM

Finally, it seems appropriate to make a few comments in regard to the victim, who has been practically disregarded within the criminal justice system.

Nowadays, when a victim or any other person reports a crime, he may be requested on one or several occasions to provide testimony during the investigation. As the notion of private revenge becomes unacceptable, and the concept that the state is the only entity authorized to punish takes root, information to the victim is omitted. The victim is only called again to render testimony during the trial and has no right to dissent from what is happening. This seemingly unfair treatment has given rise to commentary that the victim has been re-victimized by the criminal justice system.

In modern times, "victimology" tries to give the victim back his rights, reminding him that they had never been lost. Victimology presumes that the victim deposits his rights into the prosecutor's hands, and that the latter is obligated to preserve such rights, by informing the victim and considering all aspects that the victim wants to give testimony about, because, after all, he is the one who knows up to what point the offence has affected him.

VI. CONCLUSION

Nobody can deny that prosecutors in Costa Rica face an important challenge not only because the techniques developed by criminals are more sophisticated each day, but also because the new procedure code represents an opportunity to achieve the fair and efficient application of the law.

It is desirable that the changes introduced in the legislation produce an efficient and high quality criminal justice system, where the right to defense can be plainly exerted by any of the parties, and where it is not forgotten that the state's punitive power is restricted and delegated by the citizenry. Also, it must be used to strengthen democracy and to improve coexistence. However, it must never be used as an instrument of domination.

THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

*Madan Lal Sharma**

I. INTRODUCTION

India is a Union of States and is governed by a written constitution which came into force on 26 November 1949. India consists of 25 states and 7 Union Territories. Due to its colonial heritage, India follows the Anglo-Saxon common law justice system. Article 246 of the Constitution provides for three lists which are enumerated in 7th Schedule of the Constitution. List-1 is the Union List which enumerates the subjects on which the Parliament of India has exclusive power to make the laws. List-2 is the State List which enumerates the subjects on which the legislature of a state has the power to make laws. The third list is the Concurrent List which enumerates subjects on which both the Indian Parliament and the Legislatures of the state can enact laws, but if there is any conflict or inconsistency between the laws made by the Indian Parliament and the legislature of any state, the law enacted by the Union Parliament will have over-riding effect. Importantly, the "Public Order" and the "Police" are enumerated in Entries 1 and 2 respectively of the State List, meaning thereby that all matters relating to the organisation, structure and regulation of the police force fall within the ambit of the states. However, the 'Criminal Laws'and the 'Criminal Procedure' are enumerated in List-3, i.e., the Concurrent List. Both the Indian Parliament and state legislatures have the powers to make substantive and procedural laws in criminal matters. The states can also enact laws on local and special subjects. Thus, under the constitutional scheme, the basic criminal laws, i.e., the Indian Penal Code, the Code of Criminal Procedure and the Indian Evidence Act have been enacted by the Indian Parliament. The Indian Police Act has also been enacted by the Indian Parliament. The states have also enacted laws on several local and special subjects. Some states in India have also enacted their own Police Acts. The Indian Police Act, 1861, however, is the basic statutory law governing the constitution and organisation of police forces in the states.

Article 14 of the Constitution provides for equality before law. Article 21 guarantees protection of life and personal liberty. Article 20 provides protection against double jeopardy. No person can be prosecuted and punished for the same offence more than once. Article 39-A mandates the states to secure equal justice for all. It also provides for free legal aid in respect of indigent persons. Article 50 is important as it provides for the separation of the judiciary from the executive in the public services of states.

II. DISTRICT—THE BASIC UNIT OF ADMINISTRATION

In each state, there are a number of districts. The District is governed by a triumvirate consisting of the District Magistrate, the District Superintendent of Police and the District and Sessions Judge. The District Magistrate is the chief executive officer of the district and he belongs to the Administrative Service. The police in the district functions under his general direction and control. The District

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Superintendent of Police is the head of the police force in a district. He is responsible for the prevention and detection of crime and the maintenance of law and order, subject to such directions as may be issued by the District Magistrate. In practical terms, the District Magistrate has no role in criminal investigations. The District and Sessions Judge is the head of the judiciary in a district. He belongs to the higher state judicial service. The entire magistracy in the district functions under his control and supervision.

III. CRIMINAL JUSTICE SYSTEM

The criminal justice system has four important components in India, namely, the Investigating Agency (Police), the Judiciary, the Prosecution Wing and the Prison and Correctional Services. A brief mention of their structure and their roles is made here below:

A. Investigating Agency

The police forces are raised by the state under the Indian Police Act, 1861. The basic duty of the police forces is to register cases, investigate them as per the procedure laid down in the Code of Criminal Procedure (to be referred to as the Code hereinafter) and to send them up for trial. In addition to the State Police Forces, the Government of India has constituted a central investigating agency called the Central Bureau of Investigation (CBI) under the special enactment called the Delhi Special Police Establishment Act, 1946. It has concurrent jurisdiction in the matters of investigation in the Union Territories. It can take up the investigation of cases falling within the jurisdiction of the states only with the prior consent of the state governments concerned. There are certain other specialised investigating agencies constituted by the central government, in various departments, namely, the Customs Department, the Income Tax Department, the Enforcement Directorate, etc. They investigate cases falling within their jurisdictions and prosecute them in the courts of law.

Thus, India has both the state police investigating agencies and a central investigating agencies as mentioned above. CBI, however, is the primary investigating agency of the central government.

B. The Courts

The cases instituted by the state police and the Central Investigating Agency are adjudicated by the courts. We have a four-tier structure of courts in India. At the bottom level is the Court of Judicial Magistrates. It is competent to try offences punishable with imprisonment of three years or less. Above it is the Court of Chief Judicial Magistrates, which tries offences punishable with less than 7 years. At the district level, there is the Court of District and Sessions Judge, which tries offences punishable with imprisonment of more than 7 years. In fact, the Code specifically enumerates offences which are exclusively triable by the Court of Sessions.

The highest court in a state is the High Court. It is an appellate court and hears appeals against the orders of conviction or acquittal passed by the lower courts, apart from having writ jurisdiction. It is also a court of record. The law laid down by the High Court is binding on all the courts subordinate to it in a state.

At the apex, there is the Supreme Court of India. It is the highest court in the country. All appeals against the orders of the High Courts in criminal, civil and other matters come to the Supreme Court. This Court, however, is selective in its approach in taking up cases. The law laid down by the Supreme Court is binding on all the courts in the country.

C. Prosecution Wing

It is the duty of the state to prosecute cases in the courts of law. The state governments have constituted cadres of

public prosecutors to prosecute cases at various levels in the subordinate courts and the High Court. I will revert to the subject later when I discuss the structure and functioning of the prosecution wings in the states and the central governments.

D. Prisons and Correctional Services

This is the fourth important element in the criminal justice system. The prisons in India are under the control of the state governments and so are the correctional services.

IV. CONSTITUTION AND STRUCTURE OF PROSECUTION WING

As stated above, the police is a state subject in our constitutional scheme. The primary investigative unit is the police station in India. After due investigation, charge-sheets are filed in the courts concerned as per the provisions of the Code. The cases are prosecuted by the public prosecutors appointed by the state governments.

Prior to the enactment of the Criminal Procedure Code of 1973, public prosecutors were attached to the police department and they were responsible to the District Superintendent of Police. However, after the new Code of Criminal Procedure came into force in 1973, the prosecution wing has been totally detached from the police department. The prosecution wing in a state is now headed by an officer designated as the Director of Prosecutions. In some of the states, he is a senior police officer and in others, he is a judicial officer of the rank of District and Sessions Judge. He is assisted by a number of Additional Directors, Deputy Directors and Assistant Directors, etc.

At the district level, there are two levels of public prosecutors, i.e., the Assistant Public Prosecutor, Grade-I and the Assistant Public Prosecutor, Grade-II. They appear in the Courts of Magistrates. The Director of Prosecutions is responsible for the prosecution of cases in the Magisterial Courts.

In Sessions Courts, the cases are prosecuted by Public Prosecutors. The District Magistrate prepares a panel of suitable lawyers in consultation with the Sessions Judge to be appointed as public prosecutors. The state government appoints public prosecutors out of the panel prepared by the District Magistrate and the Sessions Judge. It is important to mention that public prosecutors who prosecute cases in the Sessions Courts do not fall under the jurisdiction and control of the Director of Prosecutions.

The state government also appoints public prosecutors in the High Court. The appointments are made in consultation with the High Court as per section 24 of the Code.

The most senior law officer in a state is the Advocate General who is a constitutional authority. He is appointed by the governor of a state under Article 165. He has the authority to address any court in the state.

Under section 24 of the Cr.P.C., the central government may also appoint one or more public prosecutors in the High Court or in the district courts for the purpose of conducting any case or class of cases in any district or local area. The most senior law officer of the Government of India is the Attorney General for India, who is a presidential appointee under Article 76. He has the authority to address any court in the country.

The Assistant Public Prosecutors, Grade-I and Grade-II, are appointed by a state government on the basis of a competitive examination conducted by the State Public Service Commission. They are law graduates falling within a specified age group. They join as Assistant Public Prosecutors Grade-II and appear in the Courts of Magistrates. They are promoted

to Assistant Public Prosecutors, Grade-I, and generally appear in the Courts of Chief Judicial Magistrates. On further promotion, they become Assistant Directors of Prosecution and can go up to the level of Additional Director of Prosecution. They, however, do not appear in the Sessions Court.

As mentioned above, the District Magistrate in consultation with the Sessions Judge prepares a panel of lawyers with a minimum of 7 years of experience to be appointed as public prosecutors. They are so appointed by the state government. They plead the cases on behalf of the state government in the Sessions Courts. They have tenure appointments and are not permanent employees of the state government. They are paid an honorarium (not salary) by the state government.

There is now a move to integrate the aforesaid two cadres of public prosecutors with the object to improving the promotion prospects of law officers who join at the lowest level, i.e., Assistant Public Prosecutor, Grade-II. The idea is to promote the Assistant Public Prosecutors, Grade-I to Additional Public Prosecutor or Public Prosecutor, as the case may be, to plead cases in the Sessions Court. If it comes about, this will obliterate the need for appointing lawyers from the open market as public prosecutors to plead cases in the Sessions Courts.

V. PROSECUTION BY CBI

The Central Bureau of Investigation has a Legal Division which plays an advisory and prosecutory role in the organisation. It is headed by a Legal Advisor, who is a deputationist from the Ministry of Law of the central government. This arrangement ensures objectivity of his office. He is assisted by a number of Law officers who are permanent employees of the CBI, namely, Additional Legal Advisor, Deputy Legal Advisors, Senior Public Prosecutors, Public Prosecutors, Assistant Public Prosecutors, etc. These are indicated in descending order of seniority and rank. These officers render legal advice to the investigating officers during the course of investigations as to the viability of proposed prosecutions. Their advice is taken seriously, but they can be over-ruled by the executive CBI officers. Multiple and hierarchical systems of legal advice prevails in the CBI. Legal advice is taken at least at three levels before deciding the fate of a case. After a decision has been taken to prosecute a case, the law officers conduct the prosecution of cases in the courts. The level of a law officer to prosecute a case is directly related to the level of the court, i.e., the higher the court, the higher the rank of a law officer to prosecute it.

Besides, the CBI also engages Special Public Prosecutors from the bar on a daily fee basis in important and sensational cases.

VI. CRIME SCENARIO IN INDIA

In order to analyse the role of public prosecution, it is essential to have some idea about the crime situation prevailing in India. Table 1 gives the total crimes registered under the Indian Penal Code in India (hereinafter IPC) and the share of violent crimes there.

Table 1 shows that the IPC increased by 168.3 per cent in 1991 compared to 1961. The percentage increase during the decade 1981 to 1991 was 21.1 per cent. The crime increased by 4.7 per cent in 1995 compared to 1994.

Apart from crimes under the IPC the police also registers cases under the local and special laws (to be called SLL hereinafter). It would be expedient to have a look at the volume of crimes under the IPC and the SLL as also the rate of crimes (rate of crime is defined as crime per 1.00 lac of population).

Table 1

Year	Total Cognizable Crimes (IPC)	Violent Crimes	
		Incidence	% Total
1953	601,964	49,578	8.2
1961	625,651	55,726	8.9
1971	952,581	124,380	13.1
1981	1,385,757	193,224	13.9
1986	1,405,835	182,119	13.0
1987	1,406,992	179,786	12.8
1988	1,440,356	203,589	14.1
1989	1,529,844	217,311	14.2
1990	1,604,449	234,338	14.6
1991	1,678,375	246,252	14.7
1992	1,689,341	251,952	14.9
1993	1,629,936	232,554	14.3
1994	1,635,251	235,228	14.4
1995	1,695,696	NA	NA

Table 2

Year	Incidence			Rate			% of IPC Crimes Cognizable Crimes
	IPC	SLL	Total	IPC	SLL	Total	
1984	1,358,660	2,916,808	4,275,468	184.7	396.5	581.2	31.8
1985	1,384,731	3,096,481	4,481,212	184.4	412.4	596.8	30.9
1986	1,405,835	2,984,654	4,390,489	183.5	389.6	573.1	32.0
1987	1,406,992	3,589,236	4,996,318	180.1	459.3	639.4	28.2
1988	1,440,356	3,765,669	5,206,025	180.8	472.7	653.5	27.7
1989	1,529,844	3,847,665	5,377,509	188.5	474.0	662.4	28.4
1990	1,604,449	3,293,563	4,898,012	194.0	398.3	592.3	32.8
1991	1,678,375	3,370,971	5,049,346	197.5	396.8	594.3	33.2
1992	1,689,341	3,558,448	5,247,789	194.7	410.1	604.8	32.2
1993	1,629,936	3,803,638	5,433,574	184.4	430.4	614.8	30.0
1994	1,635,251	3,876,994	5,512,245	181.7	430.8	612.5	29.7
1995	1,642,599	3,457,189	5,699,788	179.3	377.4	556.7	32.2

Table 2 gives figures about the incidence of crime under the IPC and SLL, the rate of crime under IPC and SLL, total rate of crime and percentage of IPC crime vis-à-vis, total crimes.

From Table 2, the following trends clearly emerge:

(1) There is an increase in the total volume of crime over the years—both under the IPC as well as under the SLL. IPC crime in 1995 shows an increase of 18.6 per cent compared to 1985. The crime registered under SLL also shows an increase of 11.6 per cent in the aforesaid period.

(2) However, the crime rate for IPC offences shows a slightly declining trend in 1994 and 1995 compared to

1990-91. The downward trend in the crime rate under the SLL is more pronounced, i.e., 8.5 per cent in 1995 compared to 1985.

3) The IPC crime constitutes about one-third of the total cognizable crimes registered in India.

VII. DISPOSAL OF IPC CRIME CASES BY POLICE

Table 3 shows the disposal of IPC crime cases by the police.

The percentage of cases finalised from investigation, on average, is about 80 per cent per year. In other words, only 20 per cent of the cases registered by the police in a particular year remain unfinalized within that calender year. Happily, the percentage of cases in which charge-sheets are filed is going up steadily. This is a positive development showing lesser false registrations and higher police disposal.

VIII. DISPOSAL OF CRIMES BY THE COURTS

The charge-sheets filed by the police are, in fact, inputs for the trial courts. Efficacy of the criminal justice system hinges on the prompt completion of trials and higher conviction rates. The opposite of it would be symptomatic of the systemic failure. Table 4 shows disposal of cases by courts and conviction percentage recorded over the years.

Table 4 shows that the percentage of trials completed is going down steadily. While about 30 per cent trials were completed in 1961 and 1971, the percentage came down to 23.9 per cent in 1981 and to 16.8 per cent in 1991. This percentage has further come down to only 15.5 per cent in 1994.

The conviction rate is also steadily falling over the years. It was 64.8 per cent in 1961, but came down to only 47.8 per

Table 3

Year	Total No. of cases for Inv. (including cases from previous year)	No. of Cases Investigated	No. of Cases Charge-sheeted	% of Cases Investigated	% of Cases Charge-sheeted
1961	696,155	586,279	285,059	84.2	53.6
1971	1,138,588	894,354	428,382	78.5	52.8
1981	1,692,060	1,335,994	740,881	79.0	61.3
1991	2,075,718	1,649,487	1,091,579	79.5	71.3
1993	2,090,508	1,637,712	1,106,435	78.3	72.5
1994	2,077,631	1,612,245	1,109,030	77.6	74.1

Table 4

Year	Total No. of Cases for Trial (including pending cases)	No. of Cases		Percentage	
		Trial	Convicted	Trial Completed	Conviction
1961	800,784	242,592	157,318	30.3	64.8
1971	943,394	301,869	187,072	32.0	62.0
1981	2,111,791	505,412	265,531	23.9	52.5
1991	3,964,610	667,340	319,157	16.8	47.8
1993	4,504,396	752,852	345,812	16.7	45.9
1994	4,759,521	736,797	316,245	15.5	42.9

cent in 1991. The conviction percentage has further come down to 42.9 per cent in 1994. It may be clarified that the aforesaid conviction rate is for both IPC and SLL crimes. If we exclusively take into account the IPC crimes, the conviction rate is still lower.

In 1994, only 16.02 per cent of murder cases were disposed of from trial and the conviction rate was 38 per cent.

As regards cases relating to attempts to murder, 15.75 per cent of cases were disposed of in 1994, the conviction rate being 38.8 per cent. Of under-trial rape cases, 17.75 per cent were disposed of in 1994, the conviction percentage being 30.42 per cent.

The above shows that, generally speaking, only one-sixth of the total under-trial cases were disposed of in 1994 and about one-third of heinous crimes resulted in conviction. This, however, does not take into account subsequent acquittals in the appellate courts.

IX. EFFICACY OF THE CRIMINAL JUSTICE SYSTEM

The courts are constituted by the state government under the Code and cases are prosecuted by public prosecutors appointed by the state government or the central government as the case may be. Even though the National Crime Records Bureau has been collecting data about the disposal of cases by the courts, the statistics do not seem to be authentic. It has been aptly remarked by a wisecrack that the place of a nation on the civilizational scale is to be determined by the manner in which its criminal laws are enforced. Since all the elements of the public justice system are inter-dependent, even the strictest enforcement of law by the police agency will not deliver the goods unless it is supported by the judicial system by way of prompt disposals. The role of the public prosecutor and his performance is also to be judged by his ability to assist the court in this regard.

It is in this context that we are going to have a look at the overall pendency of cases in the country. According to an estimate, there are 21.8 million cases pending in the subordinate courts. About 3.1 million cases are pending in the High Courts. The Supreme Court has a pendency of 22,000 cases only. There are about 11,000 courts working in the country.

The number of pending trial cases under the IPC was 52.8 lacs in 1995 which increased to 56.2 lacs in 1996. Of these, 21.6 per cent have been pending for more than 8 years. The number of cases pending trial for more than 8 years increased from 10.7 lacs in 1995 to 12.11 lacs in 1996, showing an increase of 13.3 per cent.

Table 5 shows the states' accounting for major pendency.

Table 5

State	1995	1996
Maharashitra	1,184,187	1,424,867
U.P.	1,375,588	1,008,558
Gujarat	473,694	619,473
Madhya Pradesh	360,664	497,728
Rajasthan	287,337	368,999
Bihar	231,799	301,360
Pune	74,302	271,318
Orissa	218,954	210,318
Andhra Pradesh	179,635	165,412
Haryana	117,582	132,346
Kanpur	111,594	116,775
Kerala	121,972	114,007
Karnataka	96,646	111,023
Delhi	117,949	110,086
Tamil Nadu	94,273	103,037
Mumbai	84,741	94,890
Assam	72,300	72,300

The pendency of trial cases during the decade 1985-1995 has piled up more than double with a growth rate of 10.6 per cent per annum.

Apart from the IPC cases mentioned above, 69.01 lac SLL cases were awaiting disposal by criminal courts in the country at the beginning of 1995. The disposal percentage in 1995 was 52.2 per cent. As against this, the percentage of disposal of IPC cases was only 18.2 per cent. This is largely explained by the fact that the SLL cases pertain to violations of minor acts like the Gambling Act, the Prohibition Act, and the Motor Vehicle Act and there are tried summarily, resulting in quicker disposals.

As mentioned earlier, the Directorate of Prosecutions in some states is under the control of the Home Department, while in others is under the control of the Law Department. The following section examines which of the two systems is working more efficiently.

A. Prosecution System under the Control of the Home Department

In the states of Tamil Nadu, Madhya Pradesh, Uttar Pradesh, Andhra Pradesh, Delhi, Maharashtra, Jammu and Kashmir, Bihar, and Kerala, the prosecution wing is under the Home Department. The conviction percentage in these states for the last seven years ranges from 67.8 per cent in Tamil Nadu to 17.7 per cent in Kerala. The average percentage of conviction for 7 years is given in Table 6.

Table 6

State	Average Percentage of Convictions of 7 years
Tamil Nadu	67.8
Madhya Pradesh	64.5
Uttar Pradesh	54.0
Andhra Pradesh	51.6
Delhi	47.6
Maharashtra	39.4
Jammu & Kashmir	37.4
Bihar	36.7
Kerala	17.7

B. Prosecution System under the Department of Law

In certain other states, the average percentage of conviction for seven years, again, ranges from 76.4 per cent in Meghalaya to 21.9 per cent in Himachal Pradesh. This is shown in Table 7.

Table 7

State	Average Percentage of Conviction of 7 years
Meghayala	76.4
Pondicherry	72.2
Sikkim	67.2
Chandigarh	65.5
Haryana	61.2
Gujarat	61.0
Manipur	47.6
Goa	44.4
Karnatka	31.9
Himachal Pradesh	21.9

Thus, no clear picture emerges as to which of the two systems is working more efficiently.

X. THE DUTIES AND FUNCTIONS OF A PUBLIC PROSECUTOR

Public prosecution is an important component of the public justice system. Prosecution of an offender is the duty of the executive which is carried out through the institution of the Public Prosecutor. The public prosecutor is appointed by the State, and he conducts prosecution on behalf of the State. While it is the responsibility of the public prosecutor to see that the trial results in conviction, he need not be overwhelmingly concerned with the outcome of the trial. He is an officer of the court and is required to present a truthful picture before the court. Even though he appears on behalf of the State, it is equally his duty to see that the accused does not suffer in an unfair and unethical manner. The public prosecutor,

though an executive officer, is an officer of the court and is duty bound to render assistance to the court. The public prosecutor represents the State and the State is committed to the administration of justice as against advancing the interest of one party at the cost of the other. He has to be truthful and impartial so that even the accused persons receive justice. The public prosecutor plays a dominant role in the withdrawal of a case from prosecution. He should withdraw from prosecution in rare cases lest the confidence of public in the efficacy of the administration of justice be shaken.

The Supreme Court of India has defined the role and functions of a public prosecutor in *Shiv Nandan Paswan vs. State of Bihar & Others* (AIR 1983 SC 1994) as under:

a) The Prosecution of an offender is the duty of the executive which is carried out through the institution of the Public Prosecutor.
b) Withdrawal from prosecution is an executive function of the Public Prosecutor.
c) Discretion to withdraw from prosecution is that of the Public Prosecutor and that of none else and he cannot surrender this discretion to anyone.
d) The Government may suggest to the Public Prosecutor to withdraw a case, but it cannot compel him and ultimately the discretion and judgement of the Public Prosecutor would prevail.
e) The Public Prosecutor may withdraw from prosecution not only on the ground of paucity of evidence but also on other relevant grounds in order to further the broad ends of public justice, public order and peace.
f) The Public Prosecutor is an officer of the Court and is responsible to it.

XI. ROLE OF A PUBLIC PROSECUTOR IN INVESTIGATIONS

Investigations in India are conducted as per provisions of Chapter XII of the Code. Cases are registered under section 154 of the Code. A police officer is competent to investigate only cognizable offences. Non-cognizable offences cannot be investigated by the police without obtaining prior orders from the courts. A police officer can examine witnesses under section 161. However, the statements are not to be signed by the witnesses. Confessions of accused persons and statements of witnesses are recorded under section 164 of the Code. A police officer has the power to conduct searches in emergent situations without a warrant from the court under section 165. A police officer is competent to arrest an accused suspected to be involved in a cognizable offence without an order from the court in circumstances specified in section 41 of the Code. He is required to maintain a day to day account of the investigation conducted by him under section 172. After completion of investigation, a police officer is required to submit a final report to the court under section 173. If a prima facie case is made out, this final report is filed in the shape of a charge-sheet. The accused has, thereafter, to face trial. If no cogent evidence comes on record, a closure report is filed in the Court.

The public prosecutor plays the following role at the investigation stage:

(1) He appears in the court and obtains arrest warrant against the accused;
(2) He obtains search warrants from the court for searching specific premises for collecting evidence;
(3) He obtains police custody remand for custodial interrogation of the accused (section 167);

(4) If an accused is not traceable, he initiates proceedings in the court for getting him declared a proclaimed offender (section 82) and, thereafter, for the consfiscation of his movable and immovable assets (section 83); and
(5) He records his advice in the police file regarding the viability/advisability of prosecution.

After the completion of investigation, if the investigating agency comes to the conclusion that there is a prima facie case against the accused, the charge-sheet is filed in the court through the public prosecutor. It is to be noted that the opinion of the public prosecutor is taken by the police before deciding whether a prima facie case is made out or not. The suggestions of the public prosecutor are also solicited to improve the quality of investigation and his suggestions are generally acted upon. However, the ultimate decision of whether to send up a case for trial or not lies with the police authorites. In case there is a difference of opinion between the investigating officer and the public prosecutor as to the viability of the prosecution, the decision of the District Superintendent of Police is final.

XII. THE ROLE OF A PUBLIC PROSECUTOR DURING TRIALS

As stated above, the public prosecutor is vested with the primary responsibility to prosecute cases in the court. After the charge-sheet is filed in the court, the original case papers are handed over to him. The cognizance of the case is taken by the courts under section 190 of the Code. The trial in India involves various stages. The first and foremost is the taking of cognizance of a case by the court. The second step is to frame charges against the accused, if there is a prima facie case against him. The third step is to record the prosecution evidence. The fourth step is to record the statement of the accused (section 313 of the Code). The fifth step is to record the defence evidence. The sixth step is to hear the final arguments from both sides, and the last step is the prouncement of judgement by the Court. The public prosecutor is the anchor man in all these stages. He has no authority to decide whether the case should be sent up for trial. His role is only advisory. However, once the case has been sent up for trial, it is for him to prosecute it successfully.

A. Withdrawal from Prosecution

The public prosecutor has the authority to withdraw a case from trial under section 321 of the Code. Under the case law, he and he alone has the ultimate authority to withdraw a case from prosecution (AIR 1983 SC 194). But the practice is that he receives instructions from the government and pursuant to those instructions, he withdraws the case from prosecution. The grounds of withdrawal could be many, including:

(1) False implication of accused persons as a result of political and personal vendatta;
(2) Inexpediency of the prosecution for the reasons of state and public policy; and
(3) Adverse effects that the continuation of prosecution will bring on public interest in the light of changed situation.

B. Burden of Proof on Prosecution

It is for the public prosecutor to establish the guilt against the accused in the court beyond a reasonable shadow of doubt. The evidence is in three forms, namely, oral evidence (i.e., statements of witnesses); documentary evidence; and circumstantial evidence. Forensic evidence also plays an important role in varied crimes. In the Indian system, the statement of a witness is recorded by the investigating officer. The

statement is not required to be signed by a witness under the law. The witness is required to appear in the court and prove the facts mentioned by him to the investigating officer at the pre-trial stage and to face cross-examination by the defence lawyer. The public prosecutor conducts the examination-in-chief of a witness and, thereafter, his re-examination, if need be, in order to clarify ambiguity, if any, after a witness' cross-examination. Similarly, the documents cited in evidence are required to be proved by the public prosecutor with the help of witnesses. The forensic evidence is proved through the documents prepared by the experts and also by the testimony of the experts in the court. The experts are also liable to be cross-examined by the defence counsel. On the basis of the facts proved by the oral, documentary and forensic evidence, the public prosecutor tries to substantiate the charges against the accused and tries to drive home the guilt against him. If there is a statutory law regarding presumptions against the accused, the public prosecutor draws the court's attention towards that and meshes it with other evidence on record. While the law requires establishing a prima facie case for charge-sheet purposes, the law for conviction is that the guilt should be proved beyond a reasonable shadow of doubt. The standard of proof in Indian courts is quite high and that largely explains the low conviction rate, particularly in IPC offences. The prosecutor has an immense role. He has to prove the facts. He has to prove the circumstances, and then he has to draw the inferences and convince the court that the arraigned accused alone is guilty of the offences that he has been charged with. This is an onerous task and requires sound legal knowledge, the ability to handle witnesses and the capability to carry the court along with him.

XIII. SPEEDY TRIAL

The concept of speedy trial is enshrined in Article 21 of the Constitution of India. Article 21 reads as under:

> No person shall be deprived of his life or personal liberty except according to procedure established by law.

The Supreme Court in 1997 CrLJ, page 195 has interpreted this Article to mean that right of speedy trial is also a fundamental right. Undeniably, the trials in India drag on for years together. There are several agencies responsible for delays, namely, the police, the lawyers, the accused and the courts. All of them play a contributory role in the delays. While the police agency may be responsible for 25 per cent of delays, non-police agencies are responsible for the rest of it. The public prosecutor, being an officer of the court, can play an important role in ensuring speedy trial. It is his duty to see that the adequate number of witnesses are called at each hearing and none of them goes back unexamined. Similarly, he is to ensure that the documents are put up to the court in time. He has also to ensure that police officers, who generally prevaricate in appearing in the courts, do appear as per the schedule fixed by the court. A good working relationship with the court may help in achieving this end. Not much cooperation can be expected from the defence counsel as experience shows that he is more interested in the delays than in speedy trial because delay means more hearings which, in turn, means more fee for him. This behaviour may be unethical on his part, but this is the ground reality. In this scenario, the role of public prosecutor assumes special significance.

XIV. PLEA BARGAINING

The Indian law does not provide for plea bargaining as it exists in the U.S.A. However, the Law Commission of India has recently recommended to the government that a separate Chapter (Chapter 21-A) be incorporated in the Code to provide for plea bargaining. The system of plea bargaining has been recommended as it is believed that 75 per cent of convictions in the U.S.A. are based on plea bargaining. It is proposed to introduce a plea bargaining system in less grievous offences, to begin with. If this experiment succeeds, it will be extended to grievous offences thereafter.

XV. PUBLIC PROSECUTION AND SENTENCING

In the criminal statutes, varied sentences are provided for different offences. The most serious offence is the crime of murder for which life imprisonment or death is provided. A death sentence is, however, to be awarded in the rarest of rare cases. There are certain statutes which provide for minimum imprisonment, but may exceed the minimum imprisonment so provided. After the court has held the accused guilty, the defence counsel and the public prosecutor are called upon to argue on the quantum of punishment. The courts in India generally believe in the individualisation of sentences. The age, educational background, social status and liabilities of the accused such as infant children, dependent wife and other factors are considered by the court before imposing a sentence. The public prosecutor has to use his discretion in arguing for adequate punishment, keeping in view the circumstances mentioned above. He should exercise the discretion keeping in mind the gravity of the offence, and the facts and circumstances of the case.

Besides, the court has the statutory authority to release a convict on probation in certain offences under the Probation of Offenders Act. The court can release a convict on admonition in cases where the punishment is not more than two years. The public prosecutor should guide the steps of the court in this regard.

The court also has the discretion to release a convict on probation under section 360 of the Code, in the following circumstances:

(1) a convict of more than 21 years of age punished with fine or imprisonment of less than 7 years; and
(2) a convict of less than 21 years of age or any woman not punished with life imprisonment or death.

The court will take into consideration his age, character and antecedents and the fact that he is not a previous convict.

The court can also release the offender on probation of good conduct in other offences excluding offences punishable with death or life imprisonment.

The prosecutor is required to help the court in arriving at a fair and judicious finding in this matter.

XVI. CO-ORDINATION BETWEEN THE POLICE AND PUBLIC PROSECUTORS

Before 1973, the Assistant Public Prosecutors (some of them were police officers) were under the direct control of the District Superintendent of Police. The public prosecutors appearing in the Sessions Courts were drawn from the open market on a tenure basis and they were responsible to the District Magistrates. After the amendment in the Code, Assistant Public Prosecutors have been totally detached from the police department. At present they report to the District Magistrate at the district level and to the Director of Prosecutions at the state level. The status of the public prosecutors appearing in the Sessions Courts remains unchanged. There is no institutionalised

interaction or co-ordination between the investigating agency and the prosecuting agency. The police files are sent to the Assistant Public Prosecutors for their legal opinion at the pre-trial stage. As they are not responsible to the district police authorities, the legal advice is sometimes perfunctory and without depth. Further, the district police is totally in the dark as to the fate of cases pending in the courts. Even though there is a district level law officer (called District Attorney in some states), to supervise the work of the Assistant Public Prosecutors, he does not have the status and stature that the District Superintendent Police has. Whatever the reasons, as shown supra in Table 4, the conviction rate is falling over the years. Be that as it may, there is no immediate prospect of the Assistant Public Prosecutors being placed under the control of District Superintendent of Police. The Law Commission of India has also supported total separation between the police department and the prosecution agency. Even so, it would be desirable to make some institutional arrangement for proper co-ordination between the two agencies. The following suggestions are being made in this regard:

(1) The District Superintendent of Police should periodically review the work of the Assistant Public Prosecutors;
(2) He should be authorised to call for information from the prosecution agency regarding the status of a particular case pending in the court;
(3) The prosecution agency should send periodical returns to the District Superintendent of Police regarding disposal of cases in the courts;
(4) The District Superintendent of Police should send a note annually to the District Magistrate regarding the performance of each Assistant Public Prosecutor working in his district, which should be placed in his confidential annual report/dossier; and
(5) On its part, the police department should make available certain facilities to the prosecutors such as housing, transport, and telephones.

The state government may provide for the above arrangement by issuing necessary orders. Such an arrangement would go a long way in bringing about co-ordination between the police and the prosecution agency.

XVII. ROLE OF PUBLIC PROSECUTORS IN NATIONAL CRIMINAL JUSTICE POLICY

The laws are enacted by the legislature, enforced by the police, and interpreted by the courts. Neither the police nor the prosecution agency has any say in the formulation of laws. The number of criminal laws is increasing by the day, but the quality of drafting shows definite deterioration and bristles with avoidable vagueness in construction. It is felt that a representative each of the police department and the prosecution agency should be associated with the formulation/ drafting of laws. Their field experience would go a long way in improving the quality of laws enacted. Further, unlike the police, the prosecution agency does not have a national level body to watch its professional and service interests. This is due to the fact that prosecution agencies are organised at the state level and not at the national level. Such an apex should be constituted by the government.

XVIII. PROBLEMS OF PROSECUTION AND SUGGESTIONS FOR IMPROVEMENT

It bears repetition that the conviction percentage in India has been falling over the years. It was 64.8 per cent in 1961, and fell down to 42.9 per cent in 1994. The disposal of cases by the courts is also falling over the years. In 1994, it stood at 15.5

per cent of the total cases pending in the Courts in that year. This clearly demonstrates non-efficacy of the public justice system. The public prosecutors cannot escape the blame for this dismal state of affairs. It is proposed to highlight some of the problems being faced by the prosecution agency and also to suggest measures to improve the situation.

(1) The first and the foremost problem is the poor quality of entrants in the prosecution agency. Undoubtedly, the entrant is a law graduate who qualifies through a state-level competitive exam, but the quality of law education is not uniform in the country and is not up to the mark in certain law colleges. Further, the earnings in the open market are much higher than what the government offers to the prosecutors. Resultantly, able and competent advocates shy away from joining the prosecution agency. The only way to remedy the situation is to make the job attractive by improving the salary structure and by providing other perks such as government housing, transport, telephone facilities and allowances such as non-practising allowance, rob allowance, and library allowance.

(2) According to an estimate, 21.8 million cases are pending trial in the subordinate courts. The exact number of public prosecutors in the country is not known. Experience, however, shows that the public prosecutors are overburdened with cases and their number is not adequate enough to efficiently handle the cases entrusted to them. It is difficult to fix a norm as to the number of cases to be entrusted to a public prosecutor as it would depend on the nature of the case. Further, the performance of a public prosecutor is largely dependent on the performance of the presiding officer and other collateral factors. While there is a case for increasing the number of criminal courts, there is equally a case for increasing the number of public prosecutors. As a norm, at least two public prosecutors of the appropriate level should be attached with each court.

(3) The Assistant Public Prosecutors are recruited from the open market, and they are entrusted with the cases without any institutional training. They learn by experience, but that takes time and, in the meanwhile, the cases suffer. It is suggested that a national level training institution should be set up for the public prosecutors to impart them proper training. The duration of the training could be one and a half years. Six months could be earmarked for training in law; four months for attachment with a police station; four months for attachment with a competent magistrate; and the remaining four months for attachment with a senior and experienced public prosecutor. The proposed institutional training could be supplemented with refersher courses from time to time.

(4) The pay scales of the Assistant Public Prosecutors are rather low. Assistant Public Prosecutors Grade-II are bracketed with a Sub Inspector of Police and Assistant Public Prosecutors Grade-I with an Inspector of Police. As they are law graduates and have lucrative avenues open to them in the market, it is necessary that their pay scales be improved and also they be given sumptuous allowances so as to make the job attractive. Similarly, the honorarium paid to the public prosecutors appearing in the Sessions Courts is grossly inadequate and this needs to be enhanced drastically.

(5) Another problem facing the public prosecutors is the lack of promotional avenues. As stated in the preceding paras, an Assistant Public Prosecutor Grade-II is promoted to Assistant Public Prosecutor Grade-I and thereafter as Assistant Director or Deputy Director, as the case may be. He can appear only in the Magisterial Courts and not in the Sessions Courts, where more heinous offences are tried. It would be expedient to integrate the two cadres and allow an Assistant Public Prosecutor to rise in the heirarchy; enabling him to appear not only in the Sessions Court, but even in the High Court, depending on his ability and calibre.

(6) The investigations are generally conducted by low level police officers who are not proficient in laws, procedures and practical police working. The supervisory officers are, sometimes, deficient in closely monitoring the investigations. Such cases when sent up for trial, often result in acquittals and the blame comes on the public prosecutors. While, it is necessary to improve the quality of public prosecutions, it is clearly important to improve the quality of investigation. Special emphasis should be laid on using modern scientific methods of investigation. A closer rapport between the investigating agency and the prosecution agency should also improve the outcome of trials.

(7) Delay in trials is one of the fundamental reasons for acquittals in criminal cases. Speedy trial is the fundamental right of the accused in Indian law. It is the paramount duty of the public prosecutor to ensure speedy trial for which he has to take along with him the court and also the defence lawyer. The police officers, sometimes, are responsible for delays in trials because of their lack of interest in trials as evidenced in non-production of witnesses in time and, occasional prevarication in appearing in the courts themselves to render evidence. A multi-disciplinary approach needs to be evolved to remedy this situation and no short-cut solutions are possible.

(8) The prosecutors generally do not have good library facilities. Due to their rather inadequate pay scales, they are not in a position to spend on books. The libraries of the Bars are overcrowded and the books are not made available to the prosecutors. It would be advisable to set up exclusive libraries for the prosecutors in cities and bigger towns at government cost.

(9) There is virtually no accountability on the part of the prosecution agency. The work of Assistant Public Prosecutors is supervised by the District Magistrate, who being the chief executive of the district, is saddled with multifarious responsibilities and has virtually no time to supervise their work. The public prosecutors appearing in the Sessions Courts, again, are responsible to the District Magistrate. Apart from the time constraint, the District Magistrate generally does not possess the legal acumen and knowledge to objectively assess the performance of each public prosecutor and cannot give thrust and impetus to the prosecution agency. The departmental superiors should play a dominant role in this regard. Norms for disposal of work should be fixed and non-performers should be penalised.

XIX. CONCLUSION

In the final analysis, a public prosecutor is an officer of the court and is required to render assistance to the court to arrive at a just and equitable decision. He is also required to be fair to the opposite party. His guiding principle should be not so much the letter of law, but the spirit of law based on prudence, common sense and equity. A society which is governed by the letter of law does not fully exploit its human potentialities. I conclude by quoting from Russian Nobel laureate Solzhenitsyn,

> A society which is based upon the letter of law, and never reaches any higher is taking very scarce advantage of high level of human possibilities. The letter of the law is too cold to have any beneficial influences on society. Whenever the issue of life is woven in legalist relations, there is an atmosphere of moral mediocrity, paralysing man's noblest impulses.

THE ROLE AND FUNCTION OF THE INDONESIAN PROSECUTION SERVICE IN CRIMINAL JUSTICE

*Ersyiwo Zaimaru**

I. INTRODUCTION

Since prosecution has been realized as a fundamental component of the criminal justice system in addition to investigation, judgment and the execution of the judge's disposition, the Prosecution Service of the Republic of Indonesia also has a pivotal role and function in the Indonesian law enforcement system. In other words, the Indonesian Prosecution Service is indispensable in the Indonesian criminal justice system.

This paper tries to describe concisely the role and function of Indonesian prosecutors in the criminal justice system.

II. ORGANIZATIONAL STRUCTURE AND ROLE OF THE INDONESIAN PROSECUTION SERVICE

A. Position within the National Organizational Structure and Its Independence and Neutrality

1. Position

The Prosecution Service of the Republic of Indonesia is a government institution, which is separated from the Ministry of Justice and other criminal agencies. This institution has the main duty to execute the state power in the field of prosecution and other duties based upon the regulations and laws and to have a share in exercising a part of the general duty of government and the development in the field of law.

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The Prosecution Service (Kejaksaan) is composed of one Attorney General's Office, 27 the High Prosecution Offices and 296 District Prosecution Offices. The Attorney General Office is located in the capital of the Republic of Indonesia, Jakarta, and its territorial jurisdiction covers the territory of the Republic of Indonesia. The High Prosecution Office covers the territory of the province and the District Prosecution Office covers the territory of the district or the respective municipality and or an administrative city. It is clear that the Attorney General's Office is the headquarters of the Indonesian prosecution service.

Furthermore, pursuant to Article 7, paragraph (1) of Act No. 5/1991, a branch of the District Prosecution Office can be formed by the decree of Attorney General after the State Minister of Administrative Reform has given his approval thereto. This means that a branch of the District Prosecution Office is the lowest level in the organizational structure of the Indonesian Prosecution Service.

The Indonesian Prosecution Service itself is led by the Attorney General who is appointed and dismissed by and responsible to the President of the Republic of Indonesia. The Attorney General is the supreme leader in and responsible for the Prosecution Service who controls over the execution of the duties and authority of the service. In conducting this daily job, he is assisted by one Vice Attorney General and six Deputy Attorney Generals.

The Attorney General and the Vice Attorney General constitute a unity of leadership components. All Deputy Attorney Generals are the components

which support the leadership. As stated in Article 4 of the Presidential Decree No. 55/1991, the structure of the Indonesian Prosecution Service consists of:

(1) Attorney General;
(2) Vice Attorney General
(3) Deputy Attorney General for Advancement;
(4) Deputy Attorney General for Intelligence Affairs;
(5) Deputy Attorney General for General Crimes;
(6) Deputy Attorney General for Special Crimes;
(7) Deputy Attorney General for Civil and Administrative Affairs;
(8) Deputy Attorney General for Supervision;
(9) Centres;
(10) Prosecution Offices at regional level which consists of:
    a. High Prosecution Offices, and
    b. District Prosecution Offices.

In addition, the Indonesian Attorney General has the level as same as a State Minister. Therefore, the Attorney General as well as the commander-in-chief of the Indonesian Armed Forces and the Minister of Justice is a member of the Cabinet which is led directly by the President.

In the Indonesian organizational structure of national government, the President and Vice President are elected by all members of the People's Consultative Assembly (MPR), which is the highest constitutional body. Under the 1945 Constitution, the MPR convenes at least once every five years to elect the President and Vice President and to adopt the broad outlines of state policy, which provide a framework for government policy directions. This body consists of all 500 members of the House of Representatives (Parliament) and 500 additional members appointed by the government. The DPR (Parliament) itself meets regularly and debates legislation submitted to it by the government.

2. Independence and Neutrality

In order for one to be appointed as a Public Prosecutor, according to Article 9 of Act No. 5/1991 on Prosecution Service of the Republic of Indonesia, *inter alia*, one must be a civil servant, hold a university degree in law, and pass the examination of the education and training for the skill profession of Public Prosecutor. Due to its status of being a civil servant, therefore undoubtedly, every Indonesian public prosecutor is fully controlled by his/her superiors. It can be seen in the actual practice of prosecution of offenders that a public prosecutor in charge, before submitting his/her requisite charges, should first ask the size of charges to the head of the District Prosecution Office for a case at the district level or the head of the High Prosecution Office for a provincial level case and the Attorney General for a national level case. In other words, every Indonesian public prosecutor is fully controled by his/her superiors, which is referred to in Article 8, paragraph (2) in the following words:

> In instituting prosecution the Public Prosecutor shall act for and on behalf of the state and be responsible to hierarchical channel.

As mentioned above, an Indonesian public prosecutor is a government official. In handling criminal cases, the execution of prosecution must be based upon the law and must always observe the sense of justice in existence with the society by paying attention to the government policy. The Indonesian public prosecutor shall act as the government and the state officials in the execution of prosecution. This means that there is no neutrality for public prosecutor because the government interest must be kept in the prosecution against the offenders. In addition, the Indonesian public prosecutor shall act as a State Attorney when there are civil and administrative actions against the state and government of the Republic of

Indonesia. It can be said that every Indonesian public prosecutor must stand by their government and their state.

B. Appointment and Training of Public Prosecutors and the Guarantee of Their Status

1. Appointment

As mentioned before that is stipulated in Article 9 of the Act No. 5/1991, in order for one to be appointed a public prosecutor, he shall have to fulfill the following requirements:

(1) be an Indonesian Citizen;
(2) be pious to the One Almighty God;
(3) be loyal to Pancasila (state philosophy) and the 1945 Constitution;
(4) not be an ex-member of the banned Indonesia Communist Party, including the mass organizations thereof or not be a person directly involved in the "Counter-Revolutionary Movement of September 30th/Indonesia Communist Party" or other banned organizations;
(5) be a civil servant;
(6) hold a university degree in law;
(7) be at least 25 years of age;
(8) be authoritative, honest, just and not behave disgracefully; and
(9) pass the examination of the education and training for the skill profession of Public Prosecutor.

Those requirements above are verified in a selection process that is conducted by the Bureau of Personnel Affairs of the Attorney General's Office.

Prosecution service has recruited legal personnel within the prosecution service. They must be law school graduates and pass the prosecutor pre-service training organized by the training center in Jakarta. Every year, the training center produces about 200 new public prosecutors. Recently, there are about 5,000 public prosecutors, who serve prosecution. That number also includes civil and administrative law enforcement.

2. Training and the Guarantee of Public Prosecutors Status

The Centre for Education and Training has the duty to execute the education and training in the environment of the Indonesian Prosecution Service by virtue of law and regulation and the policy determined by the Attorney General. This centre is a component in support of the duty and function of the prosecution service, while is under and directly responsible to the Attorney General.

Education and training programs for personnel of the prosecution service that is organized by the centre consists of Pre-Service and In-Service programs that can be seen in Table 1.

In addition to the information of Table 1, in-service programs consist of training programs on general administrative, structural, functional and technical education, and training for public prosecution candidates is a kind of functional training program. This technical education and training program may consist of training of Intellectual Property Rights, law enforcement in criminal cases, and law enforcement in civil and administrative cases, intelligence activities, etc. This kind of training can be an appropriate solution to overcome the problems of insufficient qualified public prosecutors dealing with new crimes which seem more sophisticated and organized.

The goal of functional education and training programs is strengthening the skills and professional capacities of public prosecutors as required by government regulation. Furthermore, the technical programs will give a better opportunity for any qualified public prosecutor and administrative personnel to acquire the

Table 1

KINDS OF EDUCATION AND TRAINING PROGRAMS

Kind of Education and Training Program	Participant
Pre-service Training	Candidate for Civil Servant in Prosecution Service
General Administrative	– Official Echelons V & IV – Functional Official
Structural a. Administrative Staff & Leader First Level b. Middle Level c. High Level	 Official Echelon III Official Echelon II Official Echelon I
Functional Training (Non Strata)	Functional Official
Technical Training	Structural & Functional Officials

Source: Rasmin Saleh, "The Education and Training of Indonesia Public Prosecution Service", unpublished, p. 18.

knowledge and technical skills in order to improve the objectiveness and efficiency in carrying out their duties, especially for new problems faced by Prosecution Service of the Republic of Indonesia.

Participation for every program is based on assignment. A selection team considers what is expected of those participants after they finish their training, so that they can improve their ability to achieve a better career position and a brighter future. Therefore, the education and training programs are the strategic way to get the capable and skillful public prosecutors in handling cases. It can be noted the guarantee of having a bright future is attending the series arranged programs.

C. Professional Ethics of Indonesian Prosecutors

The ideal figure of an Indonesian public prosecutor is a person who holds or reflects the values of the Prosecution Service maxims called Satya, Adhy and Wicaksana (Integrity, Maturity and Wisdom). This maxim which is called Tri Krama Adhyaksa or Indonesian Prosecution Service doctrine, was stipulated by the Attorney General's Decree No. KEP-030/JA/3/1988 on March 23, 1988.

Pursuant to Article 8, paragraph (4) of Act No. 5/1991, in executing its duty and authority, the prosecution service shall always act by virtue of the law and with due observance of the norms of religion, good manners and morality, and shall also be obligated to delve into the living values of humanity, law and justice in the society. Moreover, public prosecutors shall institute a prosecution on the belief that their prosecution is based upon sufficient legal means of proof. According to Article 184, paragraph (1) of Act No. 8/1981, legal means of proof shall be the testimony of witnesses, testimony of the experts, documents, the indication, and the testimony of the accused.

As stated in Article 11, paragraph (1) of Act No. 5/1991, unless determined otherwise by virtue of the law, the Indonesian public prosecutor may not concurrently become a businessman or a legal adviser or do another job which can influence the dignity of his/her office. The violation of this statement, according to Article 13, paragraph (1), section c, shall

result in the public prosecutor being dishonourably dismissed from his/her office. The other regulations related to the professional ethics of Indonesian Prosecutors can be found in Code of Civil Servant Ethics and several acts concerning the duty, authority and function of public prosecutors in the Indonesian justice system.

III. INVESTIGATION

A. Investigative Authority and Methodology

Arcitle 6, paragraph (1) of Act No. 8/1981 on Criminal Procedure (KUHAP) states that an investigator shall be:

(1) an official of the state police of the Republic of Indonesia; and
(2) a certain official of the civil service who is granted special authority by law.

Refering to this statement, in practice, the police official is an investigator for general crimes such as murder, theft and robbery.

The public prosecutor is also authorized to be the investigator for special crimes such as the corruption cases (Act No. 3/ 1971 on Eradication of Corruption Offences). It is sanctioned by Article 284, paragraph (2) of Act on Criminal Procedure, which states:

> ... all cases shall be subject to the provision of this Act, with temporary exception for special provisions on criminal procedure as refered to in certain acts, until they are amended and or are declared to no longer be in effect.

Another regulation which sanctions that statement above, is Article 17 of Government Regulation No. 27/1983, which mentions that public prosecutors and certain officials have authority as investigators of special crimes. It means there are several special investigators besides public prosecutors in the Indonesian investigation system, *inter alia*, naval officers for Fishery and Exclusive Economic Zone offences; and civil servants of Customs and Excise, Tax Division, Forestry Officer, etc.

An investigator as regulated in Article 7, paragraph (1) of Act No. 8/1981 shall be competent, *inter alia*, to carry out arrest, detention, search and seizure of documents; to summon a person to be heard or examined as a suspect or a witness; to take other responsible acts in accordance with law. In this regard, the investigator shall prepare minutes of the execution of acts and then shall deliver the dossier of case to the public prosecutor. The delivery of the dossier shall be accomplished as follows [Article 8, paragraph (3) of Act No. 8/1981]:

(1) At the first stage, the investigator shall deliver only the dossier of case.
(2) Where the investigation is deemed to have been completed, the investigator shall cede responsibility for the suspect and the physical evidence to the public prosecutor.

However, there is not a strict sanction against the investigator who delivers the dossier of a case late and never completes the returned case. In practice, a public prosecutor in charge will ask that investigator's superior to order the completion of the case as soon as possible.

B. Instruction and Supervision of the Police, and the Cooperation between the Public Prosecutor and the Police

As we know, the role of the public prosecutor can be seen clearly from the acceptance of the case dossier from the police officer. Then, the public prosecutor will compose the results of the criminal investigation to be the criminal prosecution against the defendant. In the Indonesian criminal justice system, a public prosecutor within seven days shall be obligated to

inform the investigator in charge whether the results are complete or incomplete. Where the results are evidently incomplete, the public prosecutor shall send the dossier back to the investigator accompanied by an instruction on what must be done to make it complete. Then, within 14 days after receiving the dossier, the investigator shall be obligated to return the dossier to the public prosecutor.

As mentioned before, there is no a strict sanction against the investigators who neglect their obligation to complete the case within the mentioned period. In that case, a good informal or personal relationship between the public prosecutor and the investigator (the State Police Officer) can be seen on the results of investigation. Conversely, the public prosecutor in charge will ask his/her superior or the head of the District Prosecution Office to contact the investigator's superior to fulfill his obligation soon. Alternately, the public prosecutor will never give or approve the extension of further detention in the investigation period. It can be deemed as an effective way for public prosecutors to supervise what the investigators have done till the end of the detention period.

Although the public prosecutor is able to return the incomplete dossier to the investigator accompanied by the instruction, however, it can not be said that the public prosecutor has supervised the state police officer in conducting the investigation vertically. Accordingly, both the public prosecutor and the police officer together have prepared a successful investigation. It must be noted a successful investigation shall determine the next stage of law enforcement results.

C. Role of Public Prosecutors in Arresting and Detaining the Suspect

Pursuant to Article 109, paragraph (1) of the Act on Criminal Procedure, where an investigator has begun the investigation of an event, which constitutes an offence, the investigator shall inform the public prosecutor of this fact. That information includes the arrest and detention of the suspect, which have been conducted by the investigator.

The investigator on a person who is strongly presumed to have committed an offense based on sufficient preliminary evidence shall issue an arrest warrant. That arrest can be made for at most one day, and a person suspected of having committed a misdemeanor shall not be arrested except when without valid reasons he has failed two consecutive times to comply with valid summons (Articles 17 to 19 of Act No. 8/1981).

Furthermore, for the purposes of investigation as well as prosecution and trial proceedings, the investigator instead of the public prosecutor and the judge at trial, has the authority to a detain a suspect who is strongly presumed to have committed an offence based on sufficient evidence. It is applied on cases where there are circumstances which give rise to concern that the suspect will escape, damage or destroy physical evidence and/or repeat the offence. According to Article 24, paragraph (1) of the Act on Criminal Procedure, a warrant of detention issued by an investigator shall only be valid for at most 20 days. It may be extended by a competent public prosecutor for at most 40 days, if an investigation has not been completed yet. After the said 60-day period, the investigator must release that suspect from detention for the sake of law.

The role of the public prosecutor in arresting and detaining a suspect which are conducted by the police or an investigator, is merely to supervise the validity of the investigator's activities concerning investigation. In fact, the investigators shall be responsible themselves for whatever they have done. In addition, a suspect shall have the right to demand compensation for the harm of

having been arrested, detained or other acts, without reason founded on law or due to a mistake with regard to his identity or to the applicable law (see Article 95, paragraph (1) of Act No. 8/1981).

IV. INDICTMENT

A. Authorized Agency to Indict and the Methodology

As mentioned before, the Prosecution Service of the Republic of Indonesia is a sole agency which shall execute the state powers in the field of prosecution. It means, there is no private prosecution in the Indonesian criminal justice system. In addition, the Prosecution Service shall have the authority to carry out the prosecution of anyone who is accused of committing an offence within a public prosecutor's jurisdiction by bringing the case before a competent court to adjudicate accompanied by a bill of indictment.

After the public prosecutor has received or accepted the returned and complete dossier case from the investigator, he shall promptly determine whether or not the dossier meets the requirements to be brought before a competent court. Where he has the opinion that a prosecution may be conducted from the results of investigation, he shall prepare as soon as possible a bill of indictment. Pursuant to Article 141 of the Act on Criminal Procedure, a public prosecutor may effect the joinder of cases and cover them in one bill of indictment, if at the same time or almost simultaneously he receives several dossiers of cases on:

(1) several offences committed by the same person and the interest of the examination does not pose an obstacle to joinder;
(2) several joinders which are interrelated one with the other; or
(3) several offences which are not interrelated but which do have some connection one another, such that the joinder is necessary for purposes of examination.

On other hand, where a public prosecutor receives a case dossier containing several offences committed by several suspects, he may conduct a prosecution against each of the defendant separately. Therefore, a public prosecutor has the authority to decide freely whether a case will be separated or not.

B. Degree of Certainty Regarding Guilt Required to Indict a Suspect

In Indonesian criminal procedure, there are three kinds of examination procedures, i.e.:

(1) Ordinary,
(2) Summary, and
(3) Express, which consists of procedures for examination of minor offences and procedures for traffic violation cases.

The ordinary examination procedures are regulated in Articles 152 to 202 of Act No. 8/1981 on criminal procedure, Articles 203 to 204 for summary procedure, Articles 205 to 210 for minor offences, and Articles 211 to 216 for the examination procedures of traffic violation cases.

Ordinary procedure is the main legal procedure that is implemented in every competent court. In this procedure, after receiving the case dossier, which must be accompanied by a Bill of Indictment from the public prosecutor, the presiding judge at the court shall determine the trial date. Moreover, the presiding judge shall also order the public prosecutor to summon the accused and witnesses to attend the trial.

There is a specialty among those examination procedures above where a public prosecutor shall never be involved directly in the examination, i.e., the express procedures. In this procedure, as

mentioned in Article 205, paragraph (2) of Act No. 8/1981, the investigator on behalf of public prosecutor shall within three days after completion of the date minutes of the examination, present the accused together with the physical evidence, witnesses, experts and/or interpreters before the court. It is a little bit different to the summary procedure in that the authorized official whose obligation is to present the accused together with the required witnesses, experts, experts, interpreters and physical evidence, is a public prosecutor. It is similar to the ordinary procedure in that the public prosecutor is more responsible for presenting the accused required witnesses, experts and interpreters before a competent court.

The criteria to decide whether a criminal case shall be examined in summary procedure, is that a case does not fall under the provisions of Minor Offences and for which the evidence and application of law, and according to the public prosecutor in charge, is simple and straightforward. Cases with a penalty of at most three months' imprisonment or confinement and a fine of not more than 7500 rupiahs (about 300 yen) shall be examined in express procedures.

In preparing a bill of indictment, which shall be dated and signed by the public prosecutor in charge, it shall contain (Article 143 of Act No. 8/1981):

(1) the full name, place of birth, age or date of birth, gender, nationality, address, religion and occupation of the suspect; and
(2) an accurate, clear and complete explanation of the offence of which accusation is made, stating the time and place where the offence was committed.

A bill of indictment which does not satisfy the provision above shall be void for the sake of law.

C. Exercise of Discretion in Prosecution

A public prosecutor may not prosecute an accused when he has found three technical circumstances and one factor of political reason (Cf. Andi Hamzah and RM. Surachman, "The Role a Public Prosecutor", paper for Indonesian-Japan joint seminar held in Jakarta on January 2-24, 1992, pp. 30-33), i.e.:

(1) the fact has insufficient evidence;
(2) the fact does not constitute an offence;
(3) it is for the interest of law; and
(4) political reason.

Whenever the public prosecutor decides to cease or to suspend the prosecution because of insufficient evidence or it has become clear that said event did not constitute an offence or the case has been closed in the interest of law, the public prosecutor shall set this forth in a written decision. According to Article 140, paragraph (2) subparagraph b of Act No. 8/1981, the content of said written decision shall be made known to the suspect and if he is detained, that suspect should be released immediately. Moreover, the copies of the written decision must be sent to the suspect or his family or legal counsel, official of the state house of detention, the investigator and the judge. If thereafter new circumstances should provide sufficient evidence, the public prosecutor may conduct a prosecution against the suspect.

In addition, pursuant to Article 183 of the Criminal Procedure Code, a judge shall not impose a penalty upon a person except when there are at least two legal means of proof enabling him to come to the conviction that an offence has truly occurred and that the accused is guilty of committing it. Therefore, if there are two among five legal means of proofs, normally, the public prosecutor shall prosecute the accused before a competent court. Furthermore, the interest of law as

mentioned above, including lapse of time, double jeopardy or nebis in idem, and the death of the accused, shall be considered when determining whether or not to prosecute the accused.

Prior to 1961, every public prosecutor in Indonesia was allowed by the law to drop the case even though there was sufficient evidence to warrant a conviction. Then, this power was abolished in 1961. However, since that time only the Attorney General has been allowed to drop a case for political reasons or for the interest of law. Hence, a public prosecutor who wishes to utilize this power has to request the Attorney General to determine it, which is, unfortunately, rarely exercised.

Although the authority to exercise the discretionary power is not stipulated explicitly in articles of the Act Number 8/ 1981 (KUHAP), the elucidation of Article 77 KUHAP infers this power which is called the opportunity principle. Fortunately, this principle has been endorsed by Article 32, paragraph (4) of Act No. 5/1991 on Prosecution Service of the Republic of Indonesia.

D. Plea Bargaining

In the Indonesian criminal justice system, plea bargaining has never been known clearly. To decide whether an accused is guilty or not, is the authority of the judges at trial. However the judges at trial shall impose a proper punishment based on sufficient legal means of proof, namely at least two legal means of proof, which convincingly establish that the accused has truly committed an offence.

A public prosecutor in instituting the prosecution, of course, will first be concerned about the sufficiency of the evidence to establish a prima facie case or that the evidence that would warrant conviction. There are severals factors usually taken into consideration before deciding to prosecute such as the gravity and circumstances of the offence, and the personal factors related to the alleged offender, *inter alia*, the character, the age, any mental illness or stress affecting the offender and the relationship of the victim to the offender. After a public prosecutor has gathered the prima facie evidence, he decides whether to prosecute or not.

V. TRIAL PROCEEDINGS

A. Proof of Criminal Facts

As stated previously, there are five legal means of proof in Indonesian criminal procedure, i.e., the testimony of witnesses, the testimony of experts, documents, indication, and the testimony of the accused [Article 184, paragraph (1) of Act No. 8/1981]. The testimony of a witness is what the witness has stated at trial, which is similar to the testimony of the expert and the accused, i.e., what the expert and the accused have stated at trial. A document as a legal means of proof should be made under an oath of office or strengthened by an oath. An indication is an act, event or circumstance which because of its consistency whether between one and the other or with the offence itself, signifies that the offence has occurred and who the perpetuator is (see Articles 184 to 189 of Act No. 8/1981).

In addition, the indication as a legal means of proof shall only be obtained from the testimony of the witnesses, the document and the testimony of the accused. The evidentiary strength of the indication is evaluated by the judges at trial wisely and prudently after those judges have accurately and carefully conducted an examination on the basis of their conscience. In practice, every public prosecutor always tries to have the indication in proving the accused guilty. In other words, every public prosecutor always tries to obtain three or more legal means of proof in proving the guilt of the accused.

However, if the court is of the opinion that from the results of examination at trial, the guilty of the accused has not been legally and convincingly proven, the accused shall be declared acquitted. Moreover, if the court is of the opinion that the act of the accused has been proven but such act does not constitute an offence, all charges against the accused shall be dismissed. In these cases, if the public prosecutor is not satisfied with the opinion of the court (i.e., dismissal or acquittal), he may appeal to the competent High Court. Furthermore, he may request for a cassation to the Supreme Court, if he is not satisfied with the High Court decision affirming the District Court decision.

According the explanation above, the competent District Court may make three kinds of decision upon the accused, i.e.:

(1) Punishment;
(2) Acquittal;
(3) Dismissal of all charges against the accused.

B. Cooperation for Speedy Trial

In pursuit of Article 4, paragraph (2) of the Act on the Basic of Judicial Power, the judicial administration shall be conducted simply, speedily and economically. These principles must fulfill the expectation of all seekers of justice. As we realized, they do not need a complicated examination procedure that may take a long time and, sometimes, it should be continued by an heir.

Cooperation among the investigator, public prosecutor and the judges at trial and also each superior, in practice, has sped up the examination process. Moreover, the role of the accused in showing the required evidence to the competent official of the law enforcement agencies, is also deemed another way for a speedy trial.

C. Securing Appropriate Sentence

In practice, there are quite many sentences passed by judges which have been considered not in accordance with the sense of justice in Indonesian society. The ordinary people consider those sentences so lenient that they might lead to an increase in crime, even though such argument has not been proven. Moreover, people do not want to understand why it has occurred in the Indonesian law enforcement system.

Securing an appropriate sentence is not only conducted by the judges at trial but also by the public prosecutor, investigator and other officials of criminal agencies. An appropriate sentence should be made on an appropriate request of charges against the defendant, and it is based on effective investigationary results. In other words, an inappropriate sentence is merely caused by human errors which are made by those law enforcement officials. Therefore, providing the proper training for those officials is necessary to reduce human errors in sentencing.

D. Supervision over the Fair Application of Law

Similar to the above-described, people often ask judges why they do not perform the same justice in sentencing offenders committing the same crime under similar circumstances. According to Justice Soerjono (see paper in Indonesia-Japan Joint Seminar, Jakarta, January 20-24, 1992, pp. 6-8), there are several factors which might influence the decision of judges in passing sentences, i.e.:

(1) Nature of Crime;
(2) Defendant's Character;
(3) Community response toward crime; and
(4) Chance.

Considering that judges, public prosecutors, investigators and other law enforcement officials are government

officials who should obey governmental disciplinary regulations, the role of their respective superiors in supervising over the fair application of law is really important. Public supervision that is carried out by the Indonesian people through the mass media is deemed another instrument to control the fair application of the law. Moreover, the request for appeal and cassation is a pivotal instrument to supervise fairness, which is the right of the public prosecutor and/or the defendant.

In conducting trial proceedings, the public prosecutor in charge shall be obligated to present the defendant, witnesses, experts and all evidence concerning the defendant who is accused of having committed a crime. If in fact the accused or the witnesses were legally summoned but failed to be present at trial, the examination of the case can not be continued and the head judge shall order said person to be summoned once again for the next trial session. Usually, delay in the trial proceedings may be caused by:

(1) The required witnesses not having received the summons.
(2) A witness' intent to arrive at the trial on the second summons. Usually, it is carried out if the defendant is still in the detention and the witness is the victim of the defendant.

VI. EXECUTION OF PUNISHMENT

Pursuant to Article 270 of the Act on Criminal Procedure, which is also signified by Act No. 5/1991 on Prosecution Service of the Republic of Indonesia, the execution of punishment which has become final and binding shall be carried out by the public prosecutor. For this purpose, a copy of the execution of punishment shall be sent to the public prosecutor by the clerk. Then, the public prosecutor shall send, a copy of the minutes on the execution of the punishment signed by himself, by the head of the correction agency and by the convicted person, to the court which decided the case in the first instance and the clerk shall record it in the register of supervision and observation.

For the purpose of supervision and observation, in every court there must be a judge who is given the special duty of assisting the head in carrying out the supervision and observation with regard to the punishment of depriving liberty. Therefore, it is clear that the executor of punishment is the public prosecutor which is different in civil law enforcement. The executor of civil law is the clerk of the court.

VII. PUBLIC PROSECUTORS' INVOLVEMENT IN NATIONAL CRIMINAL JUSTICE POLICY

Public prosecutors are also involved in the activities of, *inter alia*, in the promotion of legal public awareness, precaution as a measure in securing law enforcement policy, precaution as a measure of security of the printed matter circulation, the supervision of mysticism which can endanger the society and the state, the prevention of misuse and/or blasphemy of religion and the research and development of law and administrative matters. Additionally, public prosecutors represent the state or government inside as well as outside the courts in regards to national justice policy.

Coping with the public prosecutor's involvement in national justice policy, the Prosecution Service has five missions, i.e.:

(1) To secure and defend Pancasila as the Indonesian philosophy against any attempts which can shake the coexistence of the society, nation and state.
(2) Must be capable of giving shape to the legal security, rule of law, justice and truth based upon the law and of observing the norms of religion, good manners and morality; and also be obligated to delve into the living values of humanity, law and justice in the society;

(3) Must be capable of being fully involved in the development process, *inter alia*, having a share in the creation of conditions and infrastructure which support and secure the implementation of development in order to give shape to the just and prosperous society based upon Pancasila;
(4) Safeguarding and enforcing the authority of the government and state of the Republic of Indonesia; and
(5) To protect the interest of the people through law enforcement.

Implementation of those missions are conducted by the Attorney General, who is assisted by one Vice-Attorney General and six Deputy Attorneys General. It is clear that Indonesian public prosecutors are involved not only in law enforcement but also in the implementation of the national development programs. The involvement of the Attorney General, heads of the High Prosecution Offices and heads of the District Prosecution Offices related to each level, as the chiefs of the Committee of Supervision for General Elections, is a good example of this matter.

APPENDIX A

**TOTAL NUMBER OF PERSONNEL
IN THE INDONESIAN PROSECUTION SERVICE
(August 18, 1997)**

Region	Prosecutor	Other Staff	Total
The Attorney General Office (Headquarters)	423	1,709	2,132
Aceh Special Region	124	312	436
North Sumatera	336	619	755
West Sumatera	131	366	497
Riau	132	282	414
Jambi	94	185	279
South Sumatera	187	380	567
Bengkulu	62	123	185
Lampung	141	246	387
Jakarta District Capital	212	532	744
West Java	551	1,245	1,796
Central Java	428	1,334	1,762
Yogyakarta Special Region	99	461	560
East Java	589	1,077	1,666
Wesk Kalimantan	104	203	307
Central Kalimantan	88	159	247
South Kalimantan	136	199	335
East Kalimantan	122	118	240
North Sulawesi	101	203	304
Central Sulawesi	107	167	274
South East Sulawesi	56	141	197
South Sulawesi	289	568	857
Bali	128	308	436
West Nusa Tenggara	82	208	290
East Nusa Tenggara	107	257	364
Maluku	131	234	365
Irian Jaya	87	179	266
East Timor	73	174	247
Secondment	8	0	8
Grand Total	**5,128**	**11,989**	**17,117**

Source: Bureau of Personnel Affairs, Office of the Attorney General.

APPENDIX B

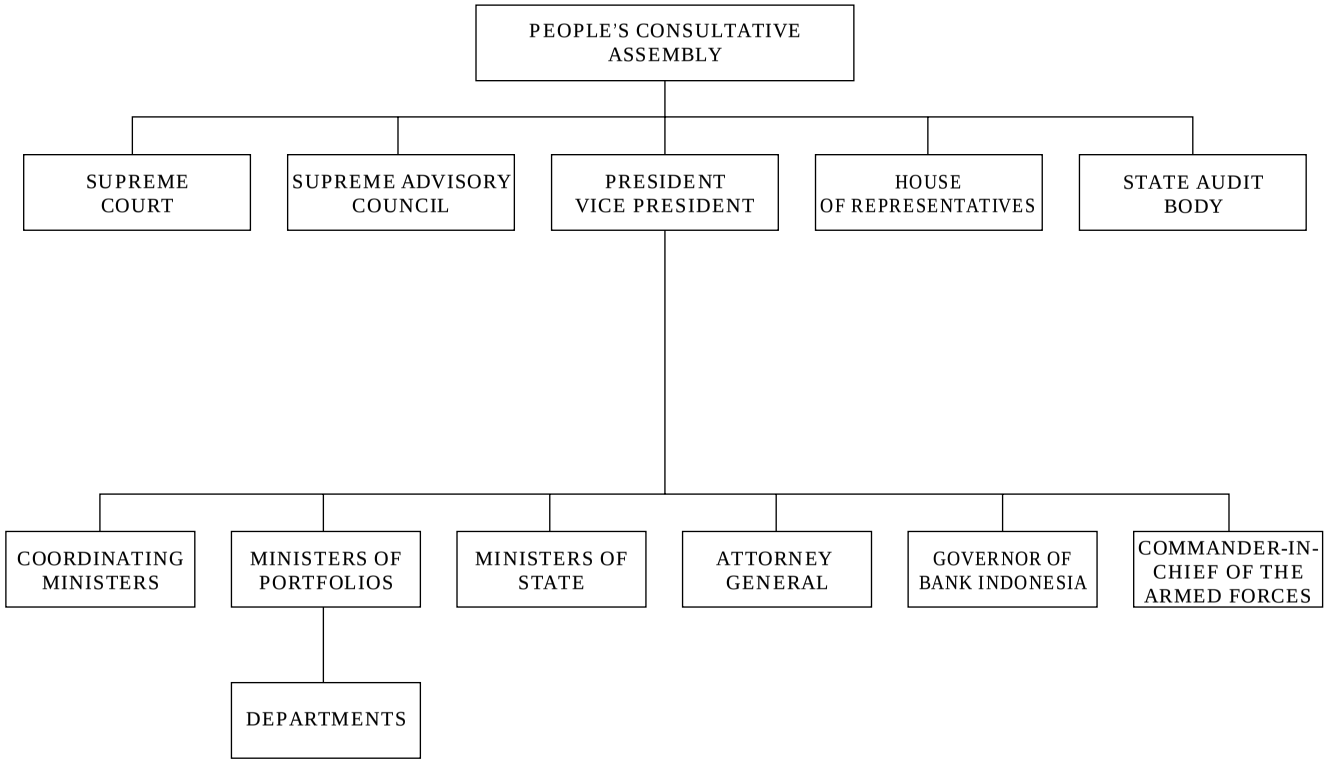
NUMBER OF GENERAL CRIME CASES ACCEPTED BY THE ATTORNEY GENERAL'S OFFICE (April 1996 – March 1997)

High Prosecuting Office	Backlog of 1996	Receipt in 1997	Total in 1997	Disposal			Stopping Investigation	
				Stopped Investigation	Become Cases	Pending in 1997	Appropriate	Inappropriate
Aceh Special Region	545	281	1,826	81	1,264	481	76	5
North Sumatera	2,074	5,550	7,624	130	4,832	2,662	122	8
West Sumatera	560	1,310	1,870	12	1,179	679	9	3
Riau	285	1,539	1,824	13	1,497	314	9	4
Jambi	295	850	1,145	13	832	300	13	–
South Sumatera	1,340	3,632	4,972	8	3,594	1,370	6	2
Bengkulu	499	724	1,223	4	659	560	–	4
Lampung	697	1,815	2,512	2	1,723	787	2	–
West Kalimantan	537	1,406	1,943	5	1,300	638	4	1
Central Kalimantan	148	815	963	3	831	129	1	2
East Kalimantan	313	2,154	2,467	13	2,198	256	3	10
South Kalimantan	1,376	1,884	3,260	44	1,829	1,387	44	–
West Java	4,061	9,621	13,682	25	9,560	4,097	19	6
Jakarta District Capital	9,056	5,633	14,689	3	5,356	9,330	–	3
Central Java	1,307	6,162	7,469	32	6,166	1,271	29	3
Yogyakarta Special Region	125	940	1,065	1	925	139	–	1
East Java	2,109	1,635	3,744	15	1,548	2,181	3	12
North Sulawesi	2,800	1,220	4,020	10	1,050	2,960	2	8
Central Sulawesi	531	845	1,376	20	798	558	17	3
South East Sulawesi	524	871	1,395	–	1,027	368	–	–
South Sulawesi	1,492	3,506	4,998	36	3,223	1,739	1	35
Bali	336	1,559	1,895	30	1,444	421	30	–
West Nusa Tenggara	918	923	1,841	55	889	897	11	44
East Nusa Tenggara	777	1,130	1,907	14	1,032	861	2	12
Maluku	1,047	1,194	2,241	54	1,010	1,177	14	40
Irian Jaya	170	1,001	1,171	23	974	174	17	6
East Timor	123	371	494	9	293	192	5	4
Total	**34,045**	**59,571**	**93,616**	**655**	**57,033**	**35,928**	**439**	**216**

Source: Office of the Deputy Attorney General for General Crime.

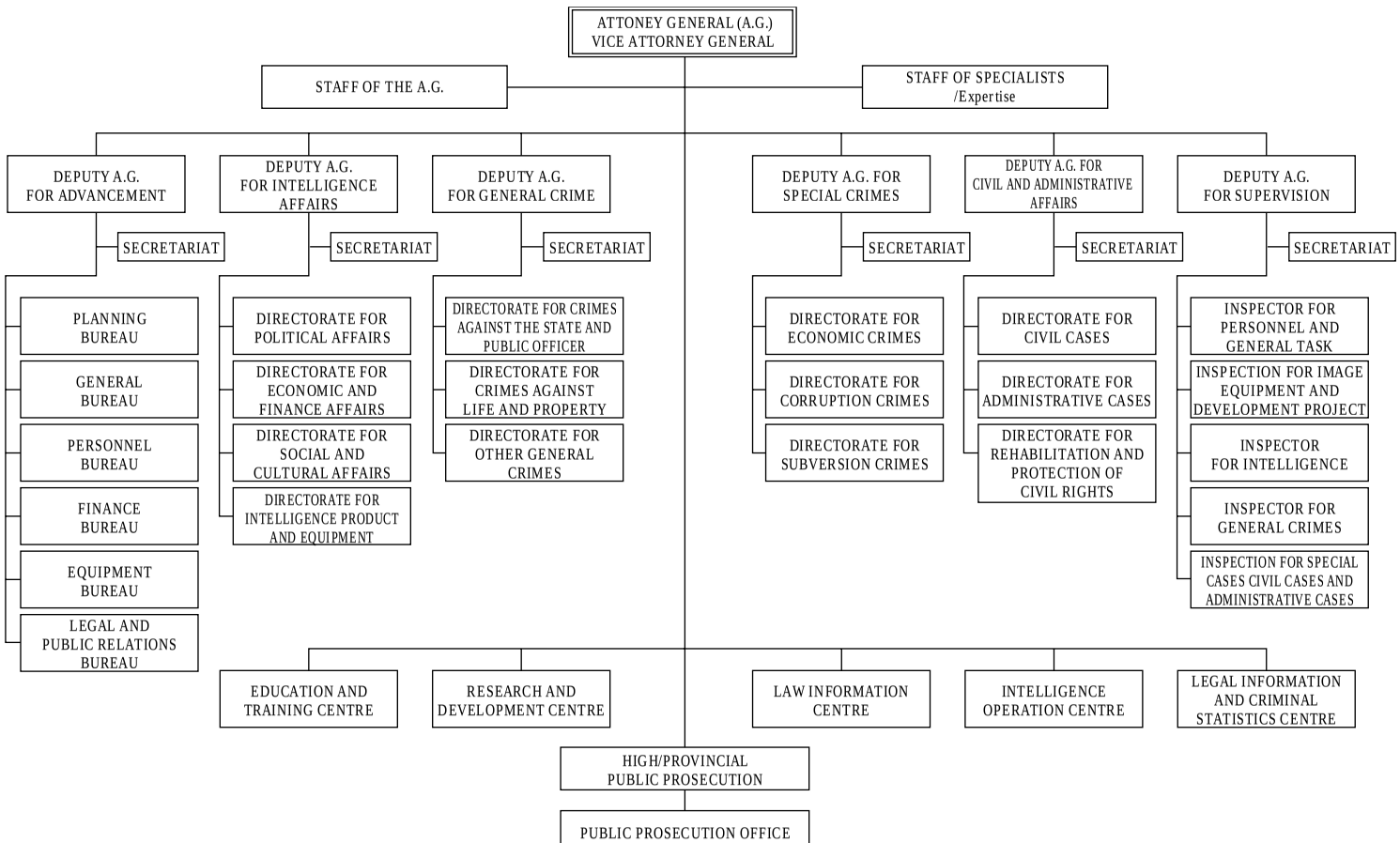
APPENDIX C

ORGANIZATIONAL STRUCTURE OF THE NATIONAL GOVERNMENT



APPENDIX D

ORGANIZATIONAL STRUCTURE OF THE PUBLIC PROSECUTION SERVICE



APPENDIX E

DETENTION PERIOD ACCORDING TO ACT NO. 8/1981 ON CRIMINAL PROCEDURE

Detention Warrant Issued by	Valid Maximum (days)	Extension		Total (days)	Exceptional Extension (art. 29)		Total
		By	Maximum (days)		By	Maximum (days)	
First Instance							
Investigator (art. 24)	20	Public Prosecutor	40	60	Head of Competent District Court	30 + 30	120
Public Prosecutor (art. 25)	20	Head of Competent District Court	30	50	Head of Competent District Court	30 + 30	110
Presiding Judge at District Court (art. 26)	30	Head of Competent District Court	60	90	Head of Competent High Court	30 + 30	150
Appeal							
Presiding Judge at High Court (art. 27)	30	Head of Competent High Court	60	90	Justice of the Supreme Court	30 + 30	150
Cassation (Second Appeal)							
Justice of the Supreme Court (art. 28)	50	Chief Justice of the Supreme Court	60	110	Chief Justice of the Supreme Court	30 + 30	170
Total maximum length of detention period				**410**	**Extreme Exceptional Extension**		**700**

THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

*Jonathan John Mwalili**

I. INTRODUCTION

A reference to the history of Kenya is essential in understanding the various sources of the law. Before Kenya gained her independence and became a Republic on 12 December 1963 and 1964 respectively, it was a British colony, and there was also the ten-mile coastal strip protectorate under the Sultan of Zanzibar. Upon colonization, the English law was applied to Kenya. It included the substance of the common law, the doctrine of equity and the statutes of general application in force in England on 12 August 1897, together with the procedure and practice observed in the courts of justice in England at that date.

The English law that was applied to Kenya could only be applied so far as the circumstances of Kenya and its inhabitants permitted. The reception clause also recognizes the existence of the various customary laws, including Islamic and Hindu law that were in operation before colonization.

With the attainment of independence and on becoming a republic, there came into being the republican constitution which became the supreme law of the land and hence a source of law in Kenya. Judicial precedent is an invaluable source of law. Decisions of the superior courts of records, the High Court and the Court of Appeal, are reported in law reports such as the Kenya Law Reports, the East African Law Reports and the Eastern African Law Reports. There are also English law reports, notably, the All England Law Reports.

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II. ORGANIZATION OF PROSECUTION

A. Office of the Attorney-General

The Attorney-General is a constitutional officer, and his office is an office within the public service. He is the principal adviser to the Government of Kenya and is also the chief public prosecutor. His role is not limited to the constitutional functions of advising and controling criminal prosecutions, but extends to a multitude of other functions such as:

(1) appearing in court on behalf of the government in civil litigation in which the government is a party;
(2) acting as a counsel for Parastatals in court;
(3) drafting bills for presentation in parliament, etc.;
(4) preparing international agreements, treaties and commercial agreements involving the Government of Kenya and foreign States or bodies;
(5) supervising the Registrar-General's Department which deals with the registration of companies, trade-marks, patents, books and news papers, marriages, births and deaths, and trade unions, welfare societies and chattel mortgages; and
(6) supervising of the Public Trustee, the Law Reform Commission, the Kenya School of Law, and the Office of the Official Receiver.

The role of the Attorney-General in this context will be limited to the examination of his advice and prosecutions in criminal cases. The Office of the Attorney-General is arranged in a vertical manner with the

Attorney-General at the apex and the State Counsel at the bottom. See Figure 1.

In addition to being the principal adviser to the government and chief public prosecutor, the Attorney-General is also an ex-officio member of the National Assembly, a cabinet minister in the government and the head of the bar (advocates). He is appointed by the President.

Membership to the National Assembly and the government assists the Attorney-General in making decisions as to whether to prosecute or not in offences that involve public policy.

B. Constitutional Position of the Attorney-General

In deciding whether or not to initiate a prosecution, the Attorney-General is not subject to any person or authority. Although Parliament is supreme in the Kenyan system of government, it cannot, in law, order the Attorney-General to prosecute. This independent exercise is illustrated in the reply to Parliament by a former Attorney-General, Mr. Joseph Kamere, when Parliament sought to have one Stanley Munga Githunguri prosecuted on charges of contravening the provisions of the Exchange Control Act. In his reply the A.G. said:

> Kenya as a constitutional government is totally committed to the rule of law. We cannot talk of the rule of law without an efficient machinery to enforce the ordinary laws of the land. The police, the judiciary and my office are the components of that machinery, and if any of those cogs break down, that essential machinery can easily come to a grinding halt. Prosecution is not persecution—what this House has been subjected to is to challenge the decision of the A.G., who decided not to proceed against Mr. Githunguri on the evidence contained in the inquiry file. This House makes laws but does not execute them. The law is left to persons of integrity, those with patience in their deliberations, to consider whether to prosecute or not to prosecute. The question as to whether to prosecute or not to prosecute is entirely left to the discretion of the A.G. In this country, we believe in the rule of law; we believe in the separation of the judiciary; and we also believe that you cannot be a judge and prosecutor. Prosecution and not prosecution, play one of the most important roles in the administration of criminal justice in any form of a constitutional government.

This statement illustrates the separation of powers of the government into the legislative arm (Parliament) the executive and the judiciary organs of government, which play mutually exclusive roles.

Officers subordinate to the Attorney-General who act in accordance with his general instructions are: the Solicitor-General, the Deputy Public Prosecutor; the Assistant Deputy Public Prosecutor; and all State Counsels, at the State Law Offices Nairobi and in the Provincial and District State Law Offices. Section 26 (4) of the Constitution gives all of them the authority to instruct the Commissioner of Police and officers subordinate to him, to carry out investigations into various offenses and to direct, generally, prosecutions in the country. (See Figure 1.)

The Attorney-General and officers subordinate to him and acting in accordance with his general or special instructions have the constitutional authority to institute and undertake criminal proceedings against any person before any court (other than a court-martial) in respect of any offense alleged to have been committed by that person. He also has the authority to take over and continue any criminal proceedings that

have been instituted or undertaken by another person or authority) popularly known as private prosecutions). He has the authority to discontinue at any stage before judgment is delivered any such criminal proceedings instituted or undertaken by himself or another person (private prosecution) or authority (e.g., the police force).

C. Decision to Prosecute and the Role of a Prosecutor

The decision to prosecute is the most problematic role of a prosecutor. Unlike other areas of the law where it is possible to resort to reported or unreported authorities, there are no such authorities to guide a prosecutor in reaching a decision as whether to mount a prosecution or not. The problem is compounded by the fact that the Attorney-General, as the chief public prosecutor, rarely makes public his reasons for mounting or discontinuing a prosecution. Unlike a court which has the opportunity of determining the credibility of witnesses, the Attorney-General and his officers have to rely on the statements of the witnesses in the investigation files.

In some cases a prosecutor, after perusing the file, may get the impression that there is prima facie evidence against the accused, but in the course of a prosecution the witness turns out to be incredible or hostile. The net effect is that no such case is made out to require an accused being put on his defense; for example, cases involving relatives.

Factors influencing the decision to prosecute include:

1. The existence of prima facie evidence. The evidence upon which a court, properly directing itself upon law and evidence, is likely to convict in the absence of an explanation from the accused. (This is a judicial definition.)
2. The attitude of the complainant. All offences are committed against the State and thus the attitude of complainant should not influence a withdrawal of a case. However, in some cases the complainant's attitude is taken into account in deciding whether a prosecution is warranted. For example, when the accused is a relative of the victim, the item stolen has been recovered, and the parents of the accused pressure the complainant to withdraw the case.
3. Health of accused. Where an accused's health is poor, prosecution may be discontinued, especially in terminal illnesses.
4. Humanitarian factor. It is a cardinal rule that a prosecutor has to be fair and not oppressive. This is a factor that should be borne in mind in considering whether a consideration of a prosecution is merited. For example if a husband and wife are charged and the husband dies in the process, the case against the wife could be withdrawn.
5. Public interest. The A.G. has to assess whether the public interest will be served best by the prosecution. Therefore, the A.G. makes consultation with his cabinet colleagues, especially in political cases.
6. Gravity of the offence, the circumstances surrounding the commission of the offence and its nature determine the gravity; e.g., trespass to land and assaults arising out of vendetta or are intended to settle old scores.
7. Impact on international relations. Where two sovereign states are involved, it is a good practice to consider the impact of such intended prosecution on the relations between the affected States.

D. Withdrawal from Prosecution in Trials before Subordinate Courts

1. Section 87 of the C.P.C

The Attorney-General may, in a trial before a Subordinate Court, but not in the High Court, instruct a police prosecutor to withdraw from the prosecution of any person. If the withdrawal is made before the accused person is called upon to make his defense, then the accused may be discharged but may be re-arrested and charged with the same offense based on the same facts. If the withdrawal is made after the accused has been called upon to make his defense, then he shall be acquitted. This power is delegated, through Legal Notice No. 106/1984, to the Solicitor General, Deputy Public Prosecutor, Assistant Deputy Public Prosecutor; all Principal State Counsels; and Provincial State Counsels in Central, Eastern, Coast, Nyanza, Rift Valley and Western Provinces. Those in the District State Law Offices do not have the delegation, i.e., Machakos, Embu, Meru, Kisii, and Eldoret.

2. Section 82 (1) of the C.P.C.: Nolle Prosequi

The Attorney General may, in any criminal case, whether in the High Court or Subordinate court and at any stage of the case before verdict or judgment (whether judgment has been written or not but before it is pronounced) enter a nolle prosequi. He may do so orally (by stating in Court that he is entering a nolle prosequi under this section) or in writing. There upon the accused shall be at once be discharged in respect of the charge for which the nolle prosequi is entered.

This discharge shall not, however, operate as a bar to subsequent proceedings against him on account of the same facts. This power is delegated under section 82 of the Criminal Procedure Code and Legal Notice No. 106 of 1984 to the Solicitor General, Deputy Public Prosecutor, Assistant Deputy Public Prosecutor, Principal State Counsels and Provincial State Counsels. For clarity, there are some Provincial State Counsels who are either State Counsels I and State Counsels II. These are allowed to sign the nolle prosequi as Provincial State Counsels and not in their respective designations.

The powers of the Attorney-General of Kenya are the same with those of the Attorney-General of England in this regard. This power was explained by Lord Dilhorne in the case of *Gouriet v. Union of Post Office Workers*, (1977), 3 All England Reports at page 88, when he said:

> The Attorney-General has many powers and duties. He may stop any prosecution in indictment by entering a nolle prosequi. He merely has to sign a piece of paper saying that he does not wish the prosecution to continue. He need not give any reasons. He can direct the institution of a prosecution and direct the Director of Public Prosecutions to take over the conduct of criminal proceedings and he may tell him to offer no evidence. In the exercise of these powers, he is not subject to direction by his ministerial colleagues or to the control and supervision of the courts. If the court can review his refusal to consent to a related action, it is an exception to the general rule.

It is, therefore, correct to say that the Attorney-General has the unfettered discretion to bring charges against a person if he considers that any law has been infringed by that person. He also has the prerogative to terminate the charges even without assigning reasons.

Despite this, the High Court of Kenya has ruled that the Attorney-General's discretion to discontinue criminal cases under section 82 (1) of the C.P.C. should not be exercised arbitrarily, oppressively, contrary to public policy. The High Court

has an inherent power and duty to secure fair treatment for all persons who are brought before courts and to prevent an abuse of the process of the court. To this limited extent, therefore, the powers of the Attorney-General to enter a nolle prosequi are subject to the control of the court.

E. Power to Appoint Public Prosecutors, Section 85 of the C.P.C.

(1) The Attorney-General, by notice in the Gazette, may appoint public prosecutors for Kenya or for any specified area thereof, and either generally of for any specified case or class of cases.

(2) The Attorney-General, by writing under his hand, may appoint any advocate of the High Court or person employed in the public service, not being a police officer below the rank of Assistant Inspector of Police, to be a public prosecutor for the purposes of any cases.

(3) Every public prosecutor shall be subject to the express directions of the Attorney-General.

F. Qualification of Prosecutors

1. Prosecution counsels in the office of the Attorney-General are qualified advocates of the High Court who have had legal training. However, due to the shortage of lawyers, the Attorney-General is empowered under section 85 of the C.P.C. to appoint public prosecutors. Pursuant to this statutory power, the Attorney-General has appointed police prosecutors who act as advocates, although they are not lawyers by training.

2. Police Prosecutors

Unlike private prosecutions, the right of the police to prosecute is by virtue of delegated power from the A.G. under section 85 of the C.P.C. It is significant to note that under section 14 of the Police Act, prosecution is not mentioned as one of the functions of the police force, which confirms the fact that the prosecutorial powers vested in them are derived from a delegated power. Most prosecutions in this country are conducted by police in the Magistrate's Courts and, as prosecutors, they fall under the direct control of the Office of the Attorney-General. However, when they are performing normal police duties, they fall under the direct control of the Commissioner of Police. (See Figure 2.)

To qualify to be prosecutors, they must be at the rank of Police Inspectors. They undergo a training for four months before joining the prosecutions branch. In terms of the organization, the Police Prosecution branch falls under the Department of Criminal Investigation (popularly known as CID). At one time the entire CID was under the control of the A.G., coincidently resembling the U.S. set-up. The CID is charged with the responsibility of investigating all serious criminal cases, while the rest are dealt with by regular police. The A.G supervises police prosecutions either in person or through his subordinate officers. This supervision is achieved by the requirement of statutory consent of the A.G. in respect of certain offences including sedition, incest by males and females, oral threats to kill, corruption in office and the prosecution of foreigners. The police prosecutors are not legally trained. They prosecute before magistrates while State Counsels appear both before the magistrates and the judges of the High Court on prosecution and on appeals. The structure of the courts is shown in Figure 3.

III. STATUS OF THE PUBLIC PROSECUTOR

The powers, authorities and functions relating to the prosecution in Kenya are vested in the Attorney General. These powers may be and are delegated by him.

While prosecuting, therefore, a policeman is acting as the representative of the A.G., and not as the representative of the Commissioner of Police. In his capacity as a prosecutor, a policeman is subject only to the directions and instructions of the A.G. The police prosecutor finds that he is, so to speak, wearing two hats. Sometimes it is hard to reconcile the two. If the police prosecutor has any difficulty in this regard, he should remember that his duty as a prosecutor is to the court.

A. The Task

The prosecutor should remember that it is not his job to secure a conviction at all costs. As Sir Horace Awory, one of England's greatest criminal judges said in *R vs. Banks*, 2KB 621:

> Counsel for the prosecution throughout a case should not struggle for a verdict against the prisoner, but they ought to bear themselves rather in the character of ministers of justice assisting the administration of justice.

The prosecutor's job is to see that all the relevant facts, including those favorable to an accused, are placed before the court and to present those facts in an ethical, fair, dispassionate, firm and clear manner. Prosecutors must refrain from all actions which could lead to the conviction of innocent persons. However, this objective attitude must not detract from the fact that as a prosecutor he is acting on behalf of an aggrieved party, the State. It is as much a miscarriage of justice for guilty persons to be acquitted as for the innocent to be convicted.

Consequently the air of detachment that the prosecutor should display does not mean that he must not present his case vigorously. Ideally whatever the results at the end of the case, the prosecutor should be able to say that he has done his best.

In the words of a former Attorney-General, Justice M.G. Muli:

> As prosecuting counsels we never lose or win cases. We only have a burden upon ourselves to prove a case beyond reasonable doubt in criminal cases and on balance of probabilities in civil cases. In this regard, we must place before this court all facts concerning the case and must be fair, honest, frank, courteous and respectful when doing so. In our system, the constitution allows for a conviction and an acquittal, so we should not therefore strain after a conviction, we must always seek to see that justice is not only seen to be done but that it is done.

In *Bukenya and others v. Uganda*, it was held that the prosecution must make available all witnesses necessary to establish the truth even if their evidence is inconsistent and that under certain circumstances the court, on its volition, has a duty to call witnesses whose evidence appears essential to the just decision of the case.

The role of the prosecutor is that of an agent of justice and as an advocate in court represents the public, including the complainant who is the victim of the some crime of which the public is interested in knowing the truth through fair prosecution in court. The reason why the role of the prosecutor is different from that of an ordinary advocate was summed up by the U.S. Supreme Court in *Berger v. United States*, 55 s. ct. 629 (1935):

> The [prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartiality is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

> As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.

If the accused is acquitted, the prosecutor should not feel that he has "lost the case" for the State does not "lose" if one of its citizens is acquitted on a criminal charge. The prosecutor should be able to say that the accused was acquitted only because the evidence was insufficient to support a conviction. He should never have to say that although the evidence was otherwise satisfactory he failed to conduct his case properly.

It is as well too to remember the salutary words of a great South African judge, Curlewis J. A, in the case of *R. v. Hepworth*, 1928 AD 265 at 277:

> A criminal trial is not a game where one side is entitled to claim the benefit of any omission or mistake made by the other side, and a judge's position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides.

The prosecutor stands between the police and the citizen and is expected to make sure that a prima facie case is made out in respect of each charge before the accused is put to the expense and inconvenience of being brought to court and called upon to plead.

B. Presentation of the State Case

The prosecutor must understand all the facts of his case and be able to present them in a clear and logical sequence so that the court is able to follow the evidence with the minimum of mental effort. From the magistrate's point of view, it is relatively easy to try a case which is presented in a logical sequence and in such a way that the relevance of each piece of evidence is readily apparent.

A properly presented case enables the magistrate to concentrate on his prime duty of judging the innocence or the guilt of the accused. It should not be necessary for the magistrate to have to shoulder the additional burden of trying to follow a badly presented case.

It is a waste of every one's time to produce unrelated and unexplained facts and exhibits before the court and expect the magistrate to be able to understand what they are all about. In addition, it is unfair to the accused who should also be able to follow the evidence with the minimum of difficulty.

It is also the duty of the prosecutor to ensure that a correct charge is filed against the accused person. Section 214 of the Criminal Procedure Code empowers the court to amend or substitute a charge if the original charge is shown to be defective.

The ease with which a prosecutor is able to present and prosecute his case is directly proportional to the amount of preparatory work he carries out. He must read the file carefully, he must know or find out the relevant laws; and he must plan the presentation of his case with care and common sense.

The magistrate's burden is greatly increased when the prosecutor is inexperienced. As pointed out by the Supreme Court in *S. v. Manger*, 1985 (1) ZLR 272:

> It is not part of the magistrate's job to assist an inexperienced prosecutor. The ways in which a magistrate may assist a prosecutor are strictly limited and no prosecutor should ever appear in court feeling that if things go wrong during the trial the magistrate will help him.

The prosecutor does not go into court just to lead in evidence of the facts contained in his file. His job is more exacting than that. He has to lead the evidence, judge its veracity and effect on the court, form an opinion concerning what facts seem to be common cause and what facts are in dispute and be prepared to argue the merits of his case, either on a point of law or on the facts. To do this, he must take a sustained and intelligent interest in all the evidence given.

Prosecuting is hard work and the prosecutor must be on his toes all the time. The successful prosecutor is always learning something new.

C. Legal Ethics

Public prosecutors, whether admitted as legal practitioners or not, are bound by the ethics of the legal profession. Members of the legal profession are bound by strict rules, which are administered by the law society. These rules are intended primarily to protect the public, particularly the clients of the legal practitioners, but are also intended to maintain an acceptable level of conduct within the profession itself. The rules, thus, regulate dealings between lawyers and the conduct of lawyers in their dealings with the courts. Public prosecutors do not have clients, as such, but they deal with members of the public in the form of the accused and the witnesses and with defense lawyers. A major part of their task involves dealing with the courts.

The public nature of a prosecutor's task makes it is essential that his conduct in the performance of that task be above reproach.

"Ethics" involves a consideration of moral questions. Conduct which is ethical is morally correct and honourable. As mentioned above, the prosecutor's task is not to win at all costs. It would be easy to win cases if one was dishonest or devious. In a civilized country which adheres to the rule of law, such conduct is completely unacceptable, being as it is immoral and thus unethical.

Prosecutors are bound by ethical rules at all stages of their task, not merely when presenting a case in court. Ethical considerations arise before and after the start of court proceedings and even when a prosecutor is off duty.

IV. PRIVATE PROSECUTIONS

A. The Attorney General in Kenya is the Director of Public Prosecutions. The authority is given to him by the Constitution of Kenya in section 26 (3) thereof to institute and undertake criminal proceeding against any person in Kenya and before any court (except a court-martial) and in respect of any offense. A prosecution is the process of institution and undertaking criminal proceedings against any person in a court of law. The Attorney General is, therefore, responsible for all public prosecutions in the country. Every public prosecutor shall be subject to his directions.

B. There may be certain instances where a private person may wish to institute criminal proceedings against another. First and foremost, there is no constitutional provision for this, i.e., the Constitution of Kenya has not, as it has done in the case of the Attorney General, expressly authorized a private person to institute and undertake criminal proceedings. However, the Criminal Procedure Code, which is subordinate to the Constitution, has under section 88 thereof, permitted a private person to conduct a criminal prosecution against another with permission of the court. This section reads:

(i) A Magistrate trying a case may permit the prosecution to be conducted by any person, but no person other than a public

prosecutor or other officer generally or specially authorized by the Attorney-General in this behalf shall be entitled to do so without permission.

(ii) Any such person or officer shall have the same power of withdrawing from the prosecution as provided by section 87, and the provisions of that section shall apply to withdrawal by that person or office.

(iii) Any person conducting the prosecution may do so personally or by an Advocate.

In private prosecutions, the A.G. is in law entitled to take over a private prosecution from the private prosecutor. After he has taken over the private prosecution, the said prosecution becomes a public prosecution after which he may terminate the proceedings as was the case in *Republic Through Herman M. Asava & Another v. Peter F. Kibisu*, in which the accused was charged with assault, confinement and malicious damage to property.

In addition to this, the High Court of Kenya has given the following guidelines on how a private prosecution may be undertaken. This was done by the then Chief Justice A.A. Simpson and the late Justice S. K. Sachdee when they stated on 12 July 1983 in H. Ct. Cr. Revision No. of 1983 *Richard Kimani* & S. M. *Maina v. Nathan Kahara* as follows:

> The right of private prosecution is a constitutional safeguard. In the words of LORD DIPLOCK in the GOURIET CASE (Supra) at p. 498; it is useful constitutional safeguard against capricions, corrupt or biased failure or refusal of police forces and the Office of the Director of Public Prosecutions to prosecute offenders against the criminal law...when an application is made under section 88 to conduct a prosecution, we think that the magistrate should question the applicant to ascertain whether a report has been made to the Attorney-General or to the police and with what result. If no such report has been made, the magistrate may either adjourn the matter to enable a report to be made and to await a decision thereon or in a simple case of trespass or assault proceed to grant permission and notify the police of that fact.
>
> The magistrate should ask himself,How is the complainant involved? What is his locus standi? Has he personally suffered injury or damage or is he motivated by malice, or political consideration?

C. It is a fundamental principle of law that private rights can be asserted by individuals and public rights can only be asserted by the Attorney-General as representing the public. Even if it be true that every citizen has sufficient interests in seeing that the law is enforced, it does not follow that every citizen has an interest in an offense which has caused him no damage or injury. The Attorney-General has made his position clear. He will not allow private prosecutions, which are motivated by personal vendetta or political considerations, to proceed. The guidelines laid down in 1983 by the High Court as stated above must be followed. To allow the mushrooming of private prosecutions is to open doors to abuses of the criminal process by individuals. Experience has taught us that it is difficult to close such doors once they have been opened wide.

V. INSTITUTION OF PROCEEDINGS

A. Proceedings may be instituted either by the making of a complaint or by the bringing before a magistrate of a person who has been arrested without warrant.

B. A person who believes from a reasonable and probable cause that an offence has been committed by another person may make a complaint thereof to a magistrate having jurisdiction.

C. A complaint may be made orally or in writing, but if made orally, shall be reduced to writing by the magistrate, and in either case, shall be signed by the complainant and the magistrate.

D. The magistrate, upon receiving any complaint, or where an accused person who has been arrested without a warrant is brought before him, shall draw up or cause to be drawn up and shall sign a formal charge containing a statement of the offence with which the accused is charged unless the charge is signed and presented by a police officer.

E. Where the magistrate is of the opinion that a complaint or formal charge made or presented does not disclose an offence, the magistrate shall make an order refusing to admit the complaint or formal charge and shall record his reasons for such and order.

VI. PROVISIONS AS TO BAIL

When a person, other than a person accused of murder, treason, robbery with violence or attempted robbery with violence, is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a court, and is prepared at any time while in the custody of that officer or at any stage of the proceedings before that court to give bail, that person may be admitted to bail.

Provided that, the officer or court may, instead of taking bail from the person, release him on his executing a bond without sureties for his appearance.

The amount of bail shall be fixed with due regard to the circumstances of the case, and shall not be excessive.

The High Court may, in any case whether or not an accused person has been committed for trial, direct that the person be admitted to bail or that bail required by a subordinate court or police officer be reduced.

VII. PLEA BARGAINING

Plea bargaining is a new concept in the English criminal law. Due to its adversarial set-up, the parties or their advocates have no say in matters of sentence which are peculiarly within the province of the trial court. The court has complete discretion as regards which sentence should be passed, and the prosecution is not permitted to state that an offence is serious as this is a matter for the court to decide. It is strange, therefore, to find the existence of plea bargaining in our criminal law which is not only adversarial in set-up in trials, but also does not allow the parties or their advocates to enter into bargains with the court.

Plea bargaining is primarily arrived at getting a lenient sentence for an accused person. This is achieved as a result of negotiations between the prosecution and the defense whereby the prosecutor, depending on the nature and circumstances of the offence, may reduce a charge of murder to one of manslaughter or may decide to prefer a charge of simple robbery instead of robbery with violence which carries a death sentence. This could be done in return for a plea of guilty by the accused to the lesser offences.

In murder cases a judge is not bound to take a plea of guilty to manslaughter even if counsel for both sides have agreed to this course of action.

In some cases, the prosecution may drop all the charges against an accused person in consideration of an accused becoming a witness in a more serious and complicated case.

Plea bargaining has its advantages and disadvantages. Successful bargained pleas do assist in reducing the backlog of cases in court. This increases the chances of serious crimes ending up as minor convictions which in turn may distort crime statistics, which are vital in the study of criminology. As a result of plea bargaining, the trial of an accused comes to a speedy end as opposed to a charge hanging over his head with uncertainty about the outcome of the trial. If the trial is likely to attract adverse press publicity, a plea of guilty will put an end to this publicity.

VIII. SENTENCING

After the court has convicted an accused, it proceeds to sentence. Defining what sentence is a difficult exercise. It has been defined as any order of the court made as a consequence of conviction, the aim of which is to protect the innocent citizens of society from the harmful acts of the criminals.

Before sentencing, a prosecuting officer is entitled as of right to inform the court whether the accused is a first offender or not. It was held in *Shiani v. Republic* that it is improper for the prosecuting officer to inform the court that an offence is serious. Under Kenya's adversarial legal system, this is a matter for the court to decide and to make findings since role of the prosecution is to present facts.

VIII. INVESTIGATING AGENCIES

Before a prosecution is mounted, there has to be an investigation into the offence allegedly committed. The investigation will show the origins, the cause, the motives, the offenders and the surrounding circumstances of the offence.

Some investigation may reveal insufficiency of evidence to warrant a prosecution in court in which event the matter is close. Other investigations may reveal sufficient evidence to warrant a prosecution, yet a prosecution may not be mounted.

There are a number of agencies involved in the investigation of crime as shown here under:

A. The Police

1. Section 14 of the Police Act gives the function of the Kenya Police Force. The Force shall be employed in Kenya for the maintenance of law and order, the preservation of peace, the protection of life and property, the prevention and detection of crime, the apprehension of offenders, and the enforcement of all laws and regulations with which it is charged. It shall also be the duty of the Force, provided in Section 16 of the Police Act, to regulate and control traffic and to keep order on and prevent obstructions in public places, and to prevent unnecessary obstructions on the occasions of assemblies, meetings and processions on public roads and streets, or in the neighborhood of places of worship during the time of worship therein.

2. In the discharge of its functions, every police officer shall promptly obey all *lawful orders* in respect of the execution of his office which he may from time to time receive from his superiors in the Force. He shall promptly obey and execute all orders and warrants lawfully issued to him. He shall promptly collect and communicate intelligence affecting law and order and promptly take all steps necessary to detect offenders and bring them to justice and to apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient ground exists. Upon his enlistment to the Force, every police officer swears that he will discharge all the duties of a police officer according to the law, without fear, favour, affection or ill-will. The duty of investigation is entrusted by the Commissioner of Police to the Director of Criminal Investigations Department covering the whole country. See Figure 4.

3. The Attorney-General, as the Director of public prosecutions in Kenya, has the constitutional role to instruct the Commissioner of Police to investigate any matter which, in the Attorney-General's opinion, relates to any offense or suspected offense [see section 26 (4) of the Constitution]. Upon being so instructed the Commissioner of Police shall comply with that requirement and shall report to the Attorney-General upon completion of the investigation. The power of the Attorney-General may be exercised by him in person or by officers subordinate to him and acting in accordance with his general or special instructions, The exercise of this function the Attorney-General shall not be subject to the direction or control of any other person or authority.

4. The public is policed by the police, but the police do police themselves. Nevertheless, they are subject to laws of the land. Where a police officer is alleged to have committed an offence, he is investigated by fellow police officers. As a matter of police practice, the investigation file has to be sent to the Director of the Criminal Investigations Department and thereafter to the office of the Attorney-General, who then decides whether a prosecution should be proceeded or not. It is important to note that the CID section of the police force is charged with the investigation of serious crimes like fraud, murder and corruption. It also offers advice and technical guidance in matters of crime investigation to the police stations. Apart from CID, there are other specialized sections within the police force like Anti-Stock theft, traffic and intelligence charged with duties from which their titles are derived.

B. The Courts

The investigative role of the court including the High Court as a trial court is very limited due to the adversarial set-up of Kenya's legal system. Under this system the role of the court is that of impartial arbiters ensuring the observance of the trial rules and thereafter the delivery of judgements.

1. Power to Summon Witnesses

Section 150 of the Evidence Act provides that the courts may summon as a witness any person whose evidence appears essential to a just decision of the case. The fact that the law permits the court to call witnesses on its own volition is an indication that investigations are a continuous process which end with the final determination of the trial. It also shows that investigation is not the exclusive province of the police or the Office of the Attorney-General. The difficulty faced by the court in this enforced role was expressed by the former Court of Appeal for East Africa in the case of *Muriu and others v. R.* in the following words:

> It has been said that a judge must not descend into the arena so that his judgement becomes warped by the dust of conflict. Conversely a judge cannot sit in splendid isolation above the conflict and not intervene even when he detects a lacuna or ambiguity in the evidence.

2. Committal Proceedings

The investigatory role of the courts is clearly discernible in offences that are triable only by the High Court. These offences include murder and treason, which are preceded by the holding of committal proceeding before proceeding to trial. The role of the Magistrate's Court in the committal proceedings is to ensure that only those cases where prima facie evidence is disclosed that proceed for trial, thereby excluding frivolous prosecutions. Once the committal bundles have been filed in court, the committal magistrate after perusing the bundles may make the following orders:

(1) Commit the accused to stand trial in the High Court.
(2) Commit the accused to stand trial in the magistrates court competent to try the offence. This will apply if it is a lesser offence like manslaughter (which is triable by a Senior, Principal or Chief Magistrate's Court).
(3) Discharge an accused.
(4) After discharging an accused, order that an inquest be held if the deceased died in prison or police custody.

The role of the High Court in committal proceedings is very limited because it is the court that tries persons who have been committed for trial to itself.

3. Inquests

Closely related to the holding of committal proceedings by the Magistrate's Courts is the conducting of inquests into sudden or unnatural deaths in compliance with sections 387 and 388 of the C.P.C. The purpose of holding an inquest is to determine the cause of death and the surrounding circumstances where foul play is suspected or where a person has died in police or prison custody. At the conclusion of the inquest, the court may order for the arrest and charging of a suspect if the evidence discloses the commission of an offence by the suspect. If at the termination of the inquest the magistrate finds that an offence has been committed by some person or persons unknown, the magistrate is required by the law to send a copy of his ruling to the Attorney-General who may direct further investigations.

C. The Office of the Attorney-General

1. The role of the Attorney-General in the investigative process is indirectly tied up with his prosecutorial powers as the chief prosecutor. In a number of offences, the statutory consent of the Attorney-General is required before a prosecution can be mounted. These offences include murder, sedition, incest, false claims, abuse of office and the prevention of corruption. Where a prosecution proceeds without the sanction of the Attorney-General, the proceedings are null and void.

2. The fact that a prosecution of an offence requires the consent of the Attorney-General, does not stop the police from arresting and charging a suspect in court. However a trial does not begin until the consent is filed in court. Where a prosecution requires the consent of the Attorney-General, the investigating agency has to send the investigation file to the office of the Attorney-General who, after perusal of the same, may direct further investigation, grant consent or direct a withdrawal of the charge against the accused. The purpose of requiring the consent is to ensure that there is prima facie evidence to warrant a prosecution and also that the charge is properly drawn out since such charges are technical and, therefore, need technical expertise.

3. The Attorney-General's role in the committal proceedings in murder cases has been considered. Apart from offences requiring the Attorney-General's consent to prosecute, there are other cases of public importance and interest that have to be referred to him for directions. The Attorney-General may also direct that an inquest be held by a magistrate. In some cases, the Office of the Attorney-General may simply advise the police to forward the file to the magistrate, who will decide whether or not to hold a public inquest.

4. The investigative role of the Attorney-General ensures that only cases where prima facie evidence is disclosed go for trial, and it also ensures that trials, are brought to a speedy end by ensuring that investigations are completed before a trial commences; for courts are not supposed to be used as commissions of inquiry.

X. CONCLUSION

The criminal justice system starts as soon as a crime is reported to the police and investigations start. A crime may be reported by the complainant or a member of the public or it may have been committed in the presence of law enforcement officers. The Attorney-General is also empowered under section 26 of the Constitution to require the Commissioner of Police to investigate a matter where he thinks a criminal offense may have been committed. Where investigations have taken place and there is enough evidence to sustain a criminal charge in court, then prosecution will normally follow. Under the constitution, the Attorney-General is in charge of criminal prosecutions. It is important to emphasize that the decision of whether or not to prosecute cannot depend on and be entrusted to public opinion. This would be tantamount to accepting mob justice or instant justice. The decision depends primarily on the investigation report carried out by the investigation agencies and whether that report contains enough evidence to establish a prima facie criminal case against a particular person. Hence is the extreme importance of thorough investigations being carried out by the police and other investigation agencies in any criminal justice system. It is vital that the police and other investigation agencies carry out proper investigation into all reported criminal cases. It is necessary to mention that failure by other criminal justice agencies to work effectively and efficiently will greatly affect the role and function of the prosecution.

Figure 1

THE STRUCTURE OF THE PUBLIC PROSECUTIONS ATTORNEY-GENERALS CHAMBERS

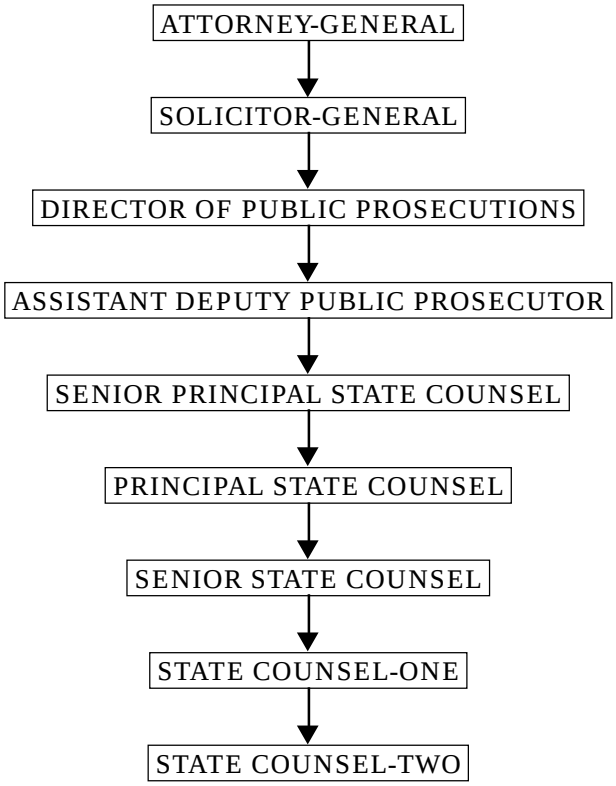

Figure 2

THE STRUCTURE AND ORGANIZATION OF THE KENYA POLICE FORCE

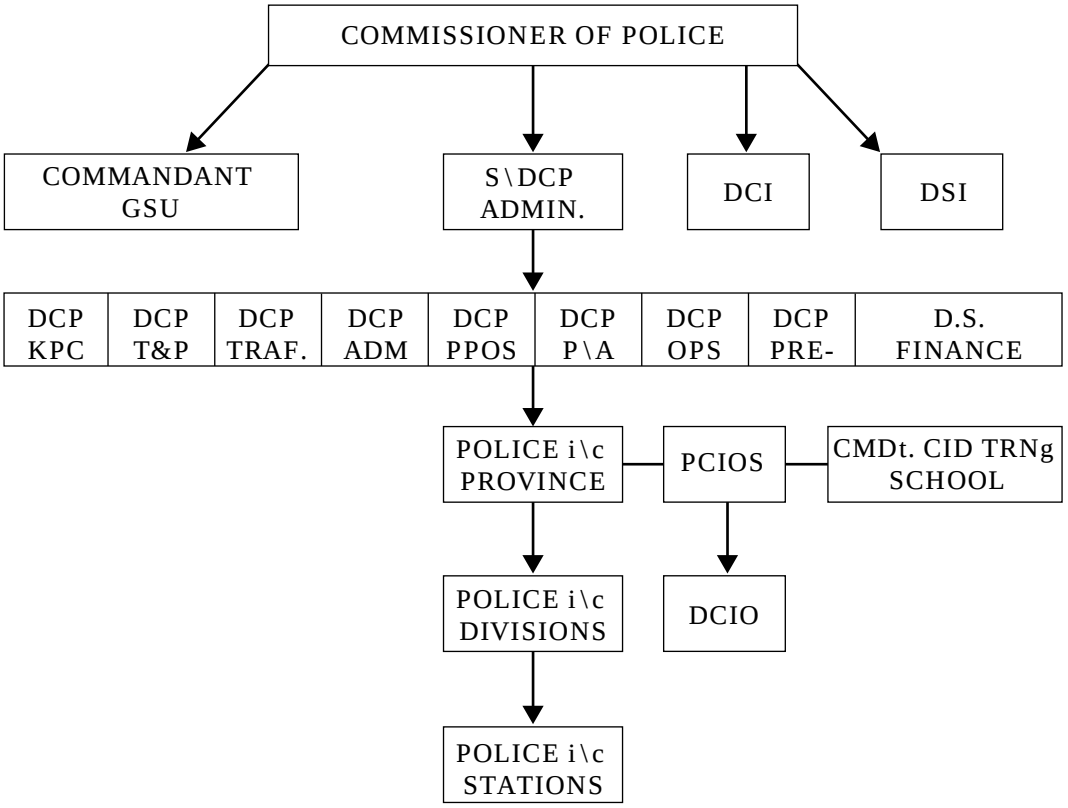

Figure 3

THE STRUCTURE AND ORGANIZATION OF THE CRIMINAL COURTS

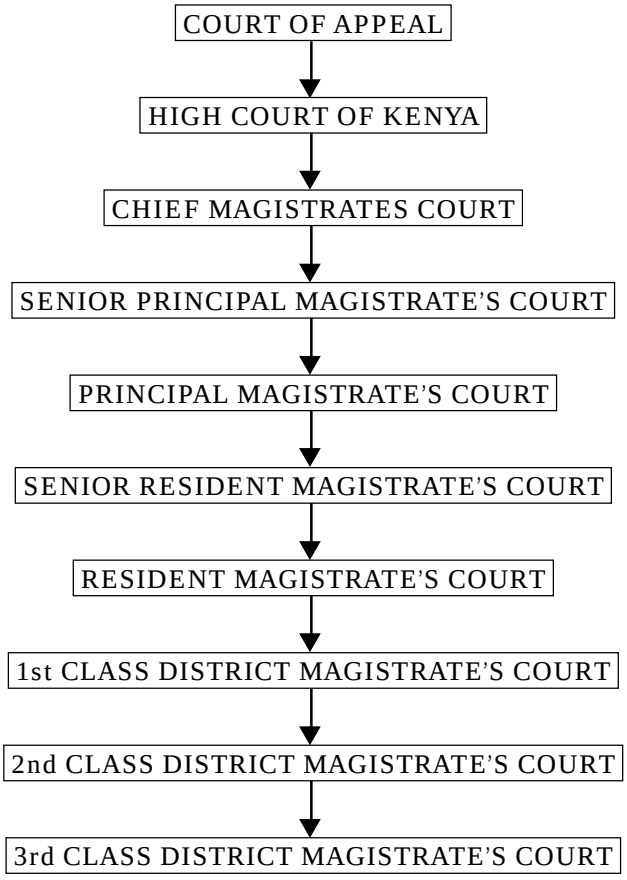

Figure 4

THE STRUCTURE AND ORGANIZATION OF THE CRIMINAL INVESTIGATION DEPARTMENT

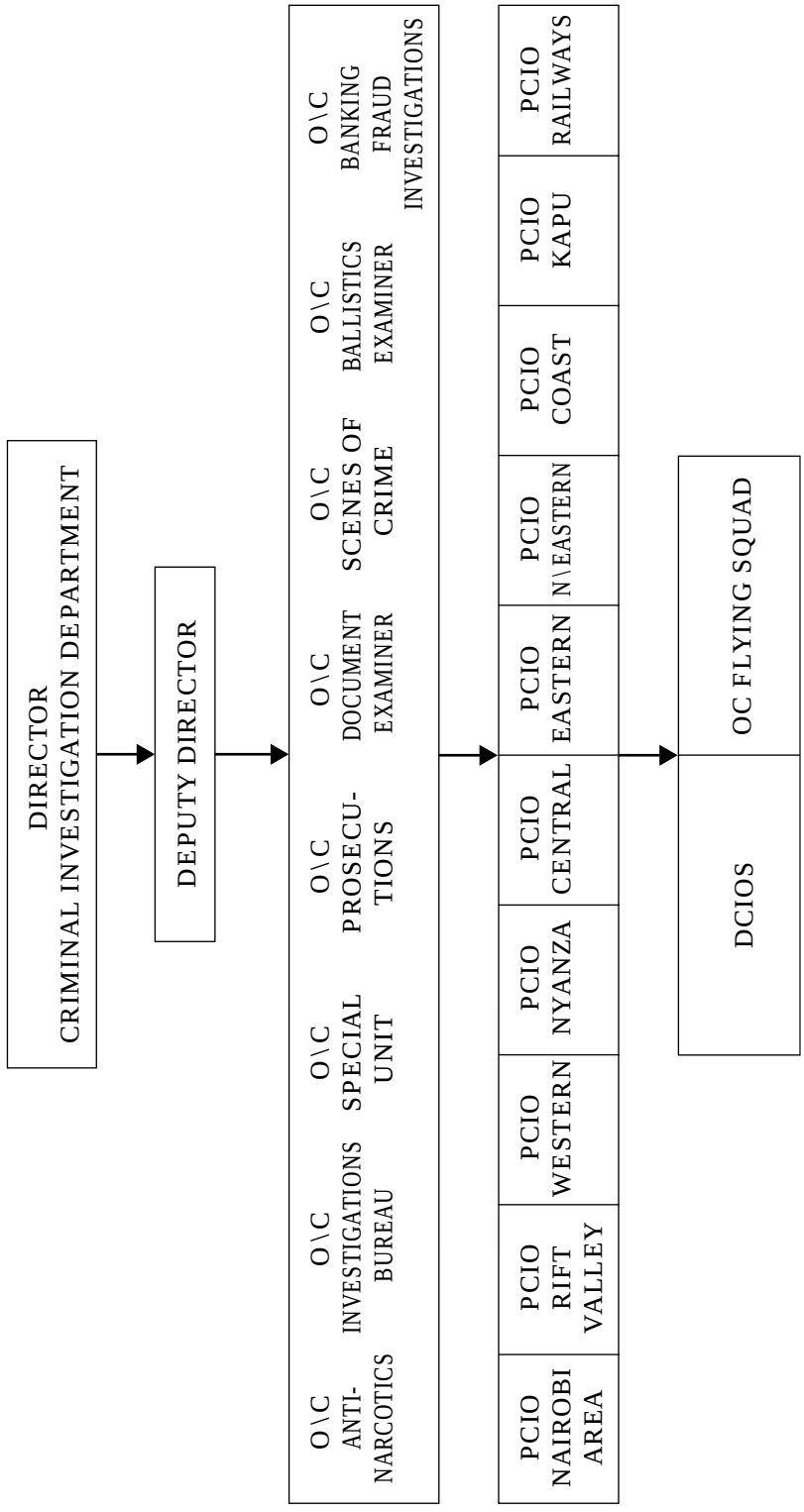

Table 1

ESTABLISHMENT AND STRENGTH—NAIROBI AREA

A. Judiciary

Nairobi Law Courts

Chief Magistrates	3
Senior Principal Magistrates	1
Principal Magistrates	2
Senior Resident Magistrates	7
Resident Magistrates	7
District Magistrate-1st Class	1
Total:	**21**

Makadara Law Courts

Principal Magistrates	1
Senior Resident Magistrates	3
Resident Magistrates	4
Total:	**8**

Kibera Law Courts

Principal Magistrates	1
Senior Resident Magistrates	3
Resident Magistrates	3
Total:	**7**

B. Prosecutors

	ACP	SSP	SP	C\I	I\P	NCO
Establishment	1	1	2	4	35	5
Strength		1	1	2	35	1

THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

*Lithnarong Pholsena**

I. POSITION OF THE PROSECUTION SYSTEM WITHIN THE NATIONAL ORGANIZATIONAL STRUCTURE AND ITS INDEPENDENCE AND NEUTRALITY

The state apparatus of Lao PDR is composed of three main groups of State bodies:

(1) The National Assembly as the legislative body;

(2) The government and local administrative authorities as the executive body; and

(3) The judiciary, which is composed of the court system and the public prosecution system. This is some how different from the common understanding of the word "judiciary". Nonetheless, the court system and the prosecution system exist as different bodies having their own position and tasks. However, both are connected to the National Assembly, to which they must report their activities every three months.

The Office of the Public Prosecutor has the role of monitoring and inspect the proper and uniform adherence to the law by ministries, State committees, offices, enterprises, other State organizations and local administrative authorities, civil servants and citizens.

The duties of the Office of the Public Prosecutor also include ensuring justice, regularizing (and systematizing) society and preserving the just rights and benefits of all ministries, State committees, offices, enterprises, other State organizations, local administrative authorities, civil servants and citizens.

Additionaly, the Office of the Public Prosecutor contributes to the education and training of civil servants and citizens to make them aware of and respectful of laws and regulations in their daily lives.

The Office of the Public Prosecutor also has a duty to:

(1) Monitor and inspect the performance of laws of all State agencies, offices, enterprises, other State organizations, civil servants and citizens (general monitoring and inspection);

(2) Monitor and inspect the performance of laws by the investigation-interrogation agencies;

(3) Monitor and inspect the performance of laws in case processing in the courts and the court's decision-making;

(4) Monitor and inspect the performance of laws in places of arrests, imprisonment, at the time that the deprivation of liberty and other court enforcement measures are being applied;

(5) Undertake prosecution against crime and other violations of the law to dispose of and terminate the causes and the conditions which cause such wrongdoing to arise;

(6) Ensure complete, thorough investigation and interrogation of all criminal cases according to their merits, and issue measures to preempt wrongdoing by coordinating with State agencies and other societal organizations;

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(7) Ensure that offenders receive punishment according to the law and not allow innocent people to be punished; and
(8) Undertake investigation and interrogation of all or some portions of any case within its authority as provided by law.

Within the scope of its powers, a lower level of the Office of the Public Prosecutor has the right to undertake investigation and interrogation of cases according to and order from a higher-level public prosecutor.

In such investigations and interrogations, the public prosecutors may assign civil servants to undertake investigation and interrogation matters in their place.

The Office of the Public Prosecutor at various levels consists of a uniform and centralized system, lead by the Public Prosecutor General.

Public prosecutors at the local levels (province, prefecture and district) and military prosecutors perform their duties independently and are not subject to the authority of local State agencies. They are only subject to the authority of the Public Prosecutor General.

The Office of the Public Prosecutor of the Lao People's Democratic Republic undertakes its activities based upon legal acts in accordance with the Constitution and the laws of the Lao People's Democratic Republic. It ensures the proper and uniform performance of the laws without being subject to the local administrative authorities; issues the necessary measures in search of violations of the law and seeks to eradicate all violations of the law; seeks to restore the violated rights of the citizenry; and prosecutes offenders in court. As indicated above the prosecutors are independent in performing their duties, relying only on the laws and the instructions of the Public Prosecutor General.

Although public prosecutors are the representative of the State and the society, struggling against law violations and supervising the respect of laws, it would not be correct to consider them a corporation which blindly protects the State and the society. Carrying out their duties, prosecutors must rely on the facts, the actual situation, the evidence and the laws. They have to be guided by a sense of neutrality, truth and justice. No interference from outside can not be admitted.

II. APPOINTMENT AND TRAINING OF PUBLIC PROSECUTORS AND THE GUARANTEE OF THEIR STATUS

The Public Prosecutor General is appointed by the National Assembly according to a proposal from the Standing Committee of the National Assembly and has a term of office equal to the term of the National Assembly. He is responsible for reporting the activities of the Office of the Public Prosecutor to the National Assembly. When the Assembly is not in session, he reports to the Standing Committee of the National Assembly.

The Public Prosecutor General is dismissed by the National Assembly according to a proposal from the Standing Committee of the National Assembly, and when the Assembly is not in session, the position may be suspended temporarily by the Standing Committee of the National Assembly.

Deputy Public Prosecutors General are appointed and dismissed by the Standing Committee of the National Assembly according to a proposal from the Public Prosecutor General.

Such prosecutors are responsible for reporting their activities to the Public Prosecutor General and the prosecutors below him, but perform according to the

orders of the Public Prosecutor General and higher-level prosecutors only.

Up to now there is no special training institution for public prosecutors in our country. For the entire country, there is only one law school, located in Vientiane. Created at the end of 1986 with about 30 students for each entry, the law school now has about 1150 students. From its beginning to July 1997, it was under the Ministry of Justice. From July 1997, it became the law faculty of the National University. Students who graduate from the law school work as judges, public prosecutors, police officers, lawyers, etc.

Some of our public prosecutors graduated from foreign universities, e.g., in the former USSR and Viet Nam. Many efforts are made to upgrade the knowledge and skills of public prosecutors by organizing for them seminars and study tours for exchange experiences.

Actual field inspection and instruction on the work of lower public prosecutors is commonly used. Particularly groups of two to three members of the Public Prosecutor General's Office travel throughout the country in order to know how provincial and district public prosecutors carry out their work and, if necessary, give them instruction.

III. INVESTIGATION

In Laos, the investigation-interrogation agencies consist of:

(1) The investigation-interrogation agency of the police;
(2) The investigation-interrogation agency of the military;
(3) The investigation-interrogation agency of customs; and
(4) The investigation-interrogation agency of forestry.

The investigation-interrogation agency of the police is under the Ministry of Interior; that of the military is under the Ministry of Defense; that of customs is under the Ministry of Finance; that of forestry is under the Ministry of Agriculture and Forestry. In many cases, the police assist other investigation-interrogation agencies to carry out their work. Most criminal cases examined by the courts originated with the police. But only the prosecutor has the authority to send offenders before the courts.

A. Rights and Duties of Investigation-Interrogation Agencies

Investigation-interrogation agencies have the following rights and duties:

- Accept and record complaints regarding offenses;
- Report to the public prosecutor regarding offenses;
- Issue an order to commence investigation-interrogation and to immediately send a copy of the order to the public prosecutors;
- Proceed with investigation-interrogation;
- Make use of preventative measures as provided for in the law;
- Send a request to cancel an order of the public prosecutor to a higher-level public prosecutor; and
- Summarize the investigation-interrogation and compile a case dossier to be sent to the public prosecutor.

In the exercise of such rights and duties, the investigation-interrogation agencies must adhere to the scope of their rights and authorities as determined by their respective divisions.

B. Methodology Utilized by Investigation-Interrogation Agencies

1. The Rendering of Statements

An investigation-interrogation official or a civil servant investigator-interrogator

must take a statement from the accused immediately after the commencement of an investigation-interrogation. If the rendering of such statement is impossible to obtain immediately, such must be documented immediately along with reasons (for such impossibility).

The rendering of a statement by the accused must be performed at the Office of the Investigation-Interrogation Agency of the Civil Servant Investigator-Interrogator. However, if necessary, such may be performed at the house of the accused or at some other location.

Initially, in the rendering of that statement, the investigating-interrogating official or the civil servant investigator-interrogator must notify the accused of the change, and explain to the concerned individual his rights and obligations.

Each rendering of a statement must be recorded in writing by the investigating-interrogating official or the civil servant interrogator.

2. Questioning in the Presence of Others

When statements are non-conforming, the investigating-interrogating official or the civil servant interrogator has the right to question those persons who gave their statements together. However such questioning shall involve no more than two people at any time. Documentation of the questioning of persons giving statements in the presence of other persons who have given statements shall be performed in accordance with Article 35 of the Law on Criminal Procedure.

3. Incident Site Report

To search for evidence of an offence and material evidence, and to allow that conditions of an offence be clear, investigating-interrogating officials or civil servant interrogators must make an incident site report and (gather) materials and other documents.

The incident site report may be made before the commencement of the investigation-interrogation.

The incident site report must be made the same day as the incident, except in necessary and urgent cases only.

At the time of the making of the incident site report, there must be at least two witnesses. The investigating-interrogating official or the civil servant interrogator has the right to summon for the making of the incident site report the accused, a suspect, an injured party, witnesses and experts.

In the incident site report, the investigating-interrogating official or the civil servant interrogator must make a sketch of the location of the incident, take physical evidence or take photographs.

4. Death Reports

Investigating-interrogating officials or civil servant interrogators must make a death report at the location where the incident arose in the presence of at least two witnesses and the doctor involved or may make use of some other expert for their preparation of the death report.

5. Document of the Report

In the incident site report or the death report, the investigating-interrogating official or the civil servant interrogator must state the location, date, time of initiation and the time of termination of the inspection; the name and surname, address, profession, the position and the title of the investigating-interrogation official or the civil servant interrogators and of the individuals involved in the inspection; all things observed or occurring at that time and anything seized.

After the documentation and reading of the report, involved individuals in the making of such inspection must sign such report.

6. Appointment of Experts to Conduct Inquiry

When it is deemed necessary to inquire specifically into such issues in a case of death by unclear causes or suspicions regarding majority age, or the inability of the accused to understand the charges or circumstances in which he finds himself, the investigating-interrogating official or the civil servant interrogator must issue an order to appoint an expert to conduct such inquiry.

That order must state the name and surname of the expert or the relevant agency, the matter and the material or goods which must be proved, the time required for the inquiry, the rights and obligations of the expert, and a statement of the expert's liabilities involved in the inquiry.

The investigating-interrogating official or the civil servant interrogator must notify the accused, the injured party, the civil plaintiff, or a civily liable party of such order. After the inquiry is concluded, the expert must summarize his opinions and send such to the investigating-interrogating official or the civil servant interrogator in accordance with the time limits assigned.

An expert's inquiry may be performed many times.

7. Searches

Searches may be conducted only when there is an order in writing from the Public Prosecutor General or a court, except in necessary and urgent cases. However, there must be a reporting to the public prosecutor within twenty-four hours after such search has been concluded. Before and after such search, the individuals involved in such search must demonstrate their (honesty and) integrity toward the owner of the searched premises.

a) Building searches

Building searches must be made in the presence of a village-level authority, the house owner and at least two witnesses. In the case that there is a search of an office, an agency or an enterprise, it must be conducted in the presence of a representative of such office, agency or enterprise.

Searches of places of worship or temples must have the participation of a temple administrator.

Searches of buildings shall be performed from six a.m. to six p.m.

In the case that searches are conducted, but have still not ended, they shall continue until completion.

Materials and documents can be seized as objective evidence only so long as there is a relationship and such evidence has been used in the wrongdoing or such materials or documents are illegal.

b) Searches of an individual

The search of an arrested person or an imprisoned person suspected of concealing objects can be made without an order (for such search). Officials conducting searches must be individuals who are of the same sex as the person being searched.

The search of a female must be conducted at enclosed premises.

c) Documentation of a search

When a building or an individual search is concluded, the officials who conducted such search must document the search and account for such items according to description, quantity and quality in detail.

Two copies of the documentation of such search must be made and the document must be read in the presence of the participants and then signed by all as evidence. One copy of such documentation becomes a part of the

case dossier and the other copy is given to the relevant house owner or the representative of the office, agency, enterprise or individual searched.

8. Seizure and Sequestration of Assets

In the case that the type, quantity, and location of materials related to the case are clearly known and such can be beneficial in the processing of the case, the investigating-interrogating official or the civil servant interrogator must issue an order to seize such assets. For materials which are movable, there shall be an order to seize such. For materials which are immovable, there shall be an order to sequester such.

9. Re-examination of Information

In order to inspect and confirm the accuracy of any information, an investigating-interrogating official or a civil servant interrogator can re-examine information.

In such re-examination, the investigating-interrogating official or the civil servant interrogator may take photographs, take measurements and make sketches.

The re-examination of information shall be made so long as it is deemed that such is not endangering life or the environment and does not cause damage to human dignity.

In such re-examination, there must be at least two witnesses involved and there may be the involvement of a suspect, an accused, witnesses and injured parties. In necessary cases, experts may also be involved.

Documentation of the re-examination shall be performed according to Article 41 of the Law on Criminal Procedure.

10. Identification of Persons and Confirmation of Property

In necessary cases, investigating-interrogating officials or civil servant interrogators may allow witnesses, injured parties, suspects or accused parties to identify individuals or confirm materials and corpses.

Before identification or confirmation, the person identifying individuals or confirming materials or corpses must make a statement regarding the conditions of their observations, along with having seen and having been aware of what they were seeing, describing the physical features, and other special points of the individual or material.

In the identification process, the person to be identified must be in the presence of at least three other individuals who have similar physical features.

In the confirmation of property, the property to be confirmed must be placed generally with at least three other goods which have similar characteristics and are of the same type.

The documentation of the identification of a person or the confirmation of property shall be performed in accordance with Article 41 of the Law on Criminal Procedure.

IV. INSTRUCTION AND SUPERVISION OF THE POLICE AND THE COOPERATION BETWEEN PUBLIC PROSECUTORS AND THE POLICE

In carrying out their duties concerning the investigation-interrogation of the criminal cases and particularly those which are complicated, the police receives instructions and is under the supervision of the public prosecutor, who has the authority:

- To instruct in writing regarding the investigation-interrogation, preventative measures, evaluation of an offense, performing investigative-interrogative measures and the search of offenders;
- To demand the criminal case dossier, documents and information regarding the offense from the investigation-interrogation agency for inspection;
- To participate in the investigation-interrogation of the criminal case and in necessary cases he investigate and interrogate on his own;
- To send the case dossier back to the investigation-interrogation agency along with instructions in writing to allow additional investigation-interrogation;
- To terminate an order from the investigation-interrogation agency or a civil servant interrogator which is illegal or is unreasonable;
- To order that the investigating-interrogating official or a civil servant interrogator who has violated the law during the case proceedings be removed from the investigation-interrogation;
- To commence investigation-interrogation, suspend case proceedings, close a case or refer a suit to court; and
- To authorize a defender to participate in a case from the date of the order to commence the investigation-interrogation.

Cooperation between public prosecutors and the police is very significant for the success of criminal proceedings. Experiences show that these two institutions must cooperate.

V. ROLE OF PUBLIC PROSECUTORS IN ARRESTING AND DETAINING SUSPECTS

A. Arrest

The arrest of any individual must be accompanied by an order in writing from the public prosecutor or the court, except in cases where an offense is seen being committed or in urgent cases.

Before the issuance of an order to arrest, the public prosecutor or the court must consider the following conditions:

(1) The wrongdoing must be a criminal offense upon which the law determines the penalty to the deprivation of personal freedom (liberty); and

(2) The evidence which supports the case must be weighty.

B. Detention

The detention must be accompanied by an order from the public prosecutor or the court and must reference the conditions mentioned above concerning arrest. The public prosecutor must issue an order of release for the accused immediately if the detention has exceeded one year and there is not sufficient evidence for a court case.

C. Indictment

1. Authorized Agency to Indict and the Methodology

In Laos, there is no examining judge as in France or other countries, who initiates criminal proceedings against the accused before the trial. We have public prosecutors, one of the duties of whom is to refer the criminal case to court.

The court shall accept a criminal case for consideration only so long as there is an order for such to be referred to the court from the public prosecutor.

The victim can not refer by himself (herself) directly a criminal case to the court. Before referring the criminal case to court, the public prosecutor must

research the case which has been sent from the investigation-interrogation agency or from the civil servant interrogator and if it is deemed that the basis for referring the case to court (indictment) is sufficient, the public prosecutor must issue an order referring the matter to the courts. In practice, indictment is composed of two separate documents. The first is called "order to refer the accused to court". It is a short document which contains the indication "Public Prosecution of...", first and last names of the accused, charges and violated articles of penal law, and the criminal procedure law serving as the basis for the indictment. The second document called "public prosecutor's statement" contains the same items as the first one, but it also gives details concerning the accused and the crime committed by him. For example, in this document, there is a description of the crime from the beginning to the end; the evidence concerning the crime; the personality of the offender; and how he should be punished by court.

The public prosecutor's statement must be convincing in all aspects that the offender has committed the crime with which he is charged. For that the evidence must have been gathered at the level it is sufficient to confirm the accused is guilty.

2. Degree of Certainty Regarding Guilt Required to Indict a Suspect

It seems that our criminal procedure and our mentality require a high degree of certainty regarding guilt in order to indict a suspect. The courts, public prosecutors, civil servant investigators or investigating-interrogating officials must submit their evaluation or evidence with their belief in (acceptance of) such evidence based upon thorough and complete consideration of the case, and based upon objectivity. In short, there must be no doubt about the guilt of the offender sent to trial. That does not mean the offender is the "queen of proof". By law and in practice, the court in many cases declares guilty and sentences the accused without the accused's guilty plea. Sometimes the guilty plea of the accused leads to an error.

The evidence in criminal proceedings has great significance. The decision of courts depends on how is the evidence gathered.

3. Exercise of Discretion in Prosecution

The Law of Criminal Procedure of Laos stipulates the following:

> In the case that officials are investigating or interrogating or the Public Prosecutor has found evidence of an offense, an investigation or interrogation must be commenced within the boundary of their authority. There must be usage of measures provided for in the law in order to search for offenses and offenders and then send such offender to the courts for sentencing according to the law.

So there can not be any discretion in prosecution. According to the law, the public prosecutor has no choice. If he/she becomes aware of an offense, he/she must initiate criminal proceedings against the offenders.

4. Plea Bargaining

In our law, there is no plea bargaining. There can not be an agreement between the prosecution and the defense or between the judge and the defense. If the accused pleads not guilty and there is not sufficient evidence as to his/her guilt or there is cause for of an exemption, the accused must be acquitted. On the contrary, if there is sufficient evidence indicating that the accused has committed the crime and there is no exemption of penal liabilities, he/she will be punished. Moreover, if there is cause conductive to mitigation of penal

responsibilities, the penalty can be less severe. In Lao law, there are ten causes conducive to mitigating penal responsibilities. However in the prescription of penalties, the court might take into consideration other factors as well.

D. Trial Proceedings

1. Proof of Criminal Facts

Criminal facts can be proved by different means, e.g., witness statements, statements of injured parties, statements of suspect, statements of the accused, opinions of experts, material evidence, investigation-interrogations documents, court activities, and other documents which relate to the case.

2. Cooperation for Speedy Trial

The criminal case referred to the court from the public prosecutor must be considered within one month from the date of having received the case dossier from the public prosecutor.

In practice, it is difficult for the courts to comply with this time provided for by law. Only a few criminal cases can be considered within one month from the date that they arrive at the courts. Currently courts face criminal cases dossiers not being complete or unclear, and thus, they must be given back to the public prosecutor for additional investigation-interrogation. Some common problems include that all the offenders who committed the same crime are not referred to the court; the offender has not been charged with all crimes committed by him; and the evidence is unclear.

3. Securing Appropriate Sentence

Before all there are laws serving as a basis for imposing the sentence. The court prescribes penalties on the punishment of infractions. In prescribing penalties, the court must consider the features and nature of the social threat generated by the infraction, the personality of the offender and the circumstances of penal responsibilities. In the law, there are causes conductive to the litigation of penal responsibilities and circumstantial causes conductive to the increase of penal responsibilities. In prescribing penalties, the court must also take in account the fact that the infraction committed is at the preparation stage or is attempted due to abuse, incitement or recidivism; the accused is the first offenders; and so on.

4. Supervision of the Fair Application of the Law

As mentioned above, the Public Prosecutor General and lower-level prosecutors monitor and inspect the performance of the law at the courts so that cases are processed properly, completely, according to their characteristics, for proper, legal and reasonable final judgments.

Concerning sentences at the first or second instance that the public prosecutor consider unfair or illegal, they will be "attacked" by the public prosecutor. In order for the public prosecutor to monitor and inspect the judgments of the courts, these are sent regularly to the prosecutor's office. Now the monitoring and inspection by the public prosecutor of court judgments is on the increase. Many criminal and civil court judgments are attacked by the public prosecutor.

E. Execution of Punishment

The organizations with the duty to enforce decisions and court judgments are:

(1) Judgment enforcement personnel of the court regarding civil damages in criminal cases;

(2) Correction personnel regarding punishment entailing the deprivation of personal liberty;

(3) Governmental authorities or public organizations, an office or an enterprise related to education and training.

A prison exists in each province. There prisons are in a bad situation. Some of them are in Savannakhet and Khammouane provinces, which were built in the French time. However those built recently are not much better. Sometimes there is not enough room for all prisoners, so "floors" are added for prisoners to sleep on.

There is no trained personnel for the re-education of offenders.

F. Public Prosecutor's Involvement in National Criminal Justice Policy

National criminal justice policy in our country is included in the five-year plan of socio-economic development adopted by the National Assembly. Each year, on the basis of this five-year plan, the government will work out an annual plan of socio-economic development. The Office of the Public Prosecutor General, the Supreme Court and the Ministry of Interior play an important part in the conception of national criminal justice policy. Now for example, Laos is struggling against bad phenomena occurring in our society: corruption, embezzlement of State properties, narcotics, and trafficking in women and children.

THE ADMINISTRATION OF CRIMINAL JUSTICE IN MALAYSIA: THE ROLE AND FUNCTION OF PROSECUTION

*Abdul Razak Bin Haji Mohamad Hassan**

INTRODUCTION

Malaysia as a political entity came into being on 16 September 1963, formed by federating the then independent Federation of Malaya with Singapore, North Borneo (renamed Sabah) and Sarawak, the new federation being Malaysia and remaining and independent country within the Commonwealth. On 9 August 1965, Singapore separated to become a fully independent republic within the Commonwealth. So today Malaysia is a federation of 13 states, namely Johore, Kedah, Kelantan, Selangor, Negeri Sembilan, Pahang, Perak, Perlis, Trengganu, Malacca, Penang, Sabah and Sarawak, plus a compliment of two federal territories namely, Kuala Lumpur and Labuan.

Insofar as its legal system is concerned, it was inherited from the British when the Royal Charter of Justice was introduced in Penang on 25 March 1807 under the aegis of the East India Company. Appropriately, the Malaysian legal system has not been plucked out from the sky but it is the product of our experiences over the centuries; so does its criminal justice system which goes side by side with the development of its legal system. In discussing the subject of The administration of criminal justice, understanding the constitutional history just cannot be avoided. Inadvertently, the legal system that Malaysia inherited from its colonial masters colours the pattern of the criminal justice system today.

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PART I

A. Constitutional History

The territories of Malaysia had been part of the British Empire for a long time. After the Second World War, there was a brief period of British military administration. A civilian government came into being in 1946 in the form of a federation known as the Malayan Union consisting of the eleven states of what is now known as West Malaysia. This Federation of Malaya attained its independence on 31 August 1957. In 1963, the East Malaysian states of Sabah and Sarawak joined the Federation and was renamed "Malaysia".

B. Parliamentary Democracy and Constitutional Monarchy

The Federal constitution provides for a parliamentary democracy at both federal and state levels. The members of each state legislature are wholly elected and each state has a hereditary ruler (the Sultan) or Yang di-Pertua Negeri (Governor) in the states of Malacca, Penang, Sabah and Sarawak. The head of state must act in almost all matters on the advice of ministers drawn from and responsible to the State Legislative Assembly.

This pattern is repeated at the federal level. Parliament is a bicameral legislature, the lower House (the House of Representatives) being wholly elected. The federal head of state, known as the Yang Di Pertuan Agong, who is appointed from among the nine Malay Sultans and serves a five-year term, must act on the advice of the Federal Cabinet or a minister acting under the general authority of the cabinet. The Prime Minister has to be a member of

the House of Representatives commanding the confidence of the House. The Upper House, the Senate, has two senators elected by each Sate Legislative Assembly and a number of members nominated by the Federal Government.

All laws are passed by Parliament, and there are bodies that see to its enforcement. The interpretation of the laws lies mainly with the judiciary. The country exercises formal social control through the establishment of a formal criminal justice system which is characterised by the existence of criminal laws, law enforcement agencies, prosecutors, judges, magistrates, correction officials, prisons and other institutions.

C. The Administration of Justice

The federal constitution provides for the exercise of power by the Legislature, the Executive and the Judiciary. The judiciary plays an important role in this balance of power. It has the power to hear and determine civil and criminal matters, and to pronounce on the legality of any legislative or executive of the federal as well as state constitutions.

The fundamental principle in Malaysia is that an accused person is innocent until proven guilty by a competent court of law. Thus the criminal justice system in Malaysia provides various safeguards to protect accused persons. A duty is imposed on the states, particularly the police force, to maintain law and order in the interest of the public. Investigation into an offence resides with the police, and the duty to decide whether a person ought to be charged or not lies with the Attorney General, who is a public prosecutor.

D. Hierarchy of The Courts and Their Jurisdiction

The Federal Constitution of Malaysia specifically provides for the rights of the individual and to ensure that those rights are upheld. It also provides an avenue for which those who suffered any grievances or those who acted against the country's laws, to seek redress or to be punished. The courts for the administration of criminal justice are provided for by the constitution and other laws.

The highest in the hierarchy of the courts is the Federal Court. It is the final court of appeal. The court's jurisdiction is appellate, supervisory and advisory. This court consist of the Chief Justice and two other judges of the High Court or a greater uneven number as decided by the Chief Justice. The Court of Appeal has appellate jurisdiction to hear all appeals on question of law or sentences from subordinate courts. Three judges will sit in the courts to make decisions on any appeal. The High Court has jurisdiction to try all offences with the highest maximum sentence of death and also has appellate jurisdiction to hear appeals of cases from subordinate courts.

The Sessions Court has jurisdiction to try all offences except those with a possible sentence of death. Normally one judge will sit in the court to hear such cases.

The Magistrate Court is the lowest rung in the hierarchy of courts. It consists of two categories of magistrates, i.e., First Class Magistrates and Second Class Magistrates. First Class Magistrates are legally qualified and have jurisdiction to try all offences punishable with imprisonment of up to ten years or with a fine and 12 strokes of whipping. However their sentencing powers are limited to impose imprisonment sentences of not more than 6 years.

Lately because of the high backlog of cases in the Sessions Court, the power of the First Class Magistrate Court has been increased to hear cases of robbery under section 392 of the Penal Code and housebreaking and theft under section 457 of the Penal Code, which are punishable with imprisonment of not more than 14 years.

Second Class Magistrates are normally public servants and junior court officials experienced in judicial administration. The sentencing in criminal cases is only limited to imprisonment of not more than 12 months or a fine.

One interesting point to note is that, the First Class Magistrates also perform duties in Juvenile Courts, to try youthful offenders of the ages of 10 to 18 years. The magistrate sits with two advisors hearing all offences except those punishable with death. The court is being conducted in the Magistrate Chambers, to the exclusion of the public. The principle of this court is to rehabilitate the youthful offenders, preventing their development as criminals.

PART II

A. Structure and Roles of Prosecution

The prosecution of criminal cases is the main domain of the public prosecutor. In Malaysia, the person responsible for this is the Attorney General. He holds office by virtue of Article 145 of the Federal Constitution of Malaysia. The powers given to the Attorney General is contained in clause (3) of Article 145 which reads as follows:

> The Attorney General shall have power, exerciseable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a Native Court or a Court Martial.

The law relating to criminal procedure in Malaysia is contained in the Criminal Procedure Code (F.M.S. Cap. 6) (hereinafter mentioned as CPC). The Code lays down rules for such matters as the mode of arrest; search of body, property or premises; police investigation of a case; prosecution of an accused person; and procedure for trial and the court competent to try and punish offences. In particular, according to section 376 (I) of the CPC, the Attorney General shall be the public prosecutor and shall have control and direction of all criminal prosecutions and proceedings under the Code.

The Attorney General is appointed by the Yang Di Pertuan Agong on the advice of the Prime Minister. Among the criteria on his appointment, he must be a person who is qualified to be a judge of the Federal Court. Immediately under him is the Solicitor General who also performs the same function in the absence of the Attorney General. Holding officers under the Attorney General's Chamber are the Senior Federal Counsel, Federal Counsel and Deputy Public Prosecutor. The Attorney General oversees all criminal prosecution in the country and in each state. There are Senior Federal Counsel and Deputy Public Prosecutors who perform this duty on the Attorney General's behalf.

The Public Prosecutor may appoint deputies who shall be under his general control and direction. The Deputy Public Prosecutor may exercise all or any of the rights and powers vested in or exerciseable by the Public Prosecutor. The power to institute criminal proceedings by the Public Prosecutor includes the power to bring criminal charges against persons.

The rights to appear before a court proceeding accorded to the Public Prosecutor is contained in sections 377 and 380 of the CPC. Besides the Public Prosecutor, the following persons are also authorised to conduct prosecution in court:

(1) a deputy public prosecutor,
(2) an advocate authorised in writing by the Public Prosecutor or a deputy public prosecutor, and
(3) a police officer not below the rank of Inspector.

The conduct of criminal proceedings in the High Court is usually done by the Public Prosecutor or his deputy. The cases that go to the High Court are of a serious

nature and demand meticulous attention. These are usually the cases that involved the death penalty or acts against the security of the country. Criminal trials in the Sessions Courts are now being conducted by deputy public prosecutors. Formerly, it was done by the police.

Prosecution of criminal matters in the Magistrate Courts are being done by the police. Besides the police, subsection (I), section 380 of the CPC allows any public officer to prosecute in any court in any case in which he is by any written law authorised to prosecute in such court. This refers to Immigration Officers, Custom Officers, Income Tax Officers and Anti-Corruption Agency Officers who have been given powers to prosecute cases coming under their respective departments. For instance, section 117 of the Customs Act 1967 provides that prosecution in respect of offences committed under the Act may be conducted by a Senior Officer of Customs, and section 39(2) of the Immigration Act 1959/63 states that every Immigration Officer shall have authority to appear in court and conduct prosecution of offences relating to the Act.

Deputy public prosecutors are law graduates either from local universities or from England. Before their appointment, they received intensive in-service training locally at the Judicial and Legal Institute. Similarly with police prosecutors in the lower courts undergo basic/advance prosecution courses at the Police College. Furthermore, section 3(3) of the Police Act 1967 provides that one of the duties of the police force is to prosecute offenders in court.

B. Professional Ethics of Prosecutors

Public prosecutors are part and parcel of the court officials. They are therefore bound by the ethics of the legal profession which are administered by the Law Society. Due to the public nature of the prosecutors duty, it is essential that their performance be above reproach. Courses and seminars are held frequently to train prosecutors on this aspect. Proper conduct of prosecutors in court is a norm and would greatly assist the court in the smooth running of the court proceedings. In this respect, most prosecutors are well versed with the court rules and procedure. Prosecutors have to be ready to proceed with a trial on a given date and would only request for adjournment in very extenuating circumstances.

C. Investigation of Criminal Cases

The criminal law defines criminal and delinquent behaviour and specifies sanctions which are enforced by a threat of punishment. In Malaysia, most of the penal provisions are contained in the Penal Code. The Code declares what acts or omission are offences and also provides for its punishment. It specifies the circumstances in which an act or omission will be regarded as an offence. This includes act or omission done intentionally, knowingly, voluntarily, fraudulently or dishonestly. It classifies offences such as those affecting the human body (e.g., murder, causing hurt), affecting property (e.g., theft, robbery), affecting reputation (e.g., defamation, insult), affecting public peace (e.g., unlawful assembly, rioting) and those affecting public health and safety (e.g., adulteration of food). It also determines the nature and quantum of punishment to be given for specific offences. Beside the Penal Code, there are numerous statutes which are either designed to punish specific offences such as the Dangerous Drug Act 1952 or which seek to regulate specific activities and only punish those who violate the rules (e.g., the Food Act 1983). Some statutes provide for preventive detention of persons without trial in a court of law, and this is to prevent them from engaging in any activity prejudicial to peace, order and security. The

Internal Security Act 1960 is one of those laws.

D. Law Enforcement Agencies

The sanctions imposed by the criminal law are carried out by the law enforcement agencies. The main body that does this is the police apart from other government agencies (e.g., Customs and Immigration Departments, to name a few). The functions of the police and other law enforcement agencies are to carry out investigation into any act or omission that is contrary to law. These can be summarised into three categories, namely:

(1) the discovery that a crime has been committed,
(2) the identification of the person/ persons suspected of committing the offence, and
(3) the collection of sufficient evidence to prosecute the suspect before the court.

The powers given to the police in respect of investigation are contained in the CPC although the Police Act 1967 Part VII also lists the duties and powers of police officers. Section 107 of the CPC requires every information relating to the commission of a crime is to be reduced into writing if given orally to the officer in charge of a police station. This happens when a person comes to the police station and makes a report of any incident. In legal term, this report is referred to as the first information report and its significance is that it is usually made very early after the occurrence of a crime. Thus the likelihood of fabrication is small because the memory of the informant is still fresh. This will form the basis of the case and the police will swing into action. Every such information shall be entered in a book and kept in the police station. It includes details such as the date and hour when the information was given and the signature of the person making the report. A copy of this report is then given to the police officers whose task is to investigate and they must be police officers of the rank of Sergeant or above or the officer in charge of the police station. They are called Investigation Officers or I.O.s.

E. Conduct of Investigation

In theory, as soon as the information is received, the investigating officer shall send the first information report to the public prosecutor. However, in practice this is usually not done and the investigating officer will normally straight away carry out the investigation. This includes the making of enquiries on the spot and the visit of the crime scene. The offender has to be traced and arrested. There are four categories of persons who may affect arrest, namely, the police officer, the Penghulu, the private person and the magistrate. Section 23 of the CPC allows a police officer to arrest without a warrant for any seizable offence committed anywhere in Malaysia. A seizable offence is an offence in which a police officer ordinarily arrests without a warrant according to the third column of the first schedule of the CPC. These are offences punishable with death or offences punishable with imprisonment for three years and above. Offences punishable with a fine only are described as non-seizable offences. The Penghulu may arrest without a warrant for a seizable offence but section 25 of the CPC requires him to hand over the person arrested to the nearest police station or police officer who shall then rearrest the person. A private person may arrest as provided under section 27 of the CPC, but the offence committed by a person must be a seizable one and committed in the view of the private person. Again the person arrested must be handed over to the nearest police station or a police officer without necessary delay. The mode of arrest is provided in section 15 of the CPC. Specifically, when a person is arrested, he shall actually be touched or his body confined unless he submits to the custody by word or action.

When a person is arrested, his body may be searched and all articles found be placed in safe custody. If these articles have any connection with a crime committed, then they may be detained until his discharge or acquittal. According to section 20 of the CPC, only a police officer can conduct a body search with strict regard to decency. The investigating officer can, when he received the first information report, discontinue to investigate if he finds that there is insufficient ground for proceeding further in the matter. In other words, if he finds that there is no offence disclosed in the information, he can close the case. When the investigating officer has determined that a seizable offence has been committed, he can start the investigation. He may by order in writing require the attendance of any person being acquainted with the circumstances of the case to come forward (section 111 of the CPC). If a person refuses to do so, the investigating officer may report such refusal to a magistrate who may then issue a warrant to secure the attendance of the person. Section 112 of the CPC provides for the recording of statements from witnesses by the police. Any person giving a statement to the police is bound to answer all questions relating to the case in question. He is legally bound to state the truth, whether or not the statement is made wholly or partly in answer to questions. This is because in the event that he is given earlier to the police, then that statement can be used to impeach his credit. He is also liable to be charged for giving false evidence in court.

F. Further Detention of Person Arrested

From the progress and development of the case, the investigating officer would have collected evidence from the scene of crime and these would be seized as exhibits of the case. If the suspect is known or is identified, then effort would be made to trace and arrest him. Things that are collected from the scene or from the victim would be properly packed and sent to the relevant authority for analysis to determine whether they have any connection with the case. These are important because it would help to identify the suspect. The investigating officers are given powers to conduct search under section 116 of the CPC for documents or other things necessary to the conduct of an investigation into any offence. Any person arrested must be produced before a magistrate within twenty-four hours inclusive of the time taken for the journey (section 28 of the CPC).

Article 5 of the Federal Constitution provides for the personal liberty of a person and in clause (4) of the same article, it also states that a person arrested and not released must be brought before a magistrate without unreasonable delay and cannot be detained for more than twenty-four hours. Any longer detention from that period has to be as ordered by the magistrate. In this connection, section 117 of the CPC allows the police to detain the arrested person for more than twenty-four hours and this extension of time has to be applied to the court when the person is produced before the magistrate. Detention on the order of the magistrate may not exceed a total of fifteen days, and the magistrate has to record his reason for granting the detention order. Normally, during the application for the remand order before the magistrate, the police would give their reasons in support of the application of further detention of the person. This is usually the case when they cannot complete the investigation within twenty-four hours and are not ready to indict the person arrested. Section 119 of the CPC provides for the police investigation diary and daily entries are made pertaining to the action taken in the conduct of the investigation. This includes:

(1) the time at which the order for investigation reached the police officer,
(2) the time at which he began and closed the investigation,
(3) the place or places visited by him, and
(4) a statement of the circumstances ascertained through his investigation.

A copy of the police investigation diary is submitted together with the grounds for further detention whenever an application is made under section 117 to the magistrate. If any person arrested wishes to make a statement, then a statement may be taken from him under section 113 of the CPC. This statement may amount to a confession or may be exculpatory in nature. It can either be oral or in writing. A caution is required to be administered to a person before he makes a statement in the following words:

> It is my duty to warn you that you are not obliged to say anything or to answer any question, but anything you say, whether in answer to a question or not, may be given in evidence.

The statement has to be given to police officer of the rank of Inspector or above.

G. The Role of Public Prosecutors in Arresting and Detaining a Suspect

The supervision of criminal investigation is done by the police alone. The powers are given to the police to conduct investigation. The Attorney General has no investigative powers, and he is not involved in the process. The Criminal Investigation Department of the police force is the main body that conduct investigation into criminal matters. Supervision and direction of the investigation are controlled by the immediate superior officer of the investigating officer.

H. Indictment

After the investigation is completed, section 120 of the CPC requires the investigating officer to forward to the Public Prosecutor a report of the investigation. However in practice, not all investigation papers are forwarded to the public prosecutor. Where there is sufficient evidence and the investigation is completed within twenty-four hours, the person will be produced in court to answer the charge by the police or after the expiry of the further detention period (section 117 of the CPC). However, the Public Prosecutor in a written directive does require investigation papers to be forwarded to him before the indictment is made. These are usually cases of a serious nature like culpable homicide and those involving very important people and government servants. Some cases require the consent of the Public Prosecutor before any formal charges can be brought against any person. For instance, offences committed under the Immigration Act and the Prevention of Corruption Act. The recorded statements of witnesses, the suspect and the investigation diary of the investigating officer form the basis on which it is decided whether the suspect should be prosecuted in court. The police will prosecute the cases that need not be referred to the Public Prosecutor, but in all cases after the completion of the trial, the police must report to the Public Prosecutor the result of the cases. The Public Prosecutor may decline to prosecute further at any stage of the trial but before judgement. The police, however, cannot exercise this discretion. The approval of the Public Prosecutor has to be obtained first before any proceeding can be discontinued.

Not all cases investigated by the police end up with prosecution in court. The Public Prosecutor will study the evidence available in the investigation papers and only those with a 50 percent chance of conviction will be prosecuted. This entails

close co-operation between the Public Prosecutor and the investigating officer, and discussions are not uncommon between them prior to the court trial.

I. Plea Bargaining

Plea bargaining is not widely practice in Malaysia. In any case, it does not involve the judge or the magistrate. Thus, in open court, one does not see the accused person plea bargaining with the judge or magistrate. At the most, where an accused person intended to plead guilty to a lesser charge, this intention is conveyed to the Attorney General or a deputy public prosecutor. If this is accepted, the consent to reduce the charge is given to the prosecutor. Usually, the accused's counsel will communicate directly with the Attorney-General on the accused's behalf and make the proposition. The judge or the magistrate would not know that a plea bargain has taken place.

PART III

A. Trial Proceedings

Prior to the amendments to the CPC in February 1995, there were four types of trials conducted in the High Courts in Malaysia. They were:

(1) trials conducted by a judge sitting alone, the procedure of which is laid out in Chapter XX of the CPC;
(2) trials by a judge with the aid of assessors, the procedure of which was laid out in Chapter XXI of the CPC;
(3) trials by a judge with a jury, the procedure of which was provided in Chapter XXII of the CPC; and
(4) trials by a Judge sitting alone according to the Essential (security cases) Regulations 1975 (ESCAR).

Since 17 February 1995, trials by jury and trials with the aid of assessors have been repealed. Trials that remain are those conducted by a judge sitting alone in accordance with Chapter XX of the CPC and in accordance with ESCAR. Trial proceedings in Malaysia follow the adversarial system and are subject to two basic principles:

(1) an accused person is presumed innocent until proven guilty; and
(2) the prosecution must prove the charge against an accused person beyond reasonable doubt.

The prosecution will open its case first by calling its witnesses. Each witness is then cross-examined by the defence counsel or the accused person personally if he is not represented by a counsel. The prosecution closes its case when all the witnesses have given their evidence.

The judge or magistrate must decide whether a prima facie case has been made out. If the court is satisfied that a prima facie case has been made out, the accused will be called upon to enter his defence. If the accused succeeds in his defence, he is entitled to an acquittal. If not, the court will proceed to convict and pass sentence.

B. Cooperation for a Speedy Trial, Securing an Appropriate Sentence and Supervision over the Fair Application of Law

For every type of offence, the law prescribes a punishment which is either imprisonment not exceeding a certain period or a fine not exceeding a certain sum or a combination of both. In respect of serious offences, imprisonment is mandatory, and in more serious types of crimes, a minimum sentence of imprisonment or death is mandatory. An appropriate sentence will be passed by the court. Any sentence passed outside the limits set or less than the minimum is a sentence wrong in law and will be reversed, set aside or altered by the Appellate Court.

C. Execution of Punishments

The final disposal of the case is the passing of the sentence on the accused person. If the sentence consists of a fine, the accused person will be given time (usually until the later part of the day) to pay the fine or seek assistance from close relatives to settle the due. When an accused person is unable to pay, he would have to serve a default sentence in prison. Where the sentence is one of imprisonment, a warrant of commitment will be issued by the court to the prison authorities. The accused will be escorted to the prison designated and serve his sentence there. Where the accused person intends to appeal against the sentence or conviction, the court will usually grant a stay of execution of the sentence pending the appeal. The accused person may be released on court bail or remanded in prison if the offence is of a serious nature.

D. Public Prosecutor's Involvement in National Criminal Justice Policy

The Attorney General is also responsible for the drafting of laws to be enacted by Parliament. Any new laws or amendments to existing ones are drawn and drafted by the Attorney General's Chamber. Changes in the laws are eminent when the country progresses. For instance, with the advance of information technology, new laws are needed to protect the industries against unscrupulous opportunists. These are new crimes that demand new skill and in-depth knowledge in combating them.

CONCLUSION

People are in general law-abiding, but it is also true that everyone breaks the law sometimes and some people break it often. Compliance with the law is never complete. Law breakers have to be dealt with in accordance with the law. Thus in any society, there is some form of system in place to tackle this problem. In Malaysia, the justice system has been in place even before independence in each of the individual state, and when Malaysia was formed, the justice system that was adopted seemed to work well in preserving the laws of the country.

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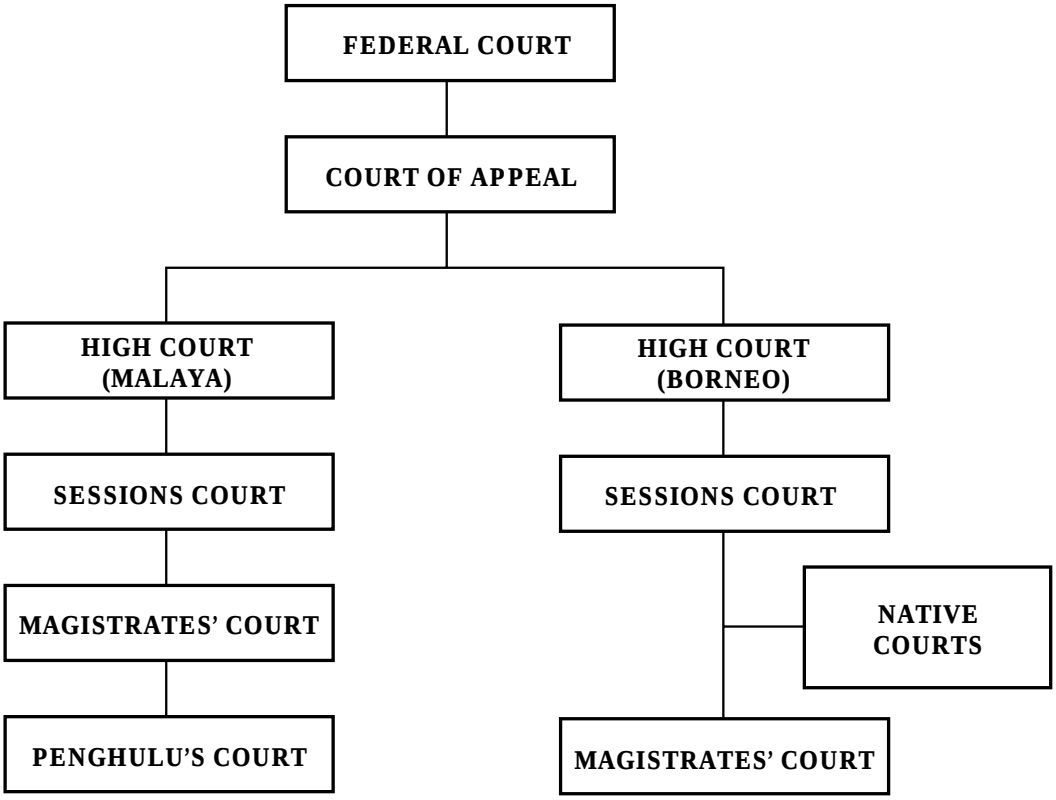
APPENDIX

COUNT ORGANIZATIONAL STRUCTURE



THE ROLE AND FUNCTION OF PROSECUTION IN CRIMINAL JUSTICE

*Zafar Ahmad Farooqi**

I. TRACES OF CRIMINAL PROCEDURE CODE AND APPLICATION OF CRIMINAL JUSTICE ADMINISTRATION

In British India, the Governor General had appointed the "Indian Law Commission" to deal with substantive criminal law and procedure of courts. The Indian Law Commission after descending and collecting various legislations, came up with the Code of Criminal Procedure, 1898. The Penal Code was prepared in 1837, though it came into operation on 1st January 1862. It was a nonpareil monument of the Indian Law Commission. In 1847, the said Commission was instructed to prepare a Scheme of pleading and procedures with forms of indictment in 1848 in order with the provisions of Penal Code. Later on, the draft on Criminal Procedure was examined and revised by the Commission, and was adopted in 1854, which repealed the earlier Act XXV of 1854 and the Amended Act VIII of 1869 and gave birth to Criminal Procedure Code of 1872 (Act X of 1872). Like its predecessor, this Code did not apply to certain courts and, therefore, was defective. The Presidency Magistrates Act (IV of 1877) was enacted to regulate the procedure of courts of magistrates in the Presidency-town. Several provisions of these three Acts—X of 1872, X of 1875 and IV of 1877 were similar though not coached in the same language. So it was thought advisable to consolidate the three Acts into one single Code of Criminal Procedure for the whole of British India, and Act X of 1882 was, therefore, passed repealing the earlier said three Acts. The Code of Criminal Procedure, 1882 remained in force for sixteen years and after its repeal, it was replaced by the Code of Criminal Procedure, 1898. In British India, the Indian Penal Code (XLV of 1860), the Code of Criminal Procedure 1898 and the Evidence Act 1872 (Act 1 of 1872) were in force for prevention of offences. When Pakistan came into being in 1947, their nomenclature were changed as the Pakistan Penal Code (XLV of 1860), the Code of Criminal Procedure, 1898 (V of 1898) and the Evident Act, 1872 (1 of 1872) to deal with the offenders.

2. The substantive criminal law relating to Pakistan is contained in the Pakistan Penal Code, which defines offences and provides for punishment. Whilst the Code of Criminal Procedure 1898 has been framed to supplement the Penal Code by rules of procedures for preventing offences and bringing offenders to justice. The two hand in hand form the basis for criminal law in Pakistan.

3. In 1979, certain Islamic laws were introduced which enforced certain Islamic law i.e., (by repealing certain laws contained in the Pakistan Penal code) (1) The Offences Against Property (Enforcement of Hudood) Ordinance, 1979; (2) The Offences of Zina (Enforcement of Hudood) Ordinance, 1979 (3); The Offences of Qazi (Enforcement of Hadd) Ordinance, 1979; and (4) The Prohibition (Enforcement of Hadd) Order, 1979, which now deals with the offences of theft, dacoity, robbery,

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fornication/whoredom, slandering, false accusations, importing/exporting/transporting/manufacturing of illegal intoxicants, etc. Likewise, the Evidence Act 1872 (Act 1 of 1872) was repealed and replaced with the Oanun-e-Shahadat Order, 1984, which basically is the same but more in conformity with Islamic laws. One example is in Chapter XVI of the Pakistan Penal Code relating to the offences affecting the human body. This was replaced with the Qisas and Diyat Ordinance 1990 by virtue of which now the heirs of the deceased or the aggrieved can seek justice through payments as affirm of settlement. Cases involving the death penalty and transportation of life are taken cognizance by the Courts of Sessions as Hudood Courts at the district superior level, while the cases involving punishment up to seven years are within the competency of Judicial Magistrates.

II. SEPARATION OF PROSECUTION AGENCY FROM POLICE

4. It is pertinent to point out here that for administering the criminal administration of justice and a step for maintenance of the judiciary, independent of the executive in toto, the then President of Pakistan in February, 1985, through a phased programme, directed the amalgamation of both the aforesaid prosecution agencies, one concerning the provincial police and the other concerning the provincial law department, into one by separating the Police Prosecution Agency from the Police. The posts of Prosecuting Deputy Superintendents (PDSP), Prosecuting Inspectors (PIs) and Prosecuting Sub-Inspectors (PSIs) of Police were abolished. The PDSPs, who opted for Provincial Law Department, were re-designated as Deputy District Attorneys and both the PIs and PSIs, who too opted as such, were made as Assistant District Attorneys. The Prosecuting Officers of Police PDSPs, PIs and PSIs, who wished to remain in the Police Department, not only ceased to be prosecutors, but their nomenclature was also changed to Inspectors (Legal). Hence they could not conduct prosecution of criminal cases on behalf of the State either in the Sessions Courts or Magistrates' Courts.

5. The entire prosecution (i.e., of the District inferior level confirming present level) rested with the District Attorneys, who headed the District Prosecution Agencies, and were purely the representatives of the Provincial Governments but not the Provincial Police. Prosecution of criminal cases in the Courts of Session is still conducted by the District and Deputy District Attorneys, and the prosecution in Magistrates' Courts, inclusive of Judicial Magistrates, was conducted by the Assistant District Attorney (Previously Prosecuting Inspectors and Prosecuting Sub-Inspectors of Police). It may be recalled that prior to February 1985, Rules 27.1 to 27.39, Chapter XXVII of the Police Rules 1934, dealt with prosecution and court duties including the role of the investigation officers and the prosecuting staff. As per Rule 27.4, Chapter XXVII of the said Rules, all the police officers, viz., all Superintendents, and Assistant and Deputy Superintendents of Police are, with reference to sections 270 and 492 of the Code of Criminal Procedure, ex-officio, public prosecutors in respect of all cases committed from their respective duties for trial before the Sessions Courts. As per Rule 27.4(2) of the said Rules, Prosecuting Inspectors and Prosecuting Sub-Inspectors of Police (redesignated as Inspectors Legal in 1985 under the Police and Assistant District Attorneys under the Law Department) were appointed. Additional public prosecutors to conduct trial of cases in the Magistrates' Courts including

magistrates having powers under section 30 of the Code of Criminal Procedure (Judicial), were also appointed.

III. DUTIES OF PROSECUTORS

6. Rule 27.15 of the Police Rules provides the following duties for the head of prosecuting agency (had been suitably amended and incorporated in the Law Department Manual):

(1) Thoroughly to scrutinise challans and intermediate reference and applications from police stations in connection with the prosecution of cases, the arrest of offenders, the confiscation of bail or security cases including security for keeping the peace (vide Rule 23.32), should receive as much attention from the district prosecuting staff as is practicable.

(2) To prosecute, watch or direct the prosecution of cases in the courts of the district. In this connection, it must be realized that his duty embraces not only the presentation of the prosecution case but contesting the claims of the defence and ensuring the observance of conditions and restrictions imposed by the law on the discretion of courts to pass orders in certain circumstances, and the observance of all High Court orders issued with the object of expediting decisions and preventing abuses.

(3) To supervise and distribute the work of prosecuting officers subordinate to him and of the police personnel attached to his office or to the courts.

(4) To take charge of, and deal with, articles and property received in connection with cases, as well as of unclaimed and suspicious property received from police stations for orders of magistrates.

(5) To supervise the transmission of warrants and summonses to the executive police under the orders of the criminal courts, and to see that returns to such processes are made without delay.

(6) To keep the District Magistrate and the Superintendent of Police informed of all important matters in connection with criminal cases under trial, to bring to notice cases requiring to be specially reported to him, and to submit a daily diary in Form 27.15 (vi) of the Police Rules showing cases sent for trial, convicted, discharged and pending in court on that particular day. The instructions of the High Court as to the duties of the prosecuting agency towards the District Magistrate are contained in Appendix 27.15 (vi).

(7) To see that the instructions in connection with the diet money and travelling expenses of witnesses are duly observed.

IV. EFFECTS OF SEPARATION OF PROSECUTION AGENCY FROM THE POLICE

7. By dint of the separation of the Police Prosecuting Agency (comprising PDSP, PIs and PSIs) and their amalgamation into the District Prosecuting Agency headed by District Attorneys, the Provincial Police had suffered a severe set-back, which further resulted in increasing the abnormal acquittal rate and the worst law-and-order situation. Thus, the Provincial Police departments had requested the Federal Government to withdraw the earlier order and repatriate the police prosecutors (PIs and PSIs) to conduct prosecution in the Magistrates' Courts, so that a maximum number of convictions could be secured. The reason being that by virtue of the separation of Police Prosecuting Agencies and their replacement under the Provincial

Law Departments, the conviction rate was reduced and the acquittal rate increased (See Appendixes A-1 to C-2 regarding a, statement of crime by the Sindh Police). As a result, the crime became unbridled and could not be controlled in its true perspective. Again, under the orders of the Federal Government, the prosecuting officers (PIs and PSIs) who had worked under the District Attorneys as ADAs, were registered to the Police Department to conduct prosecution of criminal cases in the Magistrates' Courts with their re-designation as Inspectors/Legal. This experiment has again ended in fiasco. Another move is in progress to again place the remaining prosecuting officers (PIS and PSIs) under the Provincial Law Departments. Because, as stated earlier, the District Attorneys have now been empowered to send up cases to the courts of competent jurisdiction under section 173 of the Code of Criminal Procedure, 1898.

V. ROLE OF PROSECUTION DURING INVESTIGATION, TRIALS AND APPEALS

8. Prosecution plays an important role in the administration of criminal justice. Without successful prosecution, the desired objects cannot be yielded. The role of prosecutors not only commences soon after registration of a case, but it also lasts up to the final verdicts delivered by the criminal court. The First Information Report (F.I.R.), is the important document that sets the whole machinery of law into motion. If it is founded on feeble footing, it goes on to disturb the administration of criminal justice, as it becomes a Herculean task for the prosecutors to inject into a dead horse. So while drafting an F.I.R, its pre-requisites ought to have been incorporated strictly in accordance with Code of Criminal Procedure. The prosecution is required to be equipped with the latest decisions of the superior courts for proper legal guidance to the investigating officer, who mostly banks upon the stereotype mechanism and blinks towards the latest guidelines given by the higher judicial forums. While the prosecutor renders valuable advice to the investigating officer during the course of investigation, he also removes the serious legal lacunas, whereafter the case becomes the best one possible to be presented in the court of competent jurisdiction. After submission of the challan, the role of the prosecutor is very pivotal because he has to finalize the trial after the prosecution witnesses are examined and cross-examined by the defence counsel and after he has cross-examined the defence witnesses adduced by the accused.

9. Sections 492 to 495 of the Code of Criminal Procedure, 1898 deal with the Public Prosecutors. Section 492 provides powers to appoint Public Prosecutors, and section 493 provides that the Public Prosecutor may plead in all courts in cases under his charge and pleaders privately instructed to be under his direction. Likewise, Chapter-29, Part-A of the High Courts Rules and Orders Criminal revised up to July 1996 to deal with the appointment of public prosecutors and their court duties, as envisaged in Chapter XXXIX of the Code of Criminal Procedure, referred to above. It is a recognized procedure in the administration of criminal justice that the courts take cognizance of the offences as incorporated in the police challan, i.e., report under section 173 of the Code of Criminal Procedure and the inculpatory evidence (both oral and documentary) marshalled by the investigating agency. If the case is imbued with the best piece of incriminating evidence directly linking the culprits with the commission of offences with which he is charged, the prosecutor can well present the State case and promote the cause of prosecution by bringing the offenders to

book. Whilst in case of technically defective cases, the prosecutor and the court conducting inquiry or trial cannot extract punishment. The fact may not be lost sight of that although the prosecuting officers, viz., District, Deputy and Assistant District Attorneys (under the Provincial Law Departments), Deputy Superintendents of Police/Legal and Inspectors/Legal (under the Provincial Police), play a very pivotal role in the administration of criminal justice. Yet it is all the more astounding to note that they are not sent for special courses, training (not qualified lawyers, counsels or limited legal training etc.) as the officers of other departments are given the privilege of. Prosecutors ought to be given the chance to participate in all courses relating to crime, which are either conducted in Pakistan or abroad, so that they may get themselves out of the quagmire of deprivation and take keen interest whole-heartedly.

VI. SEPARATION OF JUDICIARY FROM EXECUTIVE

10. Ever since Pakistan came into being in 1947, the judiciary in Pakistan was not independent of the executive in the real sense of the term as envisaged in the Constitution of the Islamic Republic of Pakistan. It so lingered on, only one way or the other, that the executive blamed the judiciary for the increasing acquittal rate; whereas the judiciary blamed the executive creating a law-and-order situation and especially the failure of the administration of criminal justice, which the judiciary could administer better than the executive. Be that as it may, in 1996 the Chief Justice of Pakistan, had directed the Federation of Pakistan and thus implemented the long-drawn decision of separating the judiciary from the executive in accordance with the vires of the Constitution of Islamic Republic of Pakistan 1973. Hence, the judiciary, an organ of paramount significance which plays a pivotal role in the administration of criminal justice, has now become quite independent of the executive. Results of this separation have made substantial differences. Now the Executive Magistrates have been placed under the administrative control of District Magistrate and the Judicial Magistrate under the exclusive administration of the District and Sessions Judge. The offences falling under Chapters VIII, X, XIII and XIV of the Pakistan Penal Code (Act XLV of 1860) shall be tried by the Executive Magistrates, which consist of Magistrates of the First, Second and Third Class. The Executive Magistrates are now empowered to try cases in which only 3 years' punishment can be awarded. On the other hand, the Judicial Magistrates, who are under the District and Sessions Judge, are now Illaqa Magistrates and try the criminal cases in which 7 years' punishment can be awarded. The Sessions Judge, who is subordinate to the High Court, can award the death penalty. In Hadood cases, the Sessions Court tries the offences as the District Shariat Court and can award life imprisonment and 40 stripes, besides imposing "Hadd" penalty, i.e., amputation of limb, stoning to death, etc.

VII. PRINCIPLES OF PROSECUTION

11. For successful prosecution, prosecutors ought to consider the following principles enumerated hereunder:

(1) Whether the provisions of the Code of Criminal Procedure have been violated. Is so, how to get the necessary rectifications?

(2) If the F.I.R contains technical flaws, how is the case put on straight lines during investigation and trial, whatever the case may be?

(3) Whether the investigation officer conducted investigation properly as per the law. If not, how can the case be improved?

(4) Is the oral, documentary and circumstantial evidence in order with the criteria laid down by the Qanun-e-Shahadat Order, 1984 (Revisions the repealed Evidence Act, 1872)?
(5) Whether all facts reflected in the F.I.R are commensurate with the challan, i.e., Report under section 173 of the Cr.P.C.? If not, how to plug the loopholes?
(6) Whether the challan has been submitted in court within the prescribed period as laid down in section 173 of the Code of Criminal Procedure?
(7) Whether the accused's defence is plausible. If so, how to get him discharged or acquitted by the court?

12. As regards the role of prosecutors in the Provincial High Courts, the Agency of Law Officers consists of the Advocate General, Additional Advocates General and Assistant Advocate General. The Provincial Advocate General heads the Addl: A.G. and A.A.G. They represent the State/Provincial Government not only in criminal matters, but also in civil matters where the interest of the Provincial Government is involved, in the High Courts. The Federation of Pakistan is represented by the Central Law Officers, appointed by the President of Pakistan under the Central Law Officers Ordinance, 1970, who are designated as Attorney General, Additional Attorneys, or Deputy Attorneys General Standing Counsel. Besides the Provincial High Courts, the Attorney General, Deputy Attorneys Generals and the Standing Counsel represent the Federal of Pakistan in the Apex Court, i.e., the Supreme Court of Pakistan not only in criminal matters, but also in civil matters involving the interest of the federal government.

13. The above facts would denote that the prosecutors from the district inferior criminal courts up to the Supreme Court of Pakistan play a pivotal role in the administration of criminal justice. The prosecutors/law officers representing the State in the High Courts and the Supreme Court of Pakistan are well-paid and also elevated to the High Courts as judges. However, as for the prosecutors/law officers representing the State in the Sessions Courts and Magistrates' Courts, they are neither well-paid, nor made judges in the subordinate judiciary. As a result, they having fallen prey to deprivation and disappointment and most shun to take keen interest in administering justice. If given a chance to become a judge in the subordinate judiciary, they would definitely represent the State tooth-and-nail and also help expedite the quick dispensation of justice in the administration of criminal justice.

14. In regards to the role and duties of prosecuting officers or public prosecutors as to the investigation of cases relating to the District superior and District inferior criminal courts in the administration of criminal justice, they not only impart legal guidance to the investigating officer during investigation up to the submission of the challans for promoting the cause of prosecution, but they also represent the State in courts during bail petitions and the trials of offenders.

15. The role of law officers attached with the High Courts (Advocate General, Add. Advocate General and Assistant Advocate General) and the ones attached with the Supreme Court (Attorney General, Add./ Deputy Attorney General and Standing Counsel) is quite different from the public prosecutors, as discussed in the above para. They present the cases already investigated by the provincial level and Federal Investigation Agency at the federal level respectively.

16. Sometimes, the Law and Justice Division of the Government of Pakistan appoints/nominates Special Public Prosecutors from amongst some eminent lawyers to conduct the trial of criminal cases which involve public importance and heinousness of crimes. These Special Public Prosecutors represent the State in cases investigated by the investigation agency under the legal guidance of public prosecutors.

VIII. STRUCTURE OF THE COURTS

17. The Supreme Court of Pakistan is headed by the Chief Justice (also known as the Chief Justice of Pakistan) and consists of twelve judges; whereas the sanctioned strength of the judges of the apex court is fourteen. Of the twelve Judges, two deal with the appeals pertaining to the Federal Shariat Court (Supreme Court Appellate Jurisdiction). The State is represented by the Attorney General, Deputy Attorneys General and the Standing Counsel in both in criminal and civil matters, involving the interest of Federal Government of Pakistan.

18. Besides, there are Provincial High Courts set up at the Punjab, Sindh, Baluchistan and NWFP Provinces. The Punjab Court is called as the Lahore High Court with its benches at Rawalpindi, Multan and Bahawalpur. The Provincial seat is at Lahore. The State is represented by the Advocate General, as well as Additional and Assistant Advocates General. Likewise in the other provincial High Courts and Karachi (Sindh) and Peshawar (N.W.F.P), the State is represented by the Advocate General, as well as Additional and Assistant Advocates General both in criminal/civil matters, involving the interest of the provinces.

19. Besides the High Courts, there are two classes of criminal courts, i.e., the District superior criminal (which include the Sessions Courts as enshrined in section 6) and the District inferior criminal courts, which include the Magistrates' Courts (as provided by section 6). The prosecution agencies run parallel to conduct the prosecution of criminal case in the district superior and district inferior criminal courts. At the district superior level, prosecution is conducted by the District, Deputy and Assistant District Attorneys, who are under the Provincial Law Departments and are the representatives of the provincial government. The prosecution of Magistrates' Courts is conducted by the Inspectors/Legal (previously Prosecuting Inspectors and Prosecuting Sub-Inspectors), who are under the Provincial Police. Section 173 of the Code of Criminal Procedure 1989 has now been amended and the District Attorneys, who conduct prosecution in the Session Courts, have been empowered to send up challans to criminals courts, whereas prior to February 1985 in terms of Rule 27.15 of the Police Rules, 1934, it was the job of the head of Police Prosecuting agency whether he be of the rank of Deputy Superintendent of Police or Inspector. However, the post was abolished and redesignated as Deputy Superintent of Police/Legal w.e.f. February, 1985. As regards civil matters relating to the Provincial governments, the same are conducted by the District, Deputy and Assistant District Attorneys in the civil court, which include the Courts of Civil Judge and District Session Judges.

IX. INVESTIGATION

20. Chapter XXV of the Police Rules 1934 and Chapter XIV of the Criminal Procedure Code deal with the investigation procedure, powers, arrest and submission of a report before the court by the investigating officer. The police is basically responsible for the investigation of criminal cases. In

Pakistan, the maintenance of law and order is the basic responsibility of the provincial governments, and the police is under the provincial government. The Head of the police in a province is the Inspector General of Police, and the police work is divided into Ranges and Districts. A district is further divided into police stations, and is where the investigation of criminal cases are conducted. The incharge of the police station is known as the Station House Officer, with whom some investigating officers are posted in different ranks. The supervision of investigation is being conducted by a sub-divisional police officer and by the district incharge of police, who is known as the Superintendent of Police.

21. The officer in charge of a Police Station is empowered by section 156 of the Criminal Procedure Code to investigate any offence which occurs within the limit of his jurisdiction. He is also empowered to depute his subordinate officers to investigate cases as well as to take measures for the discovery and arrest of offenders. He is empowered under section 156(1) of the Criminal Procedure Code.

22. When the police receives any information regarding a cognizable offence, the police is bound to register an information report under section 54 of the Cr.P.C. When an F.I.R. is registered, the machinery of law is set into motion. The police is bound to complete investigation without unnecessary delay and as soon as it is completed, a report under section 173 of the Cr.P.C., thereof, has to be submitted to the court of competent jurisdiction. The powers and privileges for investigation are derived from sections 154 to 175 of the Criminal Procedure Code. These sections deal with the powers to investigate and arrest an accused, search and seize property involved in crime, and finally the submission of a challan under section 173 of the Cr.P.C. The investigating officer is supposed to issue day-to-day case diary about the investigation and incorporate all action taken in respect of investigation under section 172 of the Cr.P.C. It is the duty of an investigating officer to find out the truth of the matter under investigation.

23. During investigation, the investigating officer tries his best to collect evidence, i.e., direct, oral, documentary and circumstantial evidence which could directly link the accused with the commission of the charge, which he committed. The investigating officer shall also take assistance from the technical experts for their expert evidence in finger-prints, hand writing, chemicals, explosives and medicine under Article 59 of the Qanoon-e-Shahadat 1984 (previously section 45 of the Evidence Act, 1972). The opinion of experts/third persons are relevant under Articles 59 to 65 of Qanoon-e-Shahadat 1984. Also the investigating officer can produce modern devices or technology (which include audio-video, etc.) under Article 164 of Qanoon-e-Shahadat 1984.

24. In 1974, at the federal-level, an agency known as the Federal Investigation Agency, came into existence for the investigation of matters related to bribery; corruption of the federal government and private sector corporations; the detection of such offences bank fraud, currency racketeering, violation of the Passport Act and the Immigration Ordinance; and the crime of economic evasion.

25. In order to prosecute public or government servants, two agencies were set up, viz., the Federal Investigation Agency (FIA) and the Anti-Corruption Establishment (ACE). The FIA was constituted in 1974 under the FIA Act, 1974 (VIII of 1975) for the investigation of certain offences committed in connection with matters concerning the federal

government and for matters connected therewith. The ACE, at the provincial level, deals with matters pertaining to provincial subjects. As many as 37 local and special laws and 131 sections of the Pakistan Penal Code are on the schedule of the FIA. Besides dealing with the white collar crime, it also deals with the cases of immigration and anti-smuggling. As regards the prosecution of cases in FIA, the same is conducted by the legal officers (Inspectors/ Legal, Assistant Directors/Legal and Deputy Director/Legal) who are also designated as Special Public Prosecutors in this regard. While the prosecution in ACE is conducted by the legal officers (Class-I Gazetted Status) borrowed from the provincial police.

X. INDICTMENT AND TRIAL PROCEEDINGS

26. When the Police Investigation Agency submits a challan, i.e., report under section 173 of the Cr.P.C. before the competent court, such court conducts an inquiry or trial under Chapter XV (sections 177 to 186) of the Cr.P.C. Further Chapter XIX (sections 221 to 240) of the Cr.P.C. empower the criminal courts to indict the accused in accordance with the available inculpatory evidence.

27. Chapter XIV (sections 177 to 199-B) of the Cr.P.C. deals with the jurisdiction of the criminal courts in inquiries and trial. As regards the examination of witnesses, Chapter X (Articles 130 to 161) of the Qanoon-e-Shahadat, 1984 deals with the procedure regarding the examination-in-chief and the cross-examination of witnesses.

28. After submission of the final report (challan) by the police as per section 173 of the Cr.P.C., the trial court issues a charge sheet to the accused according to the offence which he committed and was proved during police investigation. The charge shall contain such particulars as the time and place of the alleged offence and the person against whom, as the thing in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. The charge shall also contain particulars of the manner in which the alleged offence was committed.

29. Before trial proceedings start, all statements recorded by the police as per section 161 of the Cr.P.C. and confessional statements under section 164 of the Cr.P.C. recorded during police investigation are provided to the accused. If the accused pleads guilty, the court may punish him, and if he denies the charges, the court shall start regular proceedings. During trial, the court summons all the prosecution witnesses and records their statements. Afterwards the defence of the accused starts. The prosecutor and defence counsel can argue and examine all the evidence. The prosecutor also examines the accused. After completion of the proceedings, i.e., examination of the witnesses and accused, when the court feels that all relevant points are discussed, it will pronounce the judgement. It can convict or acquit the accused.

30. During trial, if the police finds additional evidence which can further strengthens its prosecution, it can submit an additional charge report under section 173 of the Cr.P.C. It should be submitted before the judgement of the case.

XI. PROPOSALS AND RECOMMENDATIONS

31. No system is perfect in the world as to criminal justice administration and the role of prosecution can always be improved:

(1) An independent prosecution service may be set up, which is independently funded with qualified lawyers. The lawyers would be able to give advice/opinion to the police and various agencies, as well as determine whether prosecution can take place. If they feel there can be no case, then they should offer an opinion which may be implemented by the various agencies.
(2) The agencies would thus serve to promote a sense of impartiality and fairness, and in the event of a case for prosecution, the lawyers would represent the agencies.
(3) This service would take a heavy load off the agencies, leaving them to investigate and do their duties without worrying about completing the cases.
(4) Private prosecutions should be encouraged for some offenses such as shop lifting or common assault.
(5) Individuals and public bodies should perform their own prosecutions. At the present moment, cases of the Nationalized State Bank are referred to the FIA, which then prosecutes. However, these bodies should instruct their own lawyers to prosecute in court.
(6) Once a criminal is convicted, the legal costs involved should be recovered from the criminal from his assets, his properties, etc. even his family.
(7) Plea bargaining should be encouraged so as to enable other crime to be detected.
(8) The media should be used to enable public awareness of criminal activities, and information must be encouraged from the public-at large.
(9) The prosecution of cases should not be detailed in media. Moveover, prosecution lawyers and the judge should not be mentioned in press reports.
(10) Taps and video should be admissible as evidence.
(11) A watch-dog body may also be set up, independently funded and comprising lawyers, journalists and academics, who would ensure that prosecution cases and justice are followed.
(12) A special reference to human rights must be made to ensure that prosecution is conducted in conformity with international treaties as to, for example, torture.
(13) A jury system may also be introduced, although expensive, to ensure a fairer system for justice.
(14) Law officers at the provincial level should be able to become court judges. This would enable law officers to pursue their careers more zealously.
(15) Modern equipment and resources should be made available to prosecutors.
(16) Review has to be made of the Pakistan Penal Code and the Criminal Code of Procedure. They are outdated and old.
(17) More prosecution is needed.
(18) General conditions for prosecuters should be improved, e.g., more salary and better equipment.

APPENDIX A-1

TOTAL CRIME POSITION IN THE COURTS

SINDH POLICE

YEAR / STATUS	85	86	87	88	89	90
No. of pending previous years	74044	78384	81938	92310	103275	112615
No. of cases reported	48125	51267	49257	48648	58736	53995
Total cases for investigation	122169	129652	136197	140978	162011	166610
Send up to court	39634	40750	41877	34520	47449	41460
Conviction	25025	26028	23795	16705	25123	16046
%	63.14	63.87	56.82	48.38	52.94	38.70
Acquitted	8731	8384	9357	9339	10865	14315
%	22.02	20.57	22.34	27.05	22.89	34.52
Pending court	5878	6338	8725	8485	11361	11099
Pending police	78384	86938	92340	104258	112522	122761

APPENDIX A-2

TOTAL CRIME POSITION IN THE COURTS

SINDH POLICE

YEAR / STATUS	91	92	93	94	95
No. of pending previous years	115719	127159	122437	134158	138453
No. of cases reported	43958	40179	41930	44628	50216
Total cases for investigation	159677	1673382	164367	178987	188669
Send up to court	7205	28549	33522	38733	45965
Conviction	12601	7633	13731	14280	23391
%	33.87	26.74	40.96	36.86	50.88
Acquitted	10785	9251	10543	12360	12380
%	28.99	32.40	31.45	31.90	26.93
Pending court	13839	11665	9248	38733	10194
Pending police	19947	136595	128747	137435	138040

APPENDIX B-1

OFFENCES AGAINST PERSONS

SINDH POLICE
(Murder, Hurt, Kidnapping, Rape, and Negligent Act, Etc.)

YEAR / STATUS	85	86	87	88	89	90
Total cases handled by police	37212	38575	41061	43821	46989	49762
Sent up in the court	6665	6189	6592	6760	7369	7174
Convicted	2178	1906	1647	1680	1872	1166
Acquitted	3583	3376	3702	3856	4116	4039
Pending court	904	907	1243	1176	1381	1505

APPENDIX B-2

OFFENCES AGAINST PERSONS

SINDH POLICE
(Murder, Hurt, Kidnapping, Rape, and Negligent Act, Etc.)

YEAR / STATUS	91	92	93	94	95
Total cases handled by Police	49200	49489	47929	51330	53145
Sent up in the Court	7261	5698	6675	7305	8734
Convicted	1453	1148	1761	1738	2852
Acquitted	3968	3110	3620	3975	4340
Pending Court	1840	1440	1294	1592	1542

APPENDIX C-1

OFFENCES AGAINST PROPERTY

SINDH POLICE
(Dacoity, Robbery, Trespass, and Theft)

YEAR / STATUS	85	86	87	88	89	90
Total cases handled by Police	11961	12403	13502	14131	20320	16906
Sent up in the Court	3229	2811	3443	3211	4105	3602
Convicted	750	567	552	520	651	370
Acquitted	788	605	724	760	1274	790
Pending Court	1691	1639	2167	1933	2180	2211

APPENDIX C-2

OFFENCES AGAINST PROPERTY

SINDH POLICE
(Dacoity, Robbery, Trespass, and Theft)

YEAR / STATUS	91	92	93	94	95
Total cases handled by Police	15710	15863	17428	18381	19494
Sent up in the Court	3167	2690	3437	3731	4671
Convicted	391	372	474	533	1879
Acquitted	874	6689	966	1216	1091
Pending Court	1922	1749	1999	1982	1701

APPENDIX D

THE COURTS IN PAKISTAN

ATTORNEY/ PROSECUTORS	CRIMINAL JUSTICE COURT	GOVERNMENT
FEDERAL LEVEL	Supreme Court of Pakistan (Highest Appellate Court) Federal Shariat Court	Attorney General/Deputy Attorney General
PROVINCIAL LEVEL General/Government	Provincial High Court (Appellate/Writ Jurisdiction) Sessions Courts	Advocate General/ Additional Advocate Pleaders/Solicitors District Attorney/Deputies Prosecutors/Assistant District
DISTRICT LEVEL	District Magistrates' Courts Special Courts	Attorneys Prosecutors

APPENDIX F

PRINCIPLES OF PROSECUTION

1. To rectify the Code of Criminal Procedure, if violated.
2. To remove the technical flaws in the First Information Report (F.I.R).
3. To improve defects in investigation.
4. To gather oral, documentary and circumstantial evidence according to Qanun-e-Shahadat (Evidence Act).
5. To remove/plug the loopholes between F.I.R. and the final report.
6. To submit the final report in the court according to the G.P.C.
7. To identify any legal problem precluding successful prosecution like missing witnesses, double jeopardy, and wrong involvement by police.
8. To take into account the accused's right of defence.
9. To be aware of public agitation for the wrong involvement by police.

APPENDIX G

LAWS REGARDING PROSECUTION

1. Criminal Procedure Code.
2. Police Rules 1934.
3. Qanun-e-Shahadat Order, 1984 (Previously Evidence Act, 1872).
4. High Courts Rules and Orders Criminal Practice.

APPENDIX H

COURT WORK 1990-94 OF THE FIA, PAKISTAN

YEAR / STATUS	1990	1992	1993	1994	1995
Cases pending in the Courts at the end of the year	4224	4220	4142	3669	3554
Challenged	1808	2322	1798	1454	1149
Total	6032	6542	5940	5123	4703
No. of Cases Decided	1812	2400	2271	1523	945
Convicted	1254	1315	1244	866	509
Acquitted	158	574	503	194	212

APPENDIX I

DUTIES OF PUBLIC PROSECUTORS

1. To promote the cause of prosecution.
2. To thoroughly scrutinize challans, i.e., Reports under section 173 of the Cr.P.C. including applications received from the police station in connection with the arrest of offenders [Police Rules, 27. 15(1)].
3. To prosecute, watch or direct the prosecution of cases in courts.
4. To ensure the observance of conditions and restrictions of courts [Police Rules, 27. 15(ii)].
5. To ensure the observance of all High Courts orders issued with the object of expediting decisions and preventing abuses.
6. To supervise the transmission of warrants and summons to the executive police under the orders of criminal courts and to see that returns to such processes are made without delay.
7. To guide the investigating officer to remove the legal lacunae during investigation, so that best evidence is presented in court.
8. To examine whether the challan has been put in court within the prescribed period, as laid down in section 175 of the Cr.P.C.
9. As soon as final report of investigation under section 173 of the Cr.P.C. is received from police, it is the duty of the public prosecutor to vet it minutely and, if found fit, he should immediately send up the same to the court and, if found not fit due to serious legal lacunae, he may withhold the same directing the investigating agency to re-submit it in the best manner.
10. To file revision petition under sections 439 and 439-A of the Cr.P.C., provided the impugned orders merits revision.
11. To prepare acquittal appeal under section 417 of the Cr.P.C.
12. To cross-examine necessarily the accused according to Article 44 of Qanun-e-Shahadat Order, 1984 (Evidence Act). It was not previously done so.
13. According to section 232 of the Cr.P.C., whenever a charge is altered or added by the court after the commencement of trial, the public prosecutor is empowered to recall or summon and examine the witness with reference to such alteration or addition.
14. According to section 265 of the Acr.P.C., in every trial before a Court of Sessions, the prosecution shall be conducted by a public prosecutor.
15. As per section 494 of the Cr. P.C., the public prosecutor may, with the consent of the court before the judgement is pronounced, withdraw from the prosecution any person tried for the offence(s).

THE ROLE AND FUNCTION OF THE PROSECUTION IN THE PHILIPPINE CRIMINAL JUSTICE SYSTEM

*Menrado Valle-Corpuz**

INTRODUCTION

The criminal justice system, essentially, is the system or process in the community by which crimes are investigated, and the persons suspected thereof are taken into custody, prosecuted in court and punished, if found guilty, provisions being made for their correction and rehabilitation.

Prior to the advent of American sovereignty in the country, we had the Spanish law on criminal procedure. The Royal Decree of September 4, 1884, by virtue of which the Penal Code in force in the archipelago, as amended in accordance with the recommendations of the Code Committee, and its accompanying law—the Provisional Law on Criminal Procedure—were published and applied in the Philippines pursuant to the Royal Decree of December 17, 1884. It became effective four months after its publication in the Gaceta de Manila. In addition, the compilation of the Laws of Criminal Procedure of 1879 and the Law of Criminal Procedure of 1882 also formed part of our law on the subject.

During the American occupation, General Otis issued General Orders No. 58 on April 23, 1990, which was amended at various times. Some of the amendments were: Act No. 194, providing for preliminary investigations; Act No. 440, relating to counsels *de officio*; Act No. 590, providing for preliminary investigations by Justices of the Peace of provincial capitals; Act No. 2677, prescribing the procedure of appeals of cases originating in the Justice of the Peace Courts to the Supreme Court; Act No. 2709, regarding the exclusion of an accused to be utilized as a government witness; and Act No. 2886, changing the name of the party who should prosecute the criminal action from that of "The United States" to "The People of the Philippines."

The Philippine criminal justice system is composed of five parts or pillars, namely, law enforcement, prosecution, judiciary, penology, and the community.

I. LAW ENFORCEMENT PROCESS

The law enforcement consists of the officers and men of the Philippine National Police (PNP), the National Bureau of Investigation (NBI), and other agencies. When they learn of the commission of crimes or discover them, their duty is to:

a. Investigate the crime which may take the form of surveillance and observation of suspects, other persons and premises; interviewing persons with knowledge of facts directly or indirectly connected with the offense; taking photographs (surreptitiously or otherwise); arranging for entrapment; searching premises and persons subject to constitutional and statutory safeguards; and examining public and other available records pertaining to the persons involved and getting copies of pertinent entries.

The police officers, in other words, collect evidence for use in the prosecution of the suspects in the court. This may consist of the testimony of witnesses, including invited suspects, which are invariably taken down in question-and-answer form;

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writings and objects, e.g., gun, knife, other weapons used in the commission of the crime, clothing of the victim, etc.

b. Arrest suspects by virtue of a warrant of arrest issued by a judge on the basis of evidence submitted by them or under circumstances justifying a warrantees arrest.

The instances when an arrest without warrant may be lawfully effected by a peace officer or a private person are as follows:

(1) When in his presence, the person to be arrested has committed, is actually committing or is attempting to commit an offense;
(2) When an offense has in fact just been committed, and he has personal knowledge of facts indicating that the person to be arrested has committed it; and
(3) When the person to be arrested is a prisoner who has escaped from a penal establishment or place where he is serving final judgment or temporarily confined while his case in pending or has escaped while being transferred from one confinement to another.

Any person who—while in custody or otherwise deprived of liberty—is under investigation for the commission of an offense, has the following constitutional rights, among others:

1) He must be informed of his right to remain silent and to have competent and independent counsel preferably of his own choice. If the person cannot afford the services of counsel, he must be provided with one. These rights cannot be waived except in writing and in the presence of counsel;
2) No torture, force, violence, threat, indimidation or any other means which vitiate the free will shall be used against him; secret detention places, solitary, in communicado or other similar forms of detention are prohibited; and
3) Any confession or admission obtained in violation of the foregoing shall be inadmissible in evidence against him.

c. Refer the case and the suspects to the Office of the Public Prosecutor or Municipal Trial Court for preliminary investigation or directly to the Municipal Trial Court for trial and judgment.

II. PROSECUTION PROCESS

The investigation and prosecution of all cases involving violations of penal laws are lodged with the Department of Justice (DOJ) through its National Prosecution Service (NAPROSS).

The DOJ is headed by the Secretary of Justice with three Undersecretaries assisting him.

Aside from being the prosecution arm of the government, the DOJ shall have the following powers and functions:

a. Act as principal law agency of the government and as legal counsel and representative thereof, whenever so required;

b. Administer the probation and correction system;

c. Extend free legal assistance/ representation to indigents and poor litigants in criminal cases and non-commercial civil disputes;

d. Preserve the integrity of land titles through proper registration;

e. Investigate and arbitrate untitled land disputes involving small landowners and members of indigenous cultural communities;

f. Provide immigration and naturalization regulatory services and implement the laws governing citizenship and the admission and stay of aliens;

g. Provide legal services to the national government and its functionaries, including government owned or controlled corporations and their subsidiaries; and

h. Perform such other function as may be provided by law. It consists of the following constituent units:

(1) Department proper;
(2) Office of the Government Counsel;
(3) National Bureau of Investigation;
(4) Public Attorney's Office;
(5) Board of Pardons and Parole;
(6) Parole and Probation Administration;
(7) Bureau of Corrections;
(8) Land Registration Authority;
(9) Bureau of Immigration; and
(10) Commission on the Settlement of Land Problems.

The NAPROSS is with the "Department Proper" which is under the control and supervision of the Secretary of Justice. It is composed of the Prosecution Staff in the Office of the Secretary of Justice headed by the Chief State Prosecutor, the Regional State Prosecution Offices headed by Regional State Prosecutors, and the Provincial and City Prosecution Offices headed by the Provincial Prosecutor and City Prosecutor, respectively.

The Prosecution Staff or State Prosecutors perform the following functions:

a. Investigate administrative charges against prosecutors and other prosecution officers;

b. Conduct the investigation and prosecution of all crimes;

c. Prepare legal opinions on queries involving violations of the Revised Penal Code and special penal laws; and

d. Review appeals from the resolutions of prosecutors and other prosecuting officers in connection with criminal cases handled by them.

Regional State Prosecutors have the following functions:

(1) Implement policies, plans, programs, memoranda, orders, circulars and rules and regulations of the DOJ relative to the investigation and prosecution of criminal cases in his region;
(2) Exercise immediate administrative supervision over all Provincial and City Prosecutors and other prosecuting officers of provinces and cities comprised within his region;
(3) Prosecute any case arising within the region.

Provincial and City Prosecutors have the following functions:

a. Be the law officer of the province or city, as the case may be. He shall have charge of the prosecution of all crimes, misdemeanors and violations of city or municipal ordinances in the courts of such province or city and shall therein discharge all the duties incident to the institution of criminal prosecutions;

b. Investigate and/or cause to be investigated all charges of crimes, misdemeanors and violations of all penal laws and ordinances within their respective jurisdictions and have the necessary information or complaint prepared or made against the persons accused. In the conduct of such investigations, he or his assistants shall receive the sworn statements or take oral evidence of witnesses summoned by subpoena for the purpose;

c. Investigate commissions of criminal acts and take an active part in the gathering of relevant evidence. For this purpose, the National Bureau of Investigation, Philippine National Police and other offices and agencies of the government shall extend to him the necessary assistance;

d. Act as legal adviser of the municipality, and municipal district of the provinces or the provincial or city government and its officers or of the city. As such, he shall, when so requested, submit his opinion in writing upon any legal question submitted to him by any such officer or body pertinent to the duties thereof; and

e. Assist the Solicitor General, when so deputized in the public interest, in the performance of any function or in the discharge of any duty incumbent upon the latter, within the territorial jurisdiction of the former, in which cases, he shall be under the control and supervision of the Solicitor General with regard to the conduct of the proceedings assigned to him and render reports thereon.

The members of the NAPROSS are selected from among qualified and professional trained members of the legal profession who are of proven integrity and competence and have been in the actual practice of the legal profession for at least five years prior to their appointment or have held during like period, any position requiring the qualifications of a lawyer.

They shall be appointed by the President of the Philippines upon recommendation of the Secretary of Justice.

Once appointed, prosecutors are required to attend seminars, lectures, convention and continuing legal education to enhance their skills in investigation and trial works.

They enjoy a security of tenure because they can be removed from office only for a cause. Their appointments are not coterminous with the appointing authority, which means that even if the President who appointed them is no longer in power, they shall still remain in office.

In the discharge of their duties, prosecutors are guided by their "Credo" and the constitutional mandate that "a public office is a public trust and public officers and employees must at all times accountable to the people, serve them with utmost responsibility, integrity, loyalty and efficiency, act with patriotism and justice and lead modest lives."

The prosecution process starts the moment the law enforcer, the complainant or public officer in charge of the enforcement of the law alleged to have been violated files a case against a suspected criminal. With such filing, preliminary investigation will set in and the second stage in the life of a criminal action is now in progress. The first stage is the police investigation.

Preliminary investigation is the stage at which the public prosecutor evaluates the finding of the police or the evidence submitted directly by a complainant or public officer in charge of the enforcement of the law alleged to have been violated, to determine if prosecution of the suspect in court is warranted. The Rules of Court define preliminary investigation as an inquiry on 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 respondent is probably guilty thereof, and should be held for trial.

A preliminary investigation is an important substantive right of persons suspected of crimes, the deprivation of which is tantamount to a deprivation of due process of law. It is designed against hasty and malicious prosecutions.

Preliminary investigations may be conducted by the public prosecutors or judges of the Municipal Circuit Trial Courts.

The procedures in the conduct of a preliminary investigation are as follows:

(1) Filing of complaint and affidavits of witnesses by the police, complainant or public officer in charge of the enforcement of the law alleged to have been violated;
(2) Personal examination of affiants by the investigating prosecutor;
(3) Preliminary action by investigating prosecutor:
   - Dismiss the complaint if he finds no cause to continue with the inquiry.
   - Issue subpoena to respondent requiring him to submit a counter-affidavit. However, if no such counter-affidavit is submitted, the investigating prosecutor shall resolve the case on the basis of the evidence submitted by the police, public officer or complainant.

   If a counter-affidavit is submitted but there are matters which need clarification, the investigating prosecutor may set a hearing to propound clarificatory questions.
(4) Preparation of resolution. Based on the evidence presented, the investigating prosecutor may:
   - Prepare information if he finds cause to hold the respondent for trial. An information is an accusation in writing charging a person with an offense subscribed by the fiscal and filed with the court.
   - Otherwise, recommend the dismissal of the complaint.

However, in both cases, the approval of the Provincial or City Prosecutor or the Chief State Prosecutor of such recommendation is necessary.

As regards offenses within the jurisdiction of Municipal Trial Courts, no preliminary investigation is required by law. All that the public prosecutor is required to do is 1) to examine the complaint and supporting affidavit and 2) to personally satisfy himself that the affiants voluntarily executed and understood their affidavits and that the suspect has probably committed the offense charged. This examination and determination he does ex parte, i.e., without notice to and in the absence of the suspect. He then files the information directly with the court.

At the preliminary investigation of a crime cognizable by a Regional Trial Court, the respondent has the following rights:

(1) To have notice of the investigation and to have a copy of the complaint, affidavits and other supporting documents;
(2) To submit a counter-affidavit and other supporting documents within ten days from notice;
(3) To examine all other evidence submitted by the complainant;
(4) To be afforded an opportunity to be present at any hearing at which clarification of certain matters is to be made and submit questions to the investigating officer for the purpose.

It bears emphasis that aside from a preliminary investigation, there is another type of investigation which a prosecutor may conduct, and this is what we call inquest investigation, which is an informal and summary investigation conducted by a public prosecutor in criminal cases involving persons arrested and detained without the benefit of a warrant of arrest for the purpose of determining whether or not said persons should remain under custody and correspondingly be charged in court.

A respondent against whom an adverse resolution was issued by the investigating

prosecutor is not without any remedy. He may file an appeal to the Secretary of Justice within fifteen days from receipt of the questioned resolution.

III. THE JUDICIAL PROCESS

If the preliminary investigation results in the finding that a crime has been committed and the suspect is probably guilty thereof, the public prosecutor will file the corresponding information in the proper court; thus, activating the judicial process.

The case shall then be set for arraignment which is the first stage of a criminal action. It consists of the reading of the information or criminal complaint in court to the accused in open court. The accused is then asked how he pleads. The accused may plead guilty or not guilty to the offense charged. If he refuses to plead, a plea of not guilty will be entered for him. If the accused pleads guilty, the court shall sentence him to the corresponding penalty if it is satisfied of the voluntariness of the plea, and otherwise, of the guilt of the accused. If the accused pleads not guilty, the case is set for pre-trial and/or trial.

The pre-trial shall consider the following matters:

(1) Plea bargaining;
(2) Stipulation of facts;
(3) Marking for identification of evidence of the parties;
(4) Waiver of objections to admissibility of evidence; and
(5) Such other matters as will promote a fair and expeditious trial.

No agreement or admission during the pre-trial shall be used in evidence against the accused unless reduced in writing and signed by him and his counsel.

After the pre-trial stage, trial follows. The prosecution commences the presentation of evidence, followed by the accused. Prosecution may present rebuttal evidence. The parties may also present written arguments or memoranda after which the case is deemed submitted for decision.

The law secures to every accused the following rights during trial:

a. To be presumed innocent until the contrary is proved beyond reasonable doubt;

b. To be informed of the nature and cause of the accusation against him;

c. To be present and defend in person and by counsel at every stage of the proceedings, from the arraignment to the promulgation of judgment. The accused may, however, waive his presence at the trial pursuant to the stipulations set forth in his bail bond, unless his presence is specifically ordered by the court for purposes of identification. The absence of the accused without any justifiable cause at the trial or a particular date of which he had notice shall be considered a waiver of his right to be present during that trial. When an accused under custody had been notified of the date of the trial and escapes, he shall be deemed to have waived his right to be present on said date and on all subsequent trial dates until custody is regained. Upon motion, the accused my be allowed to defend himself in person when it sufficiently appears to the court that he can properly protect his rights without the assistance of counsel;

d. To testify as a witness in his own behalf but subject to cross-examination on matters covered by direct examination. His silence shall not in any manner prejudice him;

e. To be exempted from being compelled to be a witness against himself;

f. To confront and cross-examine the witnesses against him at the trial. Either

party may utilize as part of its evidence the testimony of a witness who is deceased, out of or cannot with due diligence be found in the Philippines, unavailable or otherwise unable to testify, given in another case or proceeding (judicial or administrative) involving the same parties and subject matter, the adverse party having had the opportunity to cross-examine him;

g. To have compulsary process issued to secure the attendance of witnesses and production of other evidence in his behalf;

h. To have a speedy, impartial and public trial; and

i. To have the right of appeal in all cases allowed and in the manner prescribed by law.

After the reception of the contending parties pieces of evidence, the case is now submitted for decision which the court must render within ninety days after trial.

If the court acquits the accused because in its view he is innocent or his guilt is not proven beyond reasonable doubt, the case is definitely ended. Appeal by the prosecution is barred by the principle of double jeopardy.

On the other hand, if it convicts the accused because in its view his guilt of the crime charged has been established beyond reasonable doubt, the latter may move for a new trial or reconsideration which may be based on either of the following grounds:

a. That errors of law or irregularities have been committed during the trial prejudicial to the substantial rights of the accused; or

b. That new and material evidence has been discovered and produced at the trial, and which, if introduced and admitted, would probably change the judgement.

The motion for reconsideration may be based on the errors of law or fact in judgment.

In lieu of moving for new trial or reconsideration or after denial of such motion, the convicted accused may appeal to the Court of Appeals or the Supreme Court within the time fixed by law. If the appeal of the convicted accused is unsuccessful and his conviction is affirmed, the case will be remanded to the court of origin for the execution of the judgement. The latter court will set a date for the accused to present himself for the enforcement of the judgement. At the time thus appointed, the court will issue an order of commitment and the accused is passed on the next component.

IV. PENAL OR CORRECTIONAL PROCESS

Punishment is the isolation of the convicts by imprisonment for the periods laid down by the courts or in extreme cases, their execution by the method prescribed by law—and correction and rehabilitation are functions undertaken by the institutions set up by law, e.g., the Bureau of Prisons, Parole and Probation Administration.

V. THE COMMUNITY

After the convicts have passed through the correction component—either unconditionally (as by full service of the term of imprisonment imposed on them), or by parole or pardon—they go back to the community and either lead normal lives as law-abiding citizens in their barangays, or, regrettably, commit other crimes and thus, go back through the same processes and stages of the criminal justice system.

The community at large—through the appropriate legislative agencies, public and private educational institutions, parents and guardians, churches, religious organizations, civic associations, etc.—

develops and exacts conformity with acceptable moral and ethical values, creates the environment for the development of civic-spirited citizens, and fosters respect for and observance of the Rule of Law.

In particular, members of the community having knowledge of facts relevant to the investigation or prosecution of crimes, are expected to cooperate with law enforcers and investigators, by reporting crimes and giving evidence against the offenders. Attorneys in legal practice, or pertaining to associations commited to giving legal aid to indigent or otherwise deserving individuals, should be reckoned as part of the fifth component of the criminal justice system, the community. They participate directly or indirectly in the criminal justice system by giving advice to, or representing, persons involved in criminal actions before the proper authorities.

The community component should also include government institutions that play a role in the criminal justice system, such as the Bureau of Posts—which delivers court notices; the Commission of Immigration and Deportation—which may prevent the departure of suspects from the country; the Bureau of Telecommunications—which transmits communications by telephone, telegram or radio; and the government hospitals and medical centers (like the National Psychopathic Hospital)—which furnish experts who may enlighten the courts on issues involving medical or other sciences, etc. Private institutions and civic organizations should also be deemed part thereof, since they may also have roles to play in the criminal justice system.

CONCLUSION

The criminal justice system is not just the agencies and persons charged with law enforcement; not just the public prosecution, nor the courts, nor just the penal and correctional system, nor just the community. The criminal justice system is all of these institutions or pillars collectively. For it to work efficaciously and speedily, it is essential for all these pillars to work efficiently and with dispatch, and in cooperation and in coordination with one another.

REFERENCES

1. The Court and the Criminal Justice System by Honorable Chief Justice Andres Narvasa, Supreme Court of the Philippines.
2. Rules of Court (Rules 110 to 127).
3. Presidential Decree No. 1275 (Reorganizing the Prosecution Staff of the Department of Justice and the Offices of the Provincial and City Prosecutors, Regionalizing the Prosecution service and Creating the National Prosecution Service).
4. The Philippine Constitution.
5. Republic Act 296, as amended by Batas Pambansa 129, otherwise known as the Judiciary Act.
6. Executive Order No. 292 dated July 25, 1987, otherwise known as the Administrative Code of 1987.
7. DOJ Order No. 223 dated June 30, 1993C (Revised Rules on Appeal from Resolutions in Preliminary Investigation/Reinvestigation).

THE ROLE AND FUNCTION OF PUBLIC PROSECUTORS IN THAILAND

*Somjai Kesornsiricharoen**

I. INTRODUCTION

In this report, I will address general information about the responsibilities and administration of the Office of the Attorney General of Thailand. Emphasis will be put on its role in the national criminal justice system, i.e., the role in investigation, prosecution function, scope of discretion, the role in trial, and sentencing as well as controls on prosecution authority. Finally, the problems facing the public prosecutors in Thailand and their tentative recommendations for solution will be presented for your information in the comparative study of the role and functions of the public prosecutors.

II. HISTORICAL BACKGROUND

From 1887, in the reign of King Chulalongkorn, Thailand modernized her legal system to avoid from being the victim of extraterritoriality from the then powerful western countries. The Ministry of Justice was founded in 1892. From 1893, the courts have since been within the administration of the Ministry of Justice, but guaranteed independence in judicial affairs. In 1893, the Office of the Attorney General was established to be in charge of public prosecution. The first Thai penal code was introduced in 1908 before being reformed and reintroduced in 1956. As to the Thai criminal procedural code, it has been in effect since 1935. In that era, Thailand adopted the civil law system. However, the common law influence still existed in some areas of law including the procedure laws of Thailand. Private prosecution and adversary proceedings in criminal trial are some examples in that regard.

The Office of the Attorney General was an agency of the Ministry of Justice at the time of its establishment. From 1922 to 1991, it was part of the Ministry of Interior. Since 1991, the Office has become an independent agency under the direct supervision of the Prime Minister to ensure more independence and impartiality of the public prosecutors. Accordingly, the Prime Minister has no authority to interfere with the criminal justice functions of the public prosecutors. His role is limited only to administrative functions of the Office of the Attorney General.

III. FUNCTIONS AND INDEPENDENCE

As Thailand is a single state, the Office of the Attorney of Thailand is the sole office that has the primary functions of prosecuting and litigating criminal cases throughout the country. The office is also assigned to defend government officials charged with offenses related to the lawful performance of their duty. Moreover, regarding international mutual legal assistance in criminal matters, the Office serves as the Central Authority. In addition, the Office is entrusted with the duty to protect the state interest by rendering legal opinions to government agencies, reviewing draft government contracts, and handling civil cases whereby public agencies are parties. The Office also acts as the center of civil rights protection

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as well as renders national legal aid to the poor and needy.

The powers and functions of the public prosecutors in the Thai criminal justice system are not addressed in the current national constitution as those of judges. However, they are clearly stated in a number of legislation ranging from the Criminal Procedure Code of 1934, the Criminal Procedure in Summary Court of 1979, and the Establishment of the Juvenile and Family Court and its procedures. There are also some provisions in the Penal Code authorizing public prosecutors to propose to the court some safety measures, i.e., relegation, prohibition to enter a specified area, to execute a bond with security for keeping the peace, to be kept under a restraint in a hospital, prohibition to carry on a certain kind of occupation, to be imposed to some dangerous convicted persons.[1] Moreover, public prosecutors are subject to the Public Prosecutors Act of 1955 and have to comply with internal regulation and subsequent amendments providing for the standard to be followed in their performing of functions related to criminal justice.

The public prosecutors under the Office are career professionals like in most counties. The system does not allow the government to appoint any other legal professional to serve temporarily as a public prosecutor in any type of case as seen in some countries. The qualifications to become a public prosecutor and screening procedures are the same as those for judges, i.e., being a Thai citizen by birth, not less than 25 years old, graduated from an accredited law school and the Thai Bar Association, having practiced law at least two years, and (more importantly) having no criminal or disciplinary sanction record. Moreover, the applicants have to survive the very competitive recruiting examinations occasionally held. The successful candidates have to undergo practical training for one year in the position as assistant prosecutors before being royally appointed as public prosecutors. The retirement age of all public prosecutors is 60 years.

To ensure their independence and equal status with the judiciary, there exists the Public Prosecutors Commission separate from the ordinary Civil Service Commission to be exclusively responsible for the personnel management affairs of prosecutors, namely, recruitment, placement, appointment, promotion and transfer. The Commission consists of 15 members, chaired by a retried high-ranking public prosecutor elected by prosecutors from all over the country. The Attorney General, four Deputy Attorney Generals, the Director General of Criminal Litigation Department, the Director General of Legal Counsel Department, and the Director General of Planning and Development Department are members ex officio of the Commission. It also includes three elected executive public prosecutors and three elected retired executive public prosecutors. It should be noted that the Commission has absolute power to nominate the Attorney General of Thailand prior to the official appointment by His Majesty the King. There are now about 1965 public prosecutors working throughout the country.[2]

IV. THE ROLE IN CRIMINAL INVESTIGATION

Unlike the public prosecutors in the U.S., Japan, the Republic of Korea,

[1] See Appendix F for statistics on safety measures in 1996.

[2] See Appendixes A-1 and A-3 for the organization of the Office of the Attorney General and for statistics on number of the public prosecutors in Thailand, ranged by positions.

Indonesia or Germany[3], the Thai public prosecutors make prosecution decisions only based on the evidence presented by the police in investigation files as they have no power at all in the investigation process by initiating, neither by taking control nor by supervising the investigation. By law, there is almost complete separation between the investigation and prosecution as the investigation is under the sole authority of the police.[4] Accordingly, the police has absolute power in the issuance and execution of arrest warrant or any other type of warrants or in granting bail to alleged offenders during an investigation stage, without screening procedures by either the courts or public prosecutors.[5] Senior police officials from the rank of Sub-lieutenant as the head of sub police station and upwards can issue arrest or search warrants by themselves. Moreover, warrantless arrests and searches are allowed by the police in some circumstances.[6]

[3] Kittipong Kittayarak and David Johnson, "Prosecution System in Seven Countries: A Comparative Analysis", a research paper written in February 1995 for UNAFEI, Tokyo Japan, published in ACPF TODAY by Asia Crime Prevention Foundation, pp. 86-96 (June 1994).

[4] Thailand Criminal Procedures Code (CPC), sections 120 and 121.

Section 120, "The public prosecutor shall not enter a charge in Court without an investigation having previously done related to the offense in respect of which the charge is entered."

Section 121, "The investigative official has the power to investigation in reference to all criminal cases. But in case of compoundable offense, investigation shall not be held unless a complaint has been made."

[5] The police has the power to detain the arrested for up to three days from the time of arrest to their presence before the court. Thereafter, the police has to request an extension of detention from the court for the purpose of completing the investigation. The court has the power to grant one or several successive remands not exceeding 12 days each, but the total period depends on the seriousness and gravity of the charges, but the maximum is 84 days. (CPC section 87 as amended in 1996.) However, for minor offenses triable in Magistrate Courts, after the arrest, the police are required to send the suspect together with the investigation file to the public prosecutors so that he is charged to the courts within 48 hours from the time of his arrest. (Law on the Establishment of Magistrate Courts and procedures of 1956, section 7 as amended in 1996)

[6] According to CPC section 78, a warrantless arrest could be executed in the following cases:

(1) when such person has committed a flagrant offense as defined in section 80.
(2) when such person is found attempting to commit an offense, or is found under suspicious circumstances indicating his intention to commit an offense by having in his possession implement, arms or other articles likely to be used for the commission of an offense;
(3) when there are reasonable grounds to suspect that such person has committed an offense and is about to abscond; and
(4) when another person has requested the arrest of such person charging him with the commission of an offense and stating that a regular complaint has been made.

According to CPC section 92, a warrantless search could be executed in a private place in the following cases:

(1) where there is a cry for help emanating from the private place
(2) where a flagrant offense is evidently being committed in the private place
(3) where a person having committed a flagrant offense, while being perused, taken refuge; or there are serious grounds for suspecting that such person is concealing, in private place;
(4) where there are reasonable grounds for suspecting that an article obtained through an offense is concealed or to be found inside and there are reasonable grounds to believe that by reason of delay in obtaining a warrant of search the article is likely to be removed;
(5) where the person to be arrested is the head of the household of such private place and there is a warrant for his arrest, or the arrest is to be made under section 78...."

Thai public prosecutors cannot give any direction to the police officer of a criminal investigation from the outset of the report of the crime, thus making them different from their counterparts in other civil law countries. The role of public prosecutors only begins in all types of cases, no matter how serious or sensational the cases are, after the completion of the investigation and the police sends the investigation file to them for consideration to prosecute or not prosecute. The public prosecutors may send a request to the police for further investigation or send them any witnesses for their own inquiry but have no chance to examine the alleged offenders themselves. However, by reviewing the evidence as only chosen to be presented by the police, they have certainly no chance to verify the truth of the case. Even when the police fabricate or bring in misleading evidence as a result of bribery or prejudice against the offenders or victims, the public prosecutors have no way to perceive such facts. Such practice has led to excessive power and abuse of power by the police due to the lack of checking mechanisms to ensure the legality and truthfulness of the investigation.

Seeing this situation as a serious obstacle to ensuring justice to all parties in criminal procedure, the Office of the Attorney General has struggled for some role in the investigation stage for years. Actually, we do not need to take over the investigation from the police in all cases but for some high profile or complicated cases or special offenses in a position as a supervisor. However, we have never achieved such goals due to politically strong and powerful opposition by the police. This also reflects an erroneous perspective and inadequate cooperation among agencies in the criminal justice system. Our striving for some role in the investigation was distorted as a fight for power rather than a sincere effort for more justice and efficiency in the criminal process.

V. FUNCTION OF PROSECUTION

As in most countries, one of significant function of public prosecutors is to make prosecution orders against alleged offenders or non-prosecution orders. In Thailand, public prosecutors are not allowed to institute a charge in court without previous investigation with regard to that charge.[7] As above-mentioned, Thai public prosecutors have no role in the investigation stage, thereby, making their decisions only based on the evidence found in the initial investigation file or in a supplementary file presented by the police as a result of further investigation according to a public prosecutor's order. Their prosecution orders are usually based on the sufficiency of evidence presented to prove the offenders guilt to the court. They have no chance to interview the suspect before the prosecution or give instruction to conduct further investigation. Under the law, the prosecution order is final. The courts usually accept the case to trial without preliminary hearing in all types of cases, even though the law allows them to do so if they think fit, due to their trust in the screening of cases by the public prosecutors. Nonetheless, due to the lack of opportunity to deal with the evidence from the beginning, sometimes we cannot save the innocent offender from being prosecuted. There is no written law defining the evidentiary standard for the charge in Thailand. In practice, the standard in prosecution is usually based on probable cause. In other words, Thai public prosecutors will normally issue a prosecution order if the case is likely to gain conviction against the accused.

It should be noted that Thai public prosecutors have no power to accept a plea of guilty to a lesser crime than originally charged or plea bargaining as is done in the United States. Additionally, in cases of theft, snatching, robbery, gang-robbery,

[7] CPC section 120.

piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property, public prosecutors also have the responsibility to request for a court order granting the restitution of the assets by the defendant to the victim of the crime or indemnity thereof.[8]

In case of insufficiency of evidence, the prosecutor will normally issue a non-prosecution order. However, this type of order, if not issued by the Attorney General himself, is not final unless concurred by the Director-General of Police Department for cases occurring in Bangkok, or by the Provincial Governor for cases occurring outside Bangkok. If they disagree with the order, the case will finally be reviewed by the Attorney General and, therefore, his order, whether or not to prosecute, will be final.[9] The final non-prosecution order usually prevents further investigation against the offender on account of the same offense unless there is fresh evidence material to case that would likely lead to the conviction of the alleged offender.[10] The power of the Attorney General in issuing non-prosecution order has been strongly criticized recently because it is argued that it is irrevocable and not subject to be examined by any agency in the criminal justice.

On the other hand, like in England and Wales[11] and some other common law countries, the CPC also allows private prosecution or prosecution by the victim or injured party[12] in most types of cases except

8 CPC section 43, "In cases of theft, snatching, robbery, gang robbery, piracy, extortion, cheating and fraud, criminal misappropriation and receiving stolen property, where the injured person has the right to claim the restitution of the property he has been deprived of through the offense, or the value thereof, the public prosecutor, when insituting the criminal prosecution, shall, on behalf of the injured person, apply for restitution of the property or the value thereof."

9 CPC section 145, "In the case where there is an issue of a non-prosecution order other than that of the Attorney General, if it is in Bangkok, the investigation file together with the order shall forthwith be submitted to the Director-General, Deputy Director-General or Assistant Director-General of the Police Department, the file of investigation together with conflicting opinions shall be sent to Attorney General for decision. If it is in provincial area, the file of investigation together with the order shall forthwith be submitted to the Governor of such province...
In the case where the Director-General, Deputy Director-General or Assistant Director-General of the Police Department, or the Governor of the other province disagrees with the order of the public prosecutor, the file together with conflicting opinions shall be sent to the Attorney General for decision...." See also Appendix B for statistics on the decisions of the Attorney General during 1991-1996.

10 CPC section 147 "After a final non-prosecution order has been issued, no investigation can be made again relating to the same person on account of the same offense, unless there is fresh evidence material to the case that would likely lead to the conviction of the alleged offender."

11 Kittipong Kittayarak and David Johnson, "Prosecution System in Seven Countries: A Comparative Analysis", supra note 3.

12 According to CPC Articles 1(4), 5 and 6, "injured person" means a person who has received injury through the commission of any offense including:
(1) the legal representative or custodian in respect only of offenses committed against the minor or incompetent person under his charge;
(2) the ascendant for descendant, the husband or wife, in respect only of criminal offenses in which the injured person is so injured that he died or is unable to act by himself;
(3) the manager or other representatives of a legal person in respect of any offense committed against such legal person; and
(4) in a criminal case where the injured person is a minor having no legal representative, or is a person of unsound mind or an incompetent person having no custodian, or where the legal representative or custodian is unable to discharge his duty for any reason including conflict of interests with the minor or incompetent person, a relative of such person or an interested person may apply to the court to appoint him as a representative ad litem."

the cases where the state is the sole injured party such as offenses against the state security or against the Monarchy, etc. Therefore, the final non-prosecution orders usually will not bar private prosecution against the same offender.[13] Nevertheless, in practice, the public prosecutors dominate the prosecution because there is so limited private prosecution brought to trial in this case as a result of the public's trust in the professional competence of public prosecutors. Moreover, private prosecution is subject to a screening by the court through preliminary hearing.[14] During the preliminary hearing, the defendant is not allowed to present his own witnesses but allowed to appoint a lawyer to defend him and entitled to cross-examine the plaintiff's witness. The order of the court to accept the case to trial is final.[15]

In juvenile delinquency cases, the injured party cannot bring the case to court without the approval of the Director of the Juvenile Observation and Protection Center in order to protect the children from improper humiliation.[16] In case of his consideration of non-prosecution, the injured person may apply by motion to the court for permission to bring the criminal case to court. Such order of the court will be final.

However, in most cases, private prosecution in practice is practically restricted to compoundable offenses such as offenses against bad checks or defamation offenses. Additionally, in case of prosecution by public prosecutors, the injured party may apply by motion to the trial court to be a joint plaintiff in the case.[17] However, they are prevented from doing or omitting to do any act causing detriment to the case of the public prosecutor or else the public prosecutor may request the court to order the injured party to do or not to do such acts. On the other hand, in a criminal prosecution of a non-compoundable offense instituted by the injured person, the public

[13] CPC section 34, "A non-prosecution order does not bar the right of the injured person himself to institute a prosecution."

[14] CPC section 162 (1)

CPC section 162 "Where the charge is found to be conform with the law, the Court shall act as follows:

(1) in the case where a private prosecution is the prosecutor, the Court shall make a preliminary examination, but, if the public prosecutor has also instituted a criminal prosecution with the same charge, sub section (2) will apply;

(2) in the case entered by the public prosecutor, the Court need not to hold a preliminary examination, but may do so if it thinks fit.

In the case where there is a preliminary examination as aforesaid, if the accused pleads guilty, the Court shall accept the charge for trial."

[15] CPC sections 165 and 170.

Section 165, "In the case where the charge is entered by a private prosecutor, the Court has the power to hold the preliminary examination in the absence of the accused; the Court shall serve on each accused a copy of the charge and notify him of the date fixed for the preliminary examination. The accused may attend the examination with or without a defense counsel to cross-examine the witness or the prosecution. If he will not attend, he may appoint a counsel to cross-examine the witnesses for the prosecution. The accused shall not be asked by the Court to make a statement, and, before acceptance of the charge, the accused shall not be treated as such".

Section 170, "The order of the Court to the effect that there is a prima facie case is final, but the order to the effect that there is no prima facie case may be appealed against by the prosecutor in accordance with the provisions of this Code governing appeal."

[16] There are 11 Juvenile and Family Courts and 19 Juvenile and Family sections of Provincial Courts scattered throughout Thailand.

[17] CPC section 30, "In a criminal prosecution instituted by the public prosecutor, the injured person may apply by motion to associate himself as prosecutor at any stage of the proceedings before the pronouncement of judgment by the Court of First Instance."

prosecutors may apply by motion to associate themselves as prosecutor at any time before the conclusion of the case.[18]

In addition to insufficiency of evidence, in all cases according the CPC, the right to prosecute by the public prosecutors is also repealed by the following reasons:[19]

(1) the death of the offender;
(2) in case of a compoundble offense, the withdrawal of the compliant or of the prosecution or by lawful compromise;
(3) the settlement of the offense in petty cases according to the CPC requirement[20];
(4) a final judgment in reference to the offense for which the prosecution has been instituted;
(5) the coming into force of a law subsequent to the commission of the offense, abolishing such offense;
(6) prescription; and
(7) amnesty.

VI. PROSECUTORIAL DISCRETION

The CPC does not clearly prohibit the public prosecutors from using discretion in not to prosecute any offender even if there exists sufficient evidence to prove his guilt in court. Even if there is sufficient evidence, public prosecutors should consider whether the public interest requires prosecution. However, the public prosecutors have exercised this discretion for public interest in only a few cases. One of the historic cases was that the Attorney General had used this discretion in deciding not to prosecute a briber in order to save him as a key state witness against a corrupt minster because he thought that the public interest in punishing the corrupt official outweighed the briber's misconduct. According to the internal regulation on the handling of criminal cases by public prosecutors, it clearly states that if a public prosecutor is of opinion that the prosecution may not accord the public interest or be against the public moral or order or affect the national security or important national interest, he must refer the case to the Attorney General for further consideration.

The Office of the Attorney General is cautious in exercising the discretion by requiring approval of the Attorney General. Nonetheless, only a few cases have been forwarded to the Attorney General for consideration.

Moreover, in juvenile delinquency cases, the Law on the Establishment of Juvenile and Family Courts and Their Procedures, clearly states that public prosecutors are entrusted with prosecutorial discretion in dropping a case if proposed by the Director of the Juvenile Observation Center that

[18] CPC section 31, "in a criminal prosecution of a non-compoundable offence instituted by the injured person, the public prosecutor may apply by monitor to associate himself, as prosecutor any time before the case becomes final."

[19] CPC section 39.

[20] According to CPC section 37, for trivial offenses punishable with only with a fine, the cases can be settled by the payment of maximum fine by the offenders to the police officers. Likewise, for offenses punishable with maximum of one-month imprisonment or a fine not exceeding 1000 baht (US$40), or other offenses as having punishable only with fine of the maximum not exceeding ten thousand baht (US$400), or tax offenses with the maximum of fine not exceeding 10000 baht (US$400), the police officers investigating the cases can impose an administrative fine on the offenders. If the offenders voluntarily pay the amount of fine fixed by the investigator, the cases can be dropped from prosecution.

After the case has been settled by the investigating officer by such means, the investigation file and together with the notes of settlement must be sent to the public prosecutor. If the public prosecutor is of the opinion that the settlement is not proper, he may make a prosecution order and request the alleged offender for prosecution.

such delinquents can improve their behavior and easily go back to normal life. Their orders are final and not subject to any review. Nonetheless, so far, no case has been forwarded to public prosecutors for a non-prosecution order according to this section.

In the past, we attempted to introduce the system of suspended prosecution by law as a means of expansion of discretionary power in order to reduce to caseloads in courts and population in jail. More importantly, we realized that in many cases, criminal penalization might not be appropriate for some offenders in some types of cases. We proposed to use the suspension of prosecution scheme for crimes of negligence or minor offenses with a maximum imprisonment of not more than three years and conditional upon the confession of the offenders and their willingness to comply with the conditions of probation or supervision to be imposed by the public prosecutors. If such offenders commit no crime during that period, the prosecution will be permanently dropped. If they commit other crime or fail to accord to any imposed condition, the suspension of prosecution will be withdrawn and they will be prosecuted for both crimes. However, we failed to achieve this for lack of correct understanding of the role of public prosecutors among our criminal agencies concerned. It was misinterpreted as interference with the power of the judiciary. As a result, presently, there exist case overloads in courts and prisons are overcrowded. Surely, this situation will be worse in the future.

VII. ROLE IN CRIMINAL TRIAL

As in most countries, a defendant is guaranteed under the constitution to be presumed innocent until proven guilty. Before the trial, public prosecutors will institute criminal prosecution by entry of a charge in the courts.[21] A charge has to indicate sufficient facts as to the time and place of such act and the persons or articles concerned which are reasonably sufficient to give the accursed a clear understanding of the charge.

According to the CPC, the criminal trial is required to be done in open court and in the presence of the defendant. When the public prosecutor and the defendant are before the court, and after the court has been satisfied as to the identity of the defendant, the charge will be read out and explained to the accused and then he will be asked whether or not he has committed the crime and what will be his defense. The statement made by the accused will be written down. The defendants are guaranteed, according to CPC, the right to a defense lawyer in cases of capital punishment. Additionally, in cases where the defendant is a juvenile of no more than 17 years of age or where the imprisonment

[21] The courts in Thailand are divided into three levels, namely, the Courts of First Instance, the Court of Appeal and the Supreme Court. Crimes occurring in Bangkok may be prosecuted in the Criminal Court, and the the Southern Bangkok Court, and the Thonburi Criminal Court, depending on the territorial jurisdiction of those courts. However, for the offense having an imprisonment term not exceeding three years or a fine not over 60,000 baht, the case must be prosecuted in the Magistrate Court having jurisdiction over the case. Moreover, juvenile delinquents committing crimes in Bangkok shall be prosecuted in the Central Juvenile and Family Court. In the provinces, the criminal charge must be filed in the Provincial Court, the Magistrate Court or the Provincial Juvenile and Family Courts as the case may be. Judges of the Magistrate Court sit singlely as opposed to other courts of first instance where two judges are required for the forum. The quorum of the Juvenile Court consists of two career judges and two associate judges, one of which must be a woman. See Appendix A-3 for the organization of the courts of justice in Thailand.

penalty is defined, the lawyers will be provided if needed by the defendant.[22]

The Thai judiciary has been entrusted with exclusive power to determine both questions of fact and of law in criminal cases, as there is no jury system in Thailand. It is noteworthy that there is no practice of pre-trial meeting to facilitate or expedite the trial process among the judge, public prosecutor and defense lawyer as seen in some countries. Before the trial, public prosecutors need not to disclose their evidence to the defense. They have to provide only a list of witness and documents to the court and the defense.

Unlike in Japan, in case that the defendant pleads guilty, the court will convict and sentence him according to the law without any further hearing except in a case of serious offence where a minimum penalty is more than five years imprisonment. In such cases, the court has to hear the public prosecutors' evidence to be sure that the defendant is the real offender. Normally, this trial is in brief. The public prosecutors will present to the court all relevant documents and bring key witnesses or the victim to testify before the court so as to prove that there was crime committed by such a defendant. The courts usually reduce the penalty to be imposed by half in case that the defendants plead guilty.

In contested cases, the public prosecutors have to prove beyond reasonable doubt that the defendant is guilty as charged. Public prosecutors usually have the burden in search of the truth and present evidence to the court. In criminal trials, the courts have broad discretion in accepting evidence. CPC section 226 provides that any material, documentary or oral evidence likely to prove the guilt or the innocence of the accused is admissible, provided that it is not obtained through any inducement, promise, threat, deception or other unlawful means. As to hearsay evidence, it seems that there is no provision of law prohibiting hearsay evidence. All evidence will be admissible if relevant to the case and legally acquired. It has been consistently held that the witnesses' deposition and the accused's confession made to the police at the investigation stage could not be admitted to court if they were executed by threat, deception, promise or other wrongful means.[23] However, the real question is the value of such evidence when the defendant denies his voluntariness of such statement.

The Thai courts have long adopted the adversary manner procedures whereby the courts are impartially passive throughout the trial. Their role in the trial is to take note of the witness testimony as examined and cross-examined by the parties, bring related documents into the file, and decide upon verbal arguments raised during that session. Such practices have induced strong criticism by some scholars that justice may not be best done unless the courts also play an active role in the

[22] CPC section 173, as amended in 1996, "In the case of offenses punishable with death and before commencing trial, the Courts shall ask the accused as to having a defense counsel or not. If he has none, the Court shall appoint one for him.

In the cases of offenses punishable with imprisonment and in cases of offenses committed by the accused not yet exceeding 18 years of age on the day of charge, the Court before commencing the trial, shall ask the accused whether he has a counsel or not. If he has none and requires one, the Court shall appoint one for them.

The Court shall pay a reward, as specified by the Regulation of the Ministry of Justice, to the counsel appointed according to this section."

[23] CPC section 135, "No investigating officer shall make or cause to be made, any deception, threat or promise to any alleged offender inducing such person to make any particular statement concering the charge against him."

courtroom. As a consequence, this has led to a very difficult task for public prosecutors in Thailand because they have no chance to become familiarized with the evidence and are not in a position to observe the effectiveness and legality of the investigation from the beginning. Even when the witnesses reverse their testimony, public prosecutors have no way to determine which testimony is true. Principally, public prosecutors are presumed impartial throughout the criminal trial. The true aim of the prosecution should be to seek the truth rather than merely seek a conviction. Practically, this is highly possible in exercising a prosecution function stage. However, during trial, it is very hard for the public prosecutors to be impartial because they have to fight strongly against defense lawyers without the help from the court in seeking justice in the case.[24]

The trial session is usually not conducted in a consecutive period. The courts always set a trial session by appointment as agreed by all parties, usually once or twice a month. Some cases take one or two years or more to complete. As a result, for some innocent defendants, if unable to be granted bail, such long period of trial aggravates their suffering and tragedy. Therefore, the Ministry of Justice is now proposing a bill to provide a compensation scheme for those innocent defendants as a result of the miscarriage of justice. The bill is now under consideration of the government.

It should be noted that public prosecutors could exercise discretion to withdraw the cases from trial in the Court of First Instance.[25] However, the law does not establish clear-cut guidelines for the withdrawal of cases. Public prosecutors should do this with caution to the interest of justice. The withdrawal of a case by public prosecutors does not deter the injured person from re-instituting prosecution.[26] In practice, the public prosecutors used to exercise this discretion in politically-related cases so as to preserve national unity or avoid more turbulence in the nation.

VIII. ROLE IN SENTENCING

The court has absolute power in sentencing if the defendant is found guilty. Unlike the U.S. justice system, there is no sentencing hearing separated from the trial process in Thailand. Practically, public

[24] See Appendixes G to I for statistics on judgments of the Courts of First Instance. Please note that the conviction rate is very high but it includes so many trivial cases or some serious cases where defendants plead guilty.

[25] CPC section 35, "A motion for leave to withdraw a criminal prosecution may be filed at any time before judgment by the Court of First Instance. The Court may issue an order granting or refusing such leave as it thinks fit. If the motion is filed after the accused has submitted his defense, he shall be asked if he has any objections, and the Court shall dismiss the motion."

[26] CPC section 36, "A criminal prosecution which has been withdrawn from a Court cannot be reinstitued unless it falls under the following exceptions:

(1) if the public prosecutor institutes a criminal prosecution related to a non-compoundable offence and then withdraws the prosecution, such withdrawal shall not debar the injured person from re-instituting prosecution.

(2) if the public prosecutor withdraws a criminal prosecution relating to a compoundable offense without the consent in writing of the injured person, such withdrawal shall not debar the latter from re-instituting prosecution.

(3) if the injured person institutes a criminal prosecution and then withdraws the prosecution, such withdrawal shall not debar the public prosecutor form re-instituting prosecution, except in case of a compoundable offense."

prosecutors have no direct role in proposing the appropriate sentences to court. The sentencing procedure has long been perceived as the exclusive matter of courts. However, in presenting aggravating or mitigating circumstances to the court during trial proceedings, public prosecutors have some role in contributing to a proper punishment. However, in minor cases where the imprisonment term does not exceed two years, the courts may adjourn the convicts' sentences to allow court probation officials to seek the truth about their life, occupation behavior, their manner in committing crime, the effects thereof or any other related information. The courts may suspend the imprisonment punishment for them for up to five years. During such period, if there exists no other crime committed by them, their penalty will eventually be dropped.[27] In the case of violation of conditions, or the commission of further crime, the court may modify the previous conditions or revoke probation and then remand the probationer to the institution according to original disposition.

[27] Section 56 of the Thai Penal Code "Whenever any person commits an offense punishable with imprisonment and in such case the Court shall punish with imprisonment not exceed two years, if it does not appear that such person has received the punishment of imprisonment previously, or it appears that such person has received the punishment previously, but it is the punishment for an offense committed by negligence or a petty offense, the Court may, when taking into consideration the age, past record, behavior, intelligence, education and training, health, condition of the mind, habit, occupation and environment of such person or the nature of the offense, or other extenuating circumstances, pass judgment, if it thinks fit, that such person is guilty, but the determination of the punishment is to be suspended, or the punishment is determined, but the infliction of the punishment is to be suspended, and then release such person with or without conditions for controlling his behavior, so as to give such person an opportunity to reform himself within a period to time to be determined by the Court, but it shall not exceed five years as from the day on which the Court passes judgment...."

IX. ROLE IN INTERNATIONAL COOPERATION IN CRIMINAL JUSTICE

As earlier mentioned, the Attorney General is designated to act as the Central Authority according to the Act on Mutual Legal Assistance in Criminal Matters of 1992. Upon receipt of a request for assistance from a foreign State, the Attorney General is empowered to make a decision to grant or request assistance based on the criteria provided by the law. The services to be given include assistance in investigation, adducing evidence, providing information and document, service of document, search and seizure, transfer of a person in custody to testify as a witness in the requesting State and initiating a criminal case in court. The Act has certainly proved our strong intent to cooperate with foreign authorities in suppressing transnational crimes. The requesting countries could be contracting parties or non-contracting parties if assured reciprocity. The law has definitely recognized the role of public prosecutors as the center in criminal justice administration.

The Office of the Attorney General has assigned the International Affairs Department to work particularly in this area including extradition matters. Presently, our office annually renders service to several tens of requests from foreign governments. Our greater role in this area surely has a meaningful contribution to international law enforcement as a whole.

X. ROLE IN THE PROTECTION OF CHILD'S RIGHTS

The Child's Rights Protection Office was founded in the Office of the Attorney General in 1995. Its responsibilities are to protect a child's rights by safeguarding its rights according to international standards, by assisting in criminal matters specially where children are victims of crime and to conducting liaison between the governmental and non-governmental agencies in combating and overcoming child abuse and child exploitation problems. From our experiences as public prosecutors, we have learned that the criminal procedures do aggravate the suffering of child victims in many ways. We are now assisting several NGOs and other governmental agencies in the improvement of criminal procedures related to child victims to ensure the best interest of justice and at the same time protecting child's rights. We are correspondingly working with the Criminal Law Reform Institute of Canada by seeking to launch a pilot project in Chonburi, which is notorious for the child sexual abuses business.

XI. CONTROLS OVER PUBLIC PROSECUTORS

The performance of each public prosecutor is controlled by their superior and certainly subject to internal review. As for the prosecution function, unlike in Germany, the Republic of Korea or Japan[28], in Thailand, no matter the case, the court is not allowed to review the exercising of discretion by public prosecutors. As for the role of the media, even though the Office of the Attorney General is accessible to the public, it is only limited to high-profile cases. Under the law, as earlier mentioned, the non-prosecution order, if not that of the Attorney General, is not final unless concurred by the Provincial Governor for cases in the provincial jurisdiction or by the Director General of Police Department for cases in Bangkok jurisdiction. This is the mechanism under the law to balance the prosecutorial power. Recently, a new mechanism has been created in the Office of the Attorney General to allow any party dissatisfied with the role of the police or the public prosecutors in the handling of a case to submit a petition directly to the Attorney General for review. More importantly, as also earlier stated, private prosecution is also allowed under the CPC, thereby, the injured party if not satisfied with the prosecutor's order can bring the case to court against such offenders. However, it happens infrequently due to for their trust in public prosecutors. Besides, the rule of working in a more transparent and accountable manner has recently been adopted in the Office of the Attorney General in that any interested party can examine the investigation file along with the detailed reasoning of the public prosecutor responsible for a case. As for the order of the Attorney General, his final decision on whether to prosecute or not prosecute will be published with detailed reasoning. If there is any irregularity in a case, it can easily be found. In case there are reasonable grounds to believe a there must have been something like bribery as an actual reason behind the order of the public prosecutors, the interested party can institute criminal proceeding on bribery charges or call for disciplinary action against such public prosecutors.

[28] Kittipong Kittayarak and David Johnson, Prosecution System in Seven Countries: A Comparative Analysis, *supra note* 3.

XII. CURRENT PROBLEMS FACING PUBLIC PROSECUTORS IN THAILAND AND TENTATIVE RECOMMENDATIONS FOR THEIR SOLUTION

A. Nature of Problems

1. Problems Related to the Role in Investigation and Prosecution

As previously stated, the criminal justice system in Thailand almost separates the pre-trial stage functions between investigation and prosecution. Public prosecutors lack the opportunity to become familiar with all evidence to be presented to the court from the beginning. As such, public prosecutors are in no position to observe the correctness and legality of work exclusively done by the police or to serve as a balancing mechanism in the investigation process. As a result, the public prosecutors sometimes can not save innocent defendants from being prosecuted and can not ensure the injured party the efficiency of criminal justice enforcement.

2. Problems Related to the Role in Diversion

Diversion has been recognized as a meaningful tool in criminal justice administration to help reduce the number of cases, which are tried in court. As a consequence, the court can concentrate on serious crimes and at the same time such means could better rehabilitate offenders in some cases, such as offenses of negligence, domestic violence or juvenile delinquency. Our proposal to introduce the suspension of prosecution system to this means in the past was not acceptable. However, it can be argued that for the lack of our role in investigation and the lack of an opportunity to know in-depth about the case, suspension of prosecution may not function effectively.

3. Lack of Adequate Cooperation among Criminal Justice Agencies

In Thailand, criminal justice agencies are not united in the same ministry. The Office of the Attorney General is an independent organ under the supervision of the Prime Minister, while the Police Department and the Corrections Department are under the control of the Ministry of Interior. In contrast to international practices, the Ministry of Justice has the primary function of serving judicial affairs rather than emphasising on the administration of justice as seen in most countries. Moreover, their training or development of human resources is not united because they have separated training. Thus, it is subject to the policy of each agency rather than in the interest of the criminal justice system as a whole. This non-organization has resulted in inadequate coordination and cooperation among those agencies due to their different policies and practices. It has had significant impact on the efficiency of law enforcement.

B. Tentative Recommendations

1. The investigation and prosecution function should not be completely separated as in the current system. The police should not be the sole organ to initiate criminal proceedings. The role of public prosecutors in the criminal justice system should be increased for the greater efficiency of law enforcement. Public prosecutors should be essentially supported to do the function in initiating the criminal process and have some role of the investigation of serious cases and, more importantly, to do justice to both the victim of crime and to the offender.

2. Public prosecutors should be encouraged to exercise prosecutorial discretion. However, more guidelines as well as measures for internal and external control, should be adopted to effectively control public prosecutors in the exercise of discretion and to prevent the abuse of control. Moreover, public prosecutors should be directly accessible to the injured party, the media and the public to ensure accountability and transparency in their work.

3. Cooperation and coordination among criminal justice agencies are essential in the effectiveness of law enforcement. Improvements in all organs should be harmonized and moved toward the same direction to efficiently ensure safety in society and protect all parties concerned. The courts and public prosecutors in particular should avoid their competitive perspective. In this present situation where each agency works independently, one recent recommendation is that there should be a coordinating committee established to be a forum for harmonization of criminal justice policy among them.

XIII. CONCLUSION

My paper has presented the view and experience of a civil law country. As you may have realized, Thailand has her own unique criminal justice system and has some practices different from other civil law countries. However, there has been long been a struggle to change some defects in the system. I hope that improvement will be gradually realized in the future.

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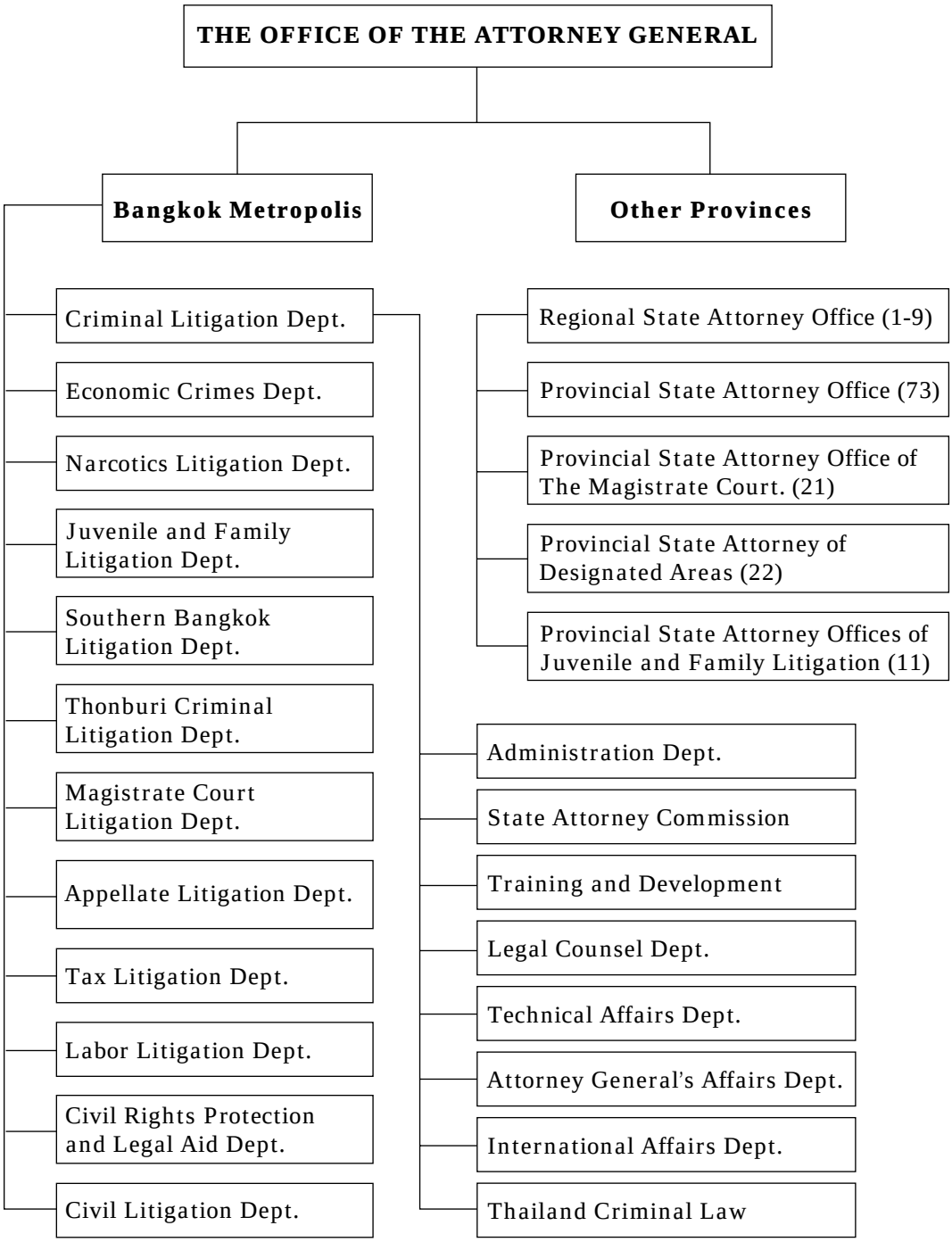
APPENDIX A-1

ORGANIZATION OF THE OFFICE OF THE ATTORNEY GENERAL, THAILAND



APPENDIX A-2

PROSECUTION AND NON-PROSECUTION CASES OF ALLEGED OFFENDERS SENT TO THE STATE ATTORNEYS DURING 1991-1996

Year	Total	Percentage	Prosecution	Percentage	Non-prosecution	Percentage	Others	Percentage
(1991)	383,272	100	374,137	97.62	8,051	2.10	1,084	0.28
(1992)	382,649	100	373,321	97.56	8,123	2.12	1,205	0.32
(1993)	400,710	100	391,286	97.65	8,278	2.07	1,146	0.28
(1994)	450,203	94	438,947	91.62	9,843	2.05	1,413	0.29
(1995)	479,077	100	468,492	97.79	8,897	1.86	1,688	0.35
(1996)	504,156	100	495,581	98.30	7,046	1.40	1,529	0.30

Note: The word "Others" means, for example, cases are sent back to inquiry officers or cases are not permitted to be prosecuted by the Attorney General.
Source: Office of the Attorney General.

APPENDIX A-3

NUMBER AND POSITIONS OF PUBLIC PROSECUTORS

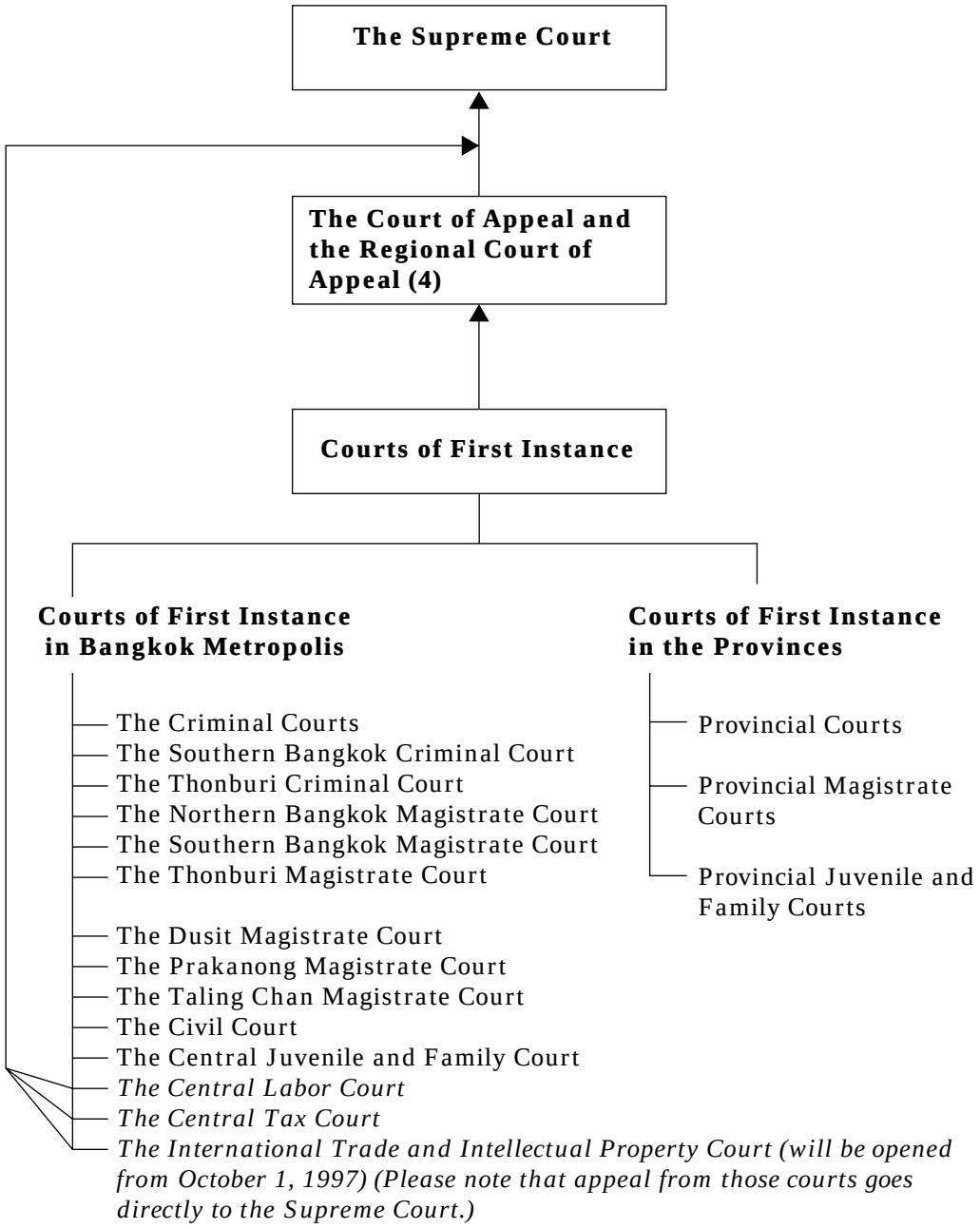
Grade	Position	Number of Prosecutors
8	Attorney General	1
7	Deputy Attorney General	4
6	– Chief Executive Public Prosecutors – Regional Chief Public Prosecutors	220
5	Senior Executive Public Prosecutors	302
4	– Provincial Chief public Prosecutor – Provincial Chief Public Prosecutor (attached to the Office)	472
3	Senior State Attorney	527
2	– Public Prosecutors – Assistant Provincial Chief Public Prosecutors	93
1	Assistant Public Prosecutors	79
	Total	1968

Male: 1800
Female: 168

Source: Office of the Attorney General, as of July 1997.

APPENDIX A-4

THE COURTS OF JUSTICE IN THAILAND



APPENDIX B

DECISIONS OF THE ATTORNEY GENERAL DURING 1991-1996

Year	Cases	Prosecution	Non-prosecution	Others
1991	80	53	25	2
1992	46	24	22	—
1993	43	19	23	1
1994	49	28	18	3
1995	45	24	20	1
1996	96	70	22	4

Source: Office of the Attorney General.

APPENDIX C

MAIN OFFENCES FOR WHICH ALLEGED OFFENDERS WERE PROSECUTED IN 1996

Types of Cases	Cases	Percentage
1. Narcotics Act	85,883	17.33
2. Gambling Act (Other Gamblings)	73,106	14.75
3. Immigration Act	72,727	14.68
4. Psychotropic Substances Act	45,513	9.18
5. Gambling Act (Illegal Lottery)	34,191	6.90
6. Offences of Theft	25,105	5.07
7. Offences Against Bodily Harm	14,794	2.99
8. Controlling Firearms Act (Licensable Firearms)	13,712	2.77
9. Miltary Service Act	7,540	1.52
10. Forestry Act, National Reservation Forest Act, National Park Act	6,084	1.23
11. Others	116,926	23.59
Total	**495,581**	**100**

Source: Office of the Attorney General.

APPENDIX D

COMPARISON OF CASE LOADS DURING 1991-1996

Type of Cases	1991	1992	1993	1994	1995	1996
1. Alleged Offenders Sent for Prosecution	383,110	382,797	401,153	451,233	478,993	504,620
2. Alleged Offenders Not Sent for Prosecution (Excluding Settlement Cases)	57,572	60,570	61,878	68,429	74,037	91,094
3. Alleged Offenders Not Sent for Prosecution (Settlement Cases Only)	1,513,043	2,055,799	1,724,844	1,832,604	1,837,919	2,187,198
4. Unknown Offenders	31,093	30,772	32,233	31,425	34,391	35,541
5. Post-mortem Inquest	316	323	308	383	368	381
6. Representing as Counsels in Criminal Cases	266	215	252	262	189	218
7. Representing as Counsels in Civil Cases	5,474	5,520	4,923	5,316	6,565	7,725
8. Criminal Cases Submitted to the Court of Appeal	10,125	7,606	10,588	6,501	6,637	13,147
9. Criminal Cases Submitted to the Supreme Court	1,678	1,375	1,827	986	924	2,777
Total	**2,002,677**	**2,544,977**	**2,238,006**	**2,397,139**	**2,440,023**	**2,842,701**

Source: Office of the Attorney General.

APPENDIX E

NARCOTIC CASES PROSECUTED DURING 1991-1996

Year	Total		Conviction		Acquittal	
	Case	Persons	Case	Persons	Case	Persons
1991	74,443	81,388	73,533	80,281	230	302
1992	82,861	87,794	81,905	86,686	181	213
1993	92,245	97,890	90,877	96,267	305	377
1994	109,464	116,773	107,843	114,763	305	389
1994	119,605	127,115	116,709	123,809	476	575
1994	131,396	140,589	127,197	135,325	563	730

Source: Office of the Attorney General.

APPENDIX F

SAFETY MEASURE CASES IN 1996

Type of Safety Measure	Last Pending		New Cases		Total		In-Court Proceedings: Safety Measures Applied		In-Court Proceedings: Safety Measures Dismissed		Total Disposal		Pending	
	Cases	Persons	Cases	Persons	Cases	Persons	Cases	Persons	Cases	Persons	Cases	Persons	Cases	Persons
1.Relegation	—	—	5	5	5	5	—	—	5	5	5	5	—	—
2.Prohibition to Enter a Specified Area	2	2	1	1	3	3	2	2	1	1	3	3	—	—
3.Execution of a Bond With Security	—	—	117	152	117	152	51	68	66	84	117	152	—	—
4.Restraint in an Institution for Treatment	—	—	324	329	324	329	224	222	100	107	324	329	—	—
5.Prohibition from Taking Alcohol or Narcotic Drugs	115	120	1,487	1,517	1,602	1,637	636	653	892	907	1,528	1,560	74	77
6.Prohibition to Exercise Certain Occupations	5	5	59	59	64	64	59	59	—	—	59	59	5	5
Total	**122**	**127**	**1,993**	**2,063**	**2,115**	**2,190**	**972**	**1004**	**1,064**	**1,104**	**2,036**	**2,108**	**79**	**82**

Note: Statistics collected during fiscal year (October-September).
Source: Office of the Attorney General.

APPENDIX G

JUDGMENTS OF COURTS OF FIRST INSTANCE DURING 1991-1996

Year	Conviction	Percentage	Acquittal	Percentage	Withdrawal	Percentage	Others	Percentage	Total	Percentage
1991	364,467	97.87	3,678	0.99	—	—	4,269	1.14	372,415	100
1992	363,736	98.10	2,947	0.80	—	—	4,088	1.10	370,771	100
1993	381,901	98.24	3,306	0.85	—	—	3,552	0.91	388,759	100
1994	428,667	98.41	3,076	0.71	13	0.003	3,836	0.88	435,592	100
1995	457,535	98.27	3,479	0.75	114	0.02	4,460	0.96	465,588	100
1996	479,257	98.40	3,398	0.70	75	0.02	4,322	0.89	487,052	100

Source: Office of the Attorney General.

APPENDIX H

OFFENDERS CONVICTED IN 1996

Convicted	Persons	Percentage
Sentence to Death	43	0.01
Life Imprisonment	235	0.03
Imprisonment Exceeding 10 years	1,933	0.26
Imprisonment Not Exceeding 10 years	7,359	1.00
Imprisonment Not Exceeding 3 years	31,831	4.30
Imprisonment Not Exceeding 6 months	50,602	6.84
Punishment Suspended	273,544	36.99
Fine Only	347,947	47.06
Other Punishment	25,926	3.51
Total	**739,420**	**100**

Source: Office of the Attorney General.

APPENDIX I

OFFENDERS CONVICTED BY COURTS OF FIRST INSTANCE, CLASSIFIED BY AGE, DURING 1994-1995

Age	1994	1995
Over 7-14 Years	6,524	9,493
Over 14-Under 18 Years	41,386	45,765
18-20 Years	110,026	111,488
Over 20-35 Years	301,717	318,534
Over 35-55 Years	189,463	194,621
Over 55 Years	56,042	54,120
Total	**705,158**	**734,021**

Source: Office of the Attorney General.

APPENDIX J-1

LIST OF CRIMINAL CASES SUBMITTED TO THE COURT OF APPEAL

Appellants	Last Pending Cases	New Cases Cases	Total Cases	Accomplishment				Total Disposal Cases	Pending Cases
				Convicted Cases	Acquitted Cases	Withdrawn Cases	Others Cases		
Public Prosecutors	73,292	6,742	80,034	2,721	2,957	10	158	5,846	74,188
Defendants and Others	70,315	6,405	76,720	3,091	1,527	62	155	4,835	71,885
Total	**143,607**	**13,147**	**156,754**	**5,812**	**4,484**	**72**	**313**	**10,681**	**146,073**

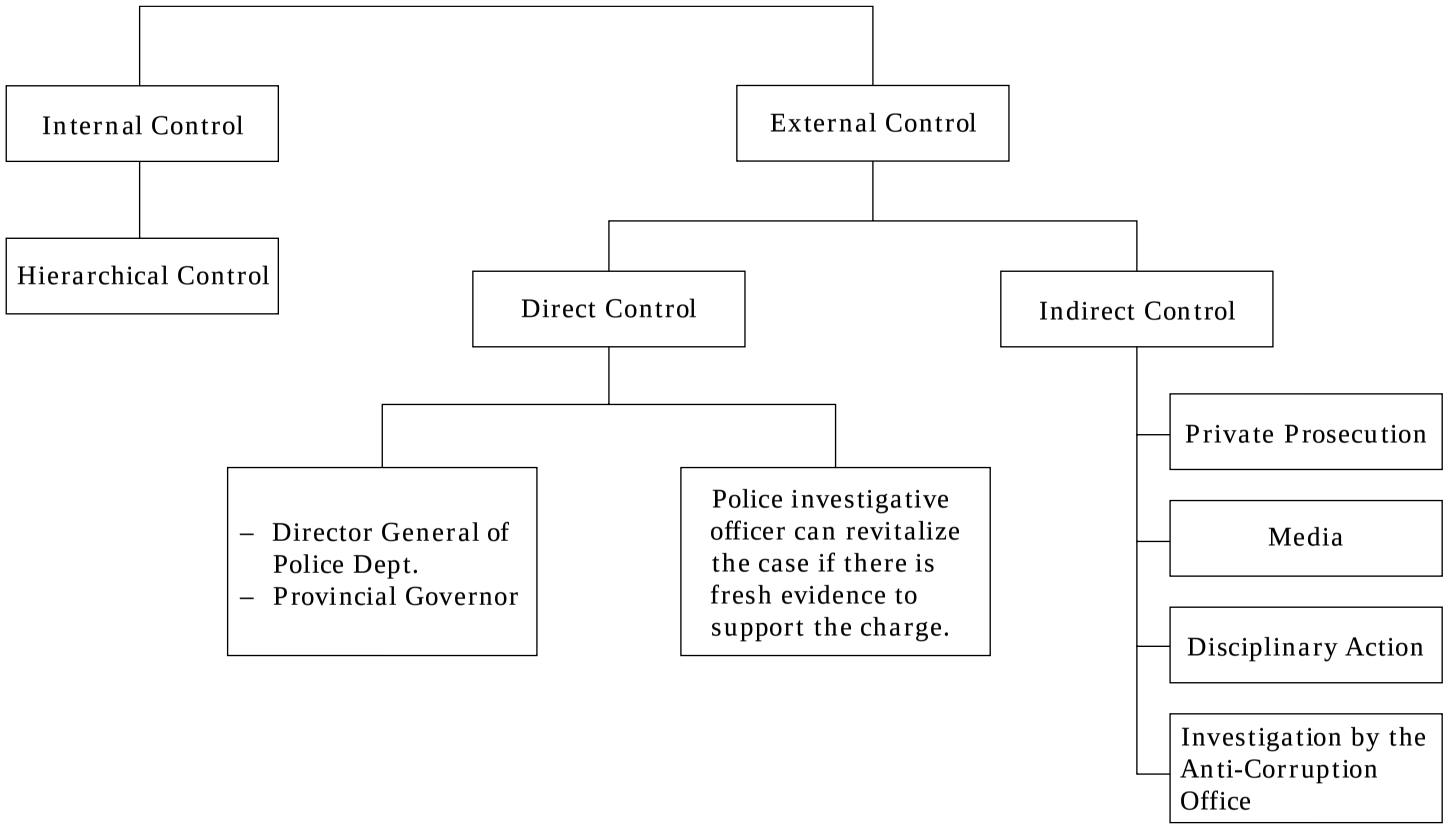
APPENDIX J-2

LIST OF CRIMINAL CASES SUBMITTED TO THE SUPREME COURT

Appellants	Last Pending Cases	New Cases Cases	Total Cases	Accomplishment				Total Disposal Cases	Pending Cases
				Convicted Cases	Acquitted Cases	Withdrawn Cases	Others Cases		
Public Prosecutors	19,203	1,426	2,490	557	578	13	22	1,170	19,459
Defendants and Others	17,642	1,351	2,701	608	398	42	62	1,110	17,883
Total	**36,845**	**2,777**	**5,191**	**1,165**	**976**	**55**	**84**	**2,280**	**37,342**

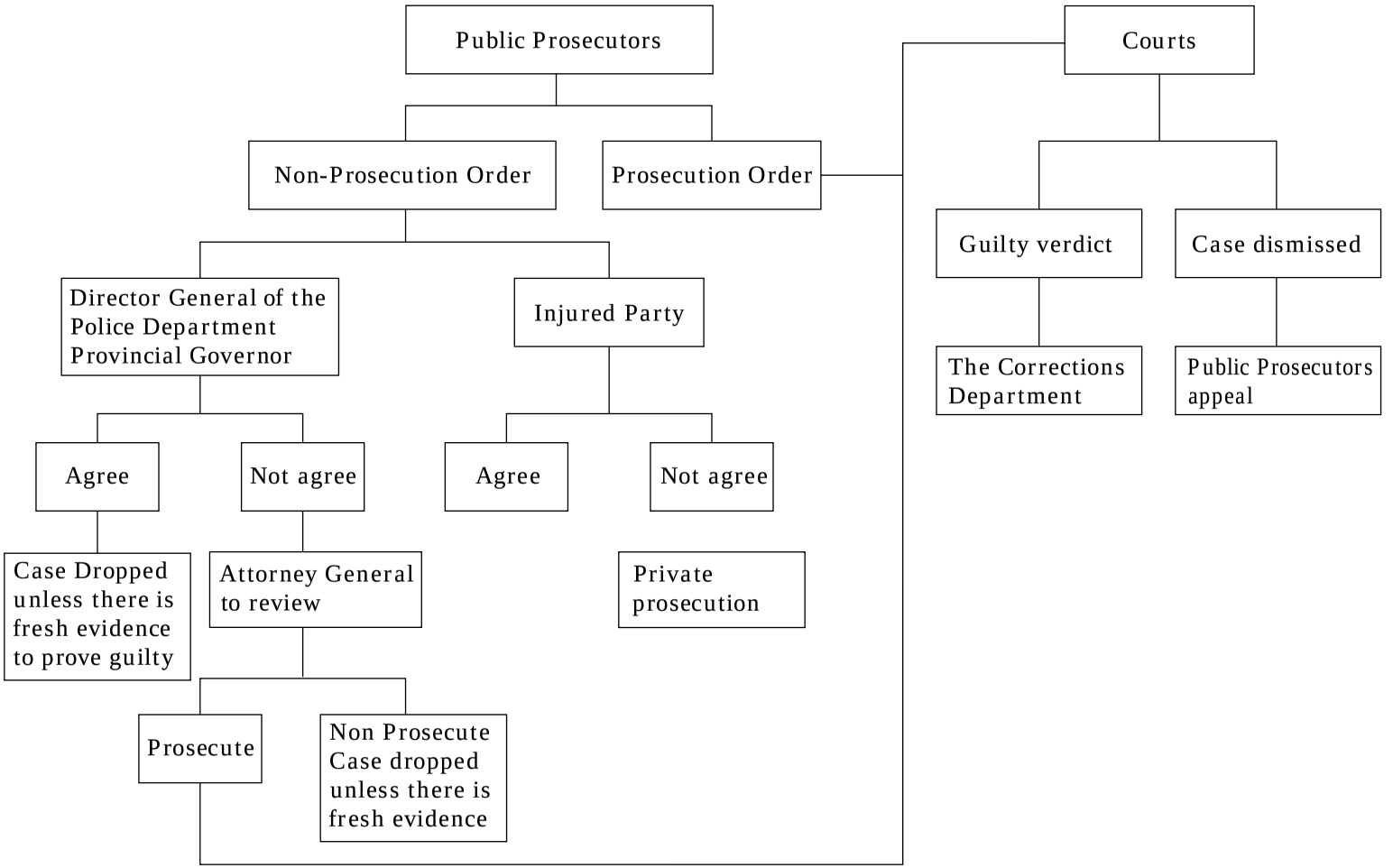
APPENDIX K

CONTROLS OVER PUBLIC PROSECUTORS



APPENDIX L

DISPOSITION OF CASES



REPORTS OF THE COURSE

GROUP 1

THE RELATIONSHIP OF THE PROSECUTION WITH THE POLICE AND INVESTIGATIVE RESPONSIBILITY

Chairperson	Mr. Zafar Ahmad Farooqi	(Pakistan)
Co-Chairperson	Mr. Takahiro Saito	(Japan)
Rapporteurs	Mr. Winfred Ansah-Akrofi	(Ghana)
	Mr. Ersyiwo Zaimaru	(Indonesia)
	Mr. Alex Mwachishi Chilufya	(Zambia)
Members	Mr. Guan Fujin	(China)
	Ms. Mariko Suzuki	(Japan)
	Mr. Toshiaki Takahashi	(Japan)
	Mr. Hiroyasu Ito	(Japan)
	Mr. Lee, Yong-Hoon	(Republic of Korea)
Adviser	Deputy Director Masahiro Tauchi	(UNAFEI)

I. INTRODUCTION

This special report is the product of an intense group workshop called upon to examine and discuss the relationship between investigation and prosecution as it pertains to the nineteen countries represented on the course. To realize this objective, it was necessary in each case to look at the police; to what extent, if at all, prosecutors get involved in investigations; the practical problems faced by investigators, police and prosecutors alike; the role played by public prosecutors in overcoming the drawbacks and problems faced by investigators; and, recommending possible avenues of circumventing existing and perceived hurdles in the way of qualitative and effective investigation and prosecution of crime and its offenders. The countries under review were conveniently divided into two principal jurisdictions, namely:

(1) countries in which only the police has investigative authority, and
(2) countries in which the police and public prosecutors are vested with investigative authority.

II. USE OF TERMS

For purposes of this report, the following terms shall be construed as hereunder:

"PROSECUTOR": Any person appointed or designated under the law as a public prosecutor or one who acts as such on behalf of the state and whose powers and functions include, *inter alia*, the following:

(a) the power of control over the presentation of a case before court; and
(b) the power of control over the continuance or discontinuance of prosecution.

"POLICE": Any organization with personnel appointed under the law and exercising the power and function of a law enforcement officer to maintain law and order in the country. This report focuses on the function of the police as an investigator.

"INVESTIGATOR": Any person who detects crime and discovers offenders through the exercise of legal powers.

III. CLASSIFICATION: RELATION OF THE PUBLIC PROSECUTOR AND THE POLICE

Nations have different institutions which conduct investigations. In some countries such as Costa Rica, Ghana, India, Kenya, Malaysia, Maldives, Nepal, Pakistan, Singapore, Sri Lanka, Thailand and Zambia, the authority to investigate lies with the police. In Cameroon, China, Indonesia, Japan, Laos, the Philippines and the Republic of Korea, the role of investigation lies with both the police and the prosecution.

A. Countries in Which Only The Police Has Investigative Authority

1. Costa Rica

a) Organizational structure of the police and the prosecution

Police: The investigative authority is the judicial police, which is under the General Director. The judicial police is under the supervision of the Internal Affairs Office. When a crime which is punishable by a fine or less than three years' imprisonment is reported to the police, all investigation thereof is conducted by the police. Upon conclusion of such investigation, the police submits the results of investigation to the prosecutor.

Prosecution: Public prosecutors belong to the Public Ministry under the supervision of the Prosecutor General. Only public prosecutors can institute criminal proceedings before the court.

b) Role of prosecutors in police investigations

When a police investigator submits to the prosecutor the results of his investigation, and if it is an offense punishable with imprisonment, not exceeding three years or a fine, the prosecutor must then require all relevant witness and suspect statements and any other material evidence considered necessary to be collected by the judicial police. Once this is satisfied, the prosecutor delivers the dossier to the trial judge.

Similarly, in offenses punishable with more than three years' imprisonment, a police officer on receipt of a complaint hands over the investigation file to the prosecutor. The prosecutor then draws up a "formal instruction requirement" which, together with the case file, he submits to the examining judge. The latter effectively takes over the case and conducts the necessary investigation. With the help of the judicial police, the collection of evidence such as witness and suspect statements, ordering the production and inspection of public and private documents, and making available results or reports of forensic laboratory tests, is done by the examining judge. The prosecutor only controls the labor of the examining judge by way of appeal to the Appeal Court if he does not agree with the proceedings followed by the examining judge. After this, the dossier is handed over to the prosecutor for prosecution.

2. Ghana

a) Organizational structure of the police and the prosecution

Police: The investigation of all crime is the responsibility of the police. This power derives from the Police Service Act No. 350/70. The police falls under the Ministry of Interior. The police powers of investigation include the power to arrest with or without a warrant, as per section 10(1) of the CPC Act 30/60 and the power to search with or without a warrant. The police is also empowered to grant bail to suspects. Suspects who can not be granted bail should be brought before a court within forty-eight hours. After the police has completed its investigations, it submits the dossier to the prosecutors for prosecution.

Prosecution: The prosecutorial function is exercised by the Attorney General. That is to say, all public prosecutors are designated by the Attorney General and operate under the Attorney General's Chambers. The Attorney General is the Minister of Justice. There are also police prosecutors exercising the powers of prosecution on behalf of the Attorney General. Police prosecutors appear before Circuit Tribunals, Community Tribunals and Juvenile Courts (these are subordinate courts of first instance). All major offenses (1st degree) are triable on indictment before the High Court. All appeal matters are handled by state attorneys from the Attorney General's Chambers.

b) Role of prosecutors in police investigations

The police seeks legal advice from the Attorney General whenever necessary during the course of an investigation. After the police has completed an investigation, a duplicate docket of the case to be tried on indictment is sent to the Attorney General's Chambers. Before the prosecutor initiates criminal proceedings in court, he studies the docket. Should there be any need for further investigation, he advises the investigator to do so. The prosecutor also arranges pretrial conferences. Here he meets and interviews all parties of a case, with a view to clarifying certain issues and ascertaining the relevance of witnesses. This also gives the prosecutor a chance to expose and work on weaknesses in the case before the matter goes to trial. During investigations, the prosecutor applies to the court for arrest, search and detention warrants, which are then executed by police investigators.

3. India

a) Organizational structure of the police and the prosecution

Police: The Central Bureau of Investigation (CBI) is the premier investigation agency of the central government. The CBI is under the Ministry of Personnel and Training, headed by a Director and answerable to the Prime Minister. The CBI has concurrent investigative jurisdiction in the Union Territories. It can also take up the investigation of cases at the request of the state governments. Besides the CBI, there are state police forces headed by Directors General of Police, who are appointed by the state government concerned. The police has power to initiate investigations of cognizable offenses itself but require a court order for non-cognizable offenses. Other investigative powers, include arrest, search, seizure and interview suspects and witnesses.

Prosecution: The prosecution wing in a state is headed by the Director of Prosecutions who is responsible for the prosecution of cases in the Magistrate's Courts. He is aided by the Additional, Deputy and Assistant Public Prosecutors (Grade I and Grade II), appointed by the state government. Public prosecutors who prosecute cases in the High Court are appointed by the state government from the panel of suitable lawyers prepared by the state government in consultation with the High Court. Public prosecutors who appear in Sessions Courts are also appointed by the state government from such panel in consultation with the Sessions Judge. They do not fall under the jurisdiction and control of the Director of Prosecutions, but rather are responsible to the District Magistrate.

The prosecution agency does not have a national level body. At the central level, the Attorney General is the most senior law

officer of the Government of India with legal power to address all courts in the country. Prosecutors appointed by the central government appear in High and District Courts in cases involving the central government.

b) Role of prosecutors in police investigations

Though prosecutors have no powers to initiate and conduct investigations, the police seeks legal advice from prosecutors during investigations. The police respects and complies with the legal advice given by prosecutors. However, prosecutors have no legal authority to direct or supervise the police. Prosecutors are employed in the CBI to provide legal services to the investigative body on a daily basis. The Head of the Legal Division of the CBI is called the Legal Advisor and is assisted by Additional and Deputy Legal Advisors and Public Prosecutors. These law officers guide the process of every criminal investigation by reviewing cases and offering legal insights into those cases and useful guidelines on how to proceed with particular investigations.

4. Kenya

a) Organizational structure of the police and the prosecution

Police: The National Police is under the Office of the President. The police initiates and conducts all criminal investigations. In the course of these investigations, the police consults prosecutors for advice. The police department is headed by the Commissioner of Police.

Prosecution: The Attorney General is the prosecution authority. All public prosecutors including police prosecutors, exercise prosecutorial functions on behalf of the Attorney General. In matters of prosecution, police prosecutors are controlled by the Attorney General.

b) Role of prosecutors in police investigations

The prosecutor has no authority to conduct investigations. The role of the prosecutor is an advisory one. In certain cases though, the Attorney General can instruct the Commissioner of Police to initiate investigations if there is a greater public interest to be served. At the conclusion of each investigation, the police files the case with prosecutors for prosecution.

Prosecutors study the investigation file and when necessary request the police to carry out additional investigations such as the recording of additional statements from witnesses, the interrogation of any other suspect and inspection of certain documents.

5. Malaysia

a) Organizational structure of the police and the prosecution

Police: In Malaysia, the Royal Malaysian Police is under the Ministry of Home Affairs. The investigation is usually done by the police. However, only police officers of above the rank of sergeant have investigative powers. In non-seizable offenses, the investigating officer can only carry out investigation after he has obtained an Order to Investigate (O.T.I.) from the public prosecutor as provided under section 108(2) of the Criminal Procedure Code. In carrying out investigation, the police can detain any person suspected of committing any seizable offense for a period not more than twenty-four hours. If it is necessary to detain the suspect for further investigation, the police officer must produce the suspect before a Magistrate's Court and request an order of remand for a period of not more than fourteen days.

Prosecution: The prosecution of criminal cases is a function of the Attorney General.

Public prosecutors exercise this power on behalf of the Attorney General. Police officers are also allowed to prosecute as per section 20 of the Police Act, 1967 and sections 377 and 378 of the CPC. Prosecution by the police prosecutor is carried out in the Magistrate's Courts and the Sessions Courts. While the police prosecutor performs prosecution in the courts, they act on behalf of public prosecutors.

b) Role of prosecutors in investigations

Public prosecutors do not have the legal authority to conduct investigations, save for police prosecutors who have investigative powers by virtue of the police office. Public prosecutors, at best, advise and instruct police investigators in the legal efficacy and expediency of carrying out investigations. Thus advice relates to cases brought to the notice of prosecutors during the investigation stage and those cases whose files have been submitted to the prosecution office for study with a view to instituting criminal proceedings.

6. Maldives

a) Organizational structure of the police and the prosecution

Police: The police is under the Ministry of Defense and National Security. The police conducts investigation and can arrest suspects, as well as search and seize on its own decision without warrants.

Prosecution: The prosecutors are under the Attorney General. The Attorney General is appointed by the President. The other prosecutors (the State Attorneys) are appointed by the Office of the President.

b) Role of prosecutor in police investigations

Prosecutors do not conduct investigations. They do not meet suspects or witnesses before trial. The prosecutors can not give directions to the police on how to conduct investigation. Once the investigation by the police is completed, the case is sent to the Attorney General's Office, which can request the police to conduct supplementary investigation if necessary. The police has no legal obligation to follow the request. However, in practice, the Attorney General's advice or request is followed.

7. Nepal

a) Organizational structure of the police and the prosecution

Police: The Police Headquarters are under the Ministry of Home Affairs. The police is authorized to conduct investigation, detect suspects, manage crime scenes and collect physical evidence. The police can arrest a suspect with or without warrant and can detain for a period of twenty-four hours without recourse to the court or the prosecutor. However, the police should within that time bound (i.e., twenty-four hours) produce the accused before the court for additional time, if needed for further investigation. If the court also deems necessary that the investigator needs additional time, then the court may permit him to detain a suspect for an additional period of twenty-five days. If the court feels that it is not necessary to detain a suspect, he will immediately be released. The investigating police officer should take the statements of witnesses and other third parties in the presence of the public prosecutor. When the investigating police officer concludes his investigation, the results should be submitted to the public prosecutor to frame the charge-sheet.

Prosecution: The prosecutorial function is independently exercised by the Attorney General of the Kingdom of Nepal, which he can delegate to his subordinate officers too. Thus in Nepal, except for the Attorney

General, no any other agency (neither the investigator nor the victim) can prosecute. The Attorney General is appointed and can be dismissed by His Majesty' the King upon the recommendation of the Prime Minister.

b) Role of prosecutors in police investigations

Though the Nepalese public prosecutor is not directly involved in investigating a crime and his participation during the investigation is limited, as and when the investigating police officer submits the case to the public prosecutor, before putting it forward to the court, the public prosecutor can direct or instruct the investigating police officer to collect some more evidence or interrogate someone, if necessary. The investigating police officer should obey such directions or instructions.

8. Pakistan

a) Organizational structure of the police and the prosecution

Police: The Federal Police is under the Ministry of the Interior. The Provincial Police comes under the Provincial Home Department.

The investigation of crime is the responsibility of the police. Like in most common law countries, the police is empowered to arrest without a warrant for cognizable offenses and produce such arrestees before the court within twenty-four hours. Thereafter, only the court has the power to sanction further remand of an accused person by issuing an extended remand warrant of up to fourteen days.

Prosecution: The Attorney General is the ultimate prosecution authority. He is appointed by the President on the recommendation of the Prime Minister, and he is also a cabinet minister of the federal government.

The Advocate General is the Head of Prosecution at the provincial state level, and public prosecutors are appointed by the provincial government. The Attorney General and his deputy represent the federal government in the Supreme Court. The Advocate General and the Assistant the Advocate General appear in the High Court on behalf of the government. In District Sessions Courts and Magistrates' Courts, the Public Prosecutors and District Attorneys represent the government.

b) Role of prosecutors in police investigations

Public prosecutors do not investigate crime, but advise the police on better legal approaches to investigations. They can request the police to do supplementary investigation when evidence is lacking in a case. The prosecutors do not control or supervise police investigations.

9. Singapore

a) Organizational structure of the police and the prosecution

Police: The police is under the Ministry of Home Affairs. The police conducts investigations, and has power of arrest with or without a warrant for non-seizable and seizable offenses. It can also search and seize property upon a warrant from the court.

Prosecution: Public prosecution is under the Attorney General's authority. The Attorney General, who is the Public Prosecutor, is appointed by the President on the advice of the Prime Minister. The Deputy Public Prosecutors are appointed by the Legal Service Commission or the Senior Personnel Board. As for police prosecutors, they are appointed by the police force.

b) Role of prosecutors in police investigations

After the investigation by the police is completed, the case is sent to the Attorney

General's Chambers. The prosecutors do not conduct investigations by themselves, but supervise and control the process of evidence collection by the police. This is done by giving advice and directions to the police on the conduct of investigations. After investigations are completed and when the case is ready for trial, the prosecutors may interview witnesses prior to going to court to establish the credibility of the witnesses or to clarify the issues. Should the prosecutors feel that the investigation is incomplete, they can return the case file to police pointing out areas requiring attention and what needs to be done.

The police investigator and the prosecutors maintain a good working relationship.

10. Sri Lanka

a) Organizational structure of the police and the prosecution

Police: The police is under the Ministry of Defense. It exercises all powers of investigation. The police can arrest and detain a suspect up to twenty-four hours under a warrant issued by the court. This detention can be extended up to fifteen days.

Prosecution: The Attorney General is the head of all prosecutions. The Attorney General is responsible for initiating and conducting all public prosecutions. Prosecutors fall under the Ministry of Justice. The Attorney General is appointed by the President.

Police prosecutors are answerable to the Attorney General in all matters affecting their prosecutorial work.

b) Role of prosecutors in police investigations

State Counsels are prosecutors in the Attorney General's Department. They are authorized to direct or supervise investigation. State Counsels have the power to advise the police at any stage of criminal inquiry. Further, State Counsels can require the police to carry out further investigations into specific areas of a case once a review of the investigation file has exposed deficiencies in evidence collection.

11. Thailand

a) Organizational structure of the police and the prosecution

Police: The police falls under the Ministry of Interior. The power to investigate all criminal offenses is exercised by the police. Section 121 of the Thai CPC confers this power on police officials. Police are also empowered to carry out arrests, searches and seizures and detain suspects by themselves. They have the power to issue warrants by themselves for purposes of search and arrest when necessary. The police can detain a suspect for up to three days prior to a court appearance. The court can allow the extension of remand warrants for intervals of twelve days up to a maximum of eighty-four days.

Prosecution: The Attorney General is the repository of the prosecution function. He falls under the direct supervision of the Prime Minister. He is assisted by four Deputy Attorney Generals, the Director of the Criminal Litigation Department and the Directors General of regional departments. The public prosecutors under the Attorney General's Office are career professionals.

b) Role of prosecutors in police investigations

The prosecutors are not involved in police investigations. They wait for the investigation report from the police. The police inquiry file gives the prosecutors a chance to deliberate and assess the evidential value and sufficiency of the investigation before deciding whether to prosecute or not.

If the evidence is insufficient, they then request the police to do further investigations or to send witnesses to them for further questioning.

12. Zambia

a) Organizational structure of the police and the prosecution

Police: The police department is under the Ministry of Home Affairs. The police is the main investigative security organ of the state. Police officers are empowered both under the Police Act and the CPC to effect arrest with or without a warrant, to conduct search and seizure, and to detain suspects in police custody for a period of twenty-four hours.

Detained suspects should be produced before court within twenty-four hours for the judicial authorities to determine the legality of an arrest and subsequent detention. However, section 33 of the CPC allows the police to detain a suspect beyond twenty-four hours for purposes of an investigation if the circumstances do not make it practicable to produce him before court within twenty-hour hours, but may do so as soon as it is practicable.

Prosecution: The Director of Public Prosecutors (DPP) is the prosecuting authority. He is independent of the Attorney General but comes under the Ministry of Legal Affairs. He is appointed by the President and enjoys a constitutional tenure of office equivalent to a puisne judge of the High Court.

State advocates and police officers are appointed by the DPP to act for him as public prosecutors pursuant to sections 86 and 87 of the CPC.

b) Role of prosecutors in police investigations

Public prosecutors are not investigators either by law or practice. After the police has done its inquiry, it forwards the inquiry file or docket to the prosecution office for study and advice.

Prosecutors may suggest to police investigators from a legal point of view how the inquiry should be conducted and what elements of evidence to look for in order to satisfy the offense. The police usually comply with the advice of prosecutors.

A prosecutor must satisfy himself that the investigation is thorough before he can proceed to court.

B. Countries in Which the Police and Prosecutors Have Investigative Authority

1. Cameroon

a) Organizational structure of the police and the prosecution

Police: The public security police, the gendarmerie and the judicial police constitute the main investigative agencies. The gendarmerie falls under the Ministry of Defense and is responsible for investigations in the rural areas, where police structures are in existence or inadequate. The public security police falls under the National Delegation of Internal Security, which is answerable to the Republican President.

In the conduct of investigations, the police and gendarmerie act as judicial police officers and assist the judiciary in the control of the State Counsel. Generally the judicial police is competent to investigate felonies and complex misdemeanors nationwide and participates in international investigations. It should be noted that the control and supervision of the judicial police in administrative matters such as promotions, transfers and disciplinary matters revert to the supervisors within the police and gendarmarie command structures.

Prosecution: Prosecution is under the Legal Department. The Minister of Justice exercises overall control over the Legal

Department. The head of prosecution is called the Procureur General and assisted by Advocate-Generals, Substitute-Generals and Attachés. Only the public prosecutors can initiate and conduct public prosecution for and on behalf of the state.

b) Role of prosecutors in police investigations

Under the Ordinance on Judicial Organization, the State Counsel has absolute power to conduct personally investigations for all offences. However, in practice, he investigates in relation to serious offences such as murder and assassinations, particularly sensitive cases or those involving senior officials.

Where a crime has been committed, the victim, witness or any person having knowledge of the circumstances may report them orally or in writing either to the State Counsel or any other investigative agency. The State Counsel upon receipt of the crime report forwards the same to the competent investigative agency with specific instructions as to the manner in which investigations should be conducted. If dissatisfied with the conduct of investigations, he may order fresh or complementary measures.

Basically, there are two types of investigations, that is, preliminary investigation and flagrante delicto investigations. Where a suspect is arrested in relation to a case of flagrante delicto, the police shall conduct him to the nearest State Counsel within twenty-four hours. The suspect may only be detained thereafter by order of the State Counsel. The said order is valid for twenty-four hours and may be extended thrice. Thereafter, if investigations are not completed the suspect must be released.

The State Counsel has wide powers to order any measures necessary during investigation to enable him to obtain evidence that will contribute to the manifestation of the truth. It is in this regard that warrants of arrest, search, remand, etc., are made his prerogative. Investigation officers, (i.e., the police) execute these warrants under the supervision and control of the State Counsel.

2. China

a) Organizational structure of the police and the prosecution

Police: The police, under the Public Security Organ, is responsible for the general investigation of crime and exercise powers of detention, arrest and interrogation.

Prosecution: Public prosecutors fall under the People's Procuratorates, which are the state organs of legal supervision. The Procurator General of the Supreme People's Procuratorate is elected by the National People's Congress. The public prosecutors are appointed and dismissed by the corresponding level Standing Committee of the People's Congress. The prosecution performs its duty independently.

b) Role of prosecutors in police investigations

The People's Procuratorates are responsible for prosecutorial work; approving arrest, investigating cases of corruption and bribery in public offices and initiating public prosecution, as per CPL Article 3. In other words, public procurators, like the police, have the authority to interrogate suspects, interview witnesses, search, seize, inspect, examine, detain and arrest suspects. When the police wishes to have a person arrested, it must seek approval from the procurators. Further, the law obliges the police to submit itself to the supervision of the procurators vis-à-vis police duties. This means that procurators have the power to require the police to file a case for investigation, send

an officer to participate in the discussion of a major case investigated by the police or demand that there be a re-inspection or re-examination of evidence in matters of criminal investigation (CPL articles 66, 87 and 107). However, in cases of corruption, bribery and dereliction of duty committed by state personnel and other major crimes of abuse of official powers, procurators file the cases for investigation and subsequent prosecution.

In reviewing the case that requires supplementary investigation, the procurator may return the case to the Public Security Organ for supplementary investigation and may also investigate on its own.

3. Indonesia

a) Organizational structure of the police and the prosecution

Police: The State Police is a component of the Indonesia Armed Forces and is led by the Commander-in-Chief of the Armed Forces. The State Police is responsible for the investigation of general crime. Article 7(1) of Act No.8/1981 gives power to the police to receive reports and complaints about crime and take steps to establish the existence of an offense and identity of an offender. This includes the power of arrest, search, detention, interrogation, and termination of investigation.

Prosecution: The Prosecution Service is headed by the Attorney General who is responsible for the prosecution of all criminal cases. Prosecution is under the Attorney General's Office. The Attorney General is a member of cabinet.

b) Role of prosecutors in police investigations

The public prosecutor has investigative power in corruption and anti-subversion offenses (Law No. 3 of 1971 and Law No.11/ Pnps/ 1963). These laws give wider powers of search, seizure, interrogation and detention to prosecutors. Besides the investigation by prosecutors themselves, the public prosecutor exercises a great deal of control and influence over police investigations. For instance, the investigator shall inform the public prosecutor about the commencement of the investigation; the public prosecutor shall grant extension of remand to the investigator for completing the investigation; the public prosecutor shall give instructions to the investigator and the investigator shall complete the case bundle according to the instruction of the public prosecutor; and if the investigator stops an investigation, he shall inform the public prosecutor, and, likewise, if the prosecutor stops prosecution, he shall so inform the concerned investigator.

4. Japan

a) Organizational structure of the police and the prosecution

Police: The police of Japan consists of the National Police Agency and the Prefectural Police Headquarters. The National Police Agency is supervised by the National Police Safety Commission, and the Prefectural Police Headquarters is supervised by the Prefectural Police Safety Commission. Criminal cases are mainly investigated by the police which belongs the Prefectural Police Headquarters. The National Police Agency conducts coordination between the Prefectural Police Headquarters. The police has investigative powers of all crimes and exercises such incidental powers as arrest, search, seizure and interrogation.

Prosecution: Public prosecution is under the Ministry of Justice. The Public Prosecutor General is the chief law officer and prosecution authority.

b) The role of prosecutors in police investigations

The public prosecutor has concurrent investigative powers with the police. In practice, the police does the initial investigation, after which the case with documents is sent to a public prosecutor's office. In the same way, an arrested person must be sent to a public prosecutor within forty-eight hours. The public prosecutor would then interrogate the suspect and, if necessary, request police to carry out certain complementary investigation to obtain relevant evidence. Public prosecutors also choose to interview the victims of crime and witnesses before deciding whether to prosecute or not. Ordinarily, particularly in serious offenses, public prosecutors get involved from the start. The police report to the public prosecutor concerning the investigation and, together, the police and the public prosecutor plan the investigation strategy, the evidence required, and when to initiate compulsory investigation. In cases initiated by the public prosecutors office, public prosecutors conduct independent investigation. The PPOs have a criminal investigation division of specialized investigators, mostly in economic crimes.

5. Republic of Korea

a) Organizational structure of the police and the prosecution

Police: The Korean National Police is under the National Police Agency (NPA), an independent agency of the Ministry of Home Affairs. The National Police Commission (NPC) conducts administrative supervision over the police. Under the NPA, there are Provincial Police Agencies in each province. Police stations are administered through the PPAS. The police serves as investigative assistant to the public prosecutor, even though it may in practice initiate the investigation of most crimes. The Criminal Procedure Code vests the power to initiate and conclude the investigation of crime in the public prosecutor.

Prosecution: The Public Prosecutor's Office belongs to the Ministry of Justice. The Prosecutor's Office is an independent entity comprising the Supreme Public Prosecutor's Office, five High Public Prosecutor's Office, twelve Public Prosecutor's Offices and their branches, each corresponding to a respective court. All public prosecutors are qualified attorneys.

b) Role of prosecutors in police investigations

As the law vests the power of investigation in the public prosecutor, it is the responsibility of the public prosecutor to take a lead in initiating and directing the conduct of criminal investigation. Consequently, the police and special investigative agencies conduct investigations in accordance with the general standard and/or special direction issued by the public prosecutor, and necessarily, transfer all cases to the pubic prosecutor for the conclusion of an investigation.

In short, the public prosecutor has the authority and duty to supervise judicial police officials. The police must request the public prosecutor for issuance of a warrant of arrest or detention by a judge.

It is noteworthy that in practice most public prosecutors are enthusiastic to do their own probes into serious crimes. Cases of organized crime, white collar crime, drug offenses, environmental offenses, corruption, are mainly investigated and prosecuted by the public prosecutors themselves.

6. Lao People's Democratic Republic

a) Organizational structure of the police and the prosecution

Police: The police is under the Ministry of Interior. The Minister of Interior is Head of the police. He is appointed and dismissed by the Prime Minister. The police has the power to investigate crime. This power extends to arrest, search, seizure, and the interrogation and interview of suspects and witnesses. However, the police must obtain a warrant from the court or a prosecutor in order to effect arrest, search or seizure.

Prosecution: The Attorney General Prosecutor is the head of public prosecutors. He is appointed and dismissed by the National Assembly, on recommendation of a Standing Committee. The Attorney General Prosecutor appoints and dismisses the chief of public prosecutors at provincial, prefectural and district levels.

b) The role of prosecutors in police investigations

Public prosecutors have the authority to initiate investigations of all crime. They have the power to arrest, search, seize and interrogate suspects by themselves. They can also issue warrants of arrest, search, seizure and detention. Public prosecutors can take up a case from the police and conduct supplementary investigation. When the police get information about crime, they normally report to prosecutors about the case within forty-eight hours. In practice, prosecutors only conduct investigations of corruption by themselves. The prosecutors work through the police, ordering them to execute warrants of arrests, search, seizure and detention. Public prosecutors, however, work very closely with the police and conduct joint investigations in cases of corruption.

7. The Philippines

a) Organizational structure of the police and the prosecution

Police: The police is under the Department of the Interior and Local Government (DILG). A police officer is appointed and dismissed by the Head of DILG.

The authority to investigate crime is vested in the police. This includes the power to interrogate suspects, interview witnesses, search and seizure and arrest without warrant.

Prosecution: The prosecution is under the Department of Justice. Public prosecutors are appointed and dismissed by the President of the Philippines on the recommendation of the Secretary of Justice.

When a complaint is submitted to a public prosecutors office, the public prosecutors also conduct investigation, which they call "preliminary investigation".

During the preliminary investigation, public prosecutors have the right to interrogate the suspect and interview witnesses, but they do not have the right to execute other investigative measures.

The police and the public prosecutors can investigate all kinds of cases, except graft and corrupt crime.

b) Role of prosecutors in police investigations

Prosecutors have no hand in the investigation of the police. In the Philippines, the police and the public prosecutors office belong to different ministries, and, thus, they work independently. Once a case is investigated by the police, it will be the only investigating agency, and the public prosecutor is not involved in the case. Public prosecutors do not conduct supplementary investigation by themselves, and cannot take over the case from the police.

IV. DRAWBACKS AND PROBLEMS OF INVESTIGATIONS CONDUCTED BY POLICE INVESTIGATORS

Investigation into the breach of criminal laws plays an important and primary role in achieving justice and fair play in every society.

The group after studying the relationship between the police and the prosecution during investigation has identified some drawbacks and problems in police investigation.

A. Inappropriate Procedural Approach

Inappropriate procedural approaches include where investigators engage in illegal investigations such as arresting or detaining suspects without a legal basis or beyond the legalized period and the use of excessive force on suspects when seizing physical evidence and obtaining the statements. When the latter happens, such statements are rejected by the court, with the consequent result of not obtaining a conviction in that particular case. This happens in countries where statements taken by the police are admissible in the court.

B. Delay in Investigations

Delay of investigation could be due to different reasons. In Japan, sometimes for very important and sensitive cases, the police takes a long time. Moreover, public prosecutors also are in the picture and in the collection of some important evidence, delay can happen. In the Republic of Korea sometimes when suspects have moved to another place, the cases are transferred and this can cause delay in investigation.

Delay, for example, occurs in some countries in a case where two or more suspects are involved but the police could arrest only one. After the maximum period of detention expires, the suspect is produced before the court which places him in a detention center or judicial custody. In such cases, the police can request the court for adjournment of trial till the other suspects are arrested. In this situation, the investigation can be delayed. This way the justice for victim as well as defendant is delayed. This situation is sometimes justified, but sometimes due to other rush work, the police becomes lazy.

Delay in investigation could be due to the following reasons:

(1) Excessive work load of investigators at a given time which may either be due to an increase in crime or a shortage of manpower. This is mostly in countries where prosecutors do not assist in investigations. When such situations exist, efficient and effective investigations are sacrificed. In some instances such delay leads to the discharge of the offenders in the court.

(2) In some instances, the police initiates investigation very late, and consequently, either the suspect escapes or implements used in the crime are destroyed.

(3) The frequent deployment and transfer of police officers are causes which contribute to delays in investigation by the police. An officer does not undertake his career at one station or in one unit. When it happens, discontinuity is created in the investigation of cases which that officer may be handling.

C. Inadequate Legal and Investigative Knowledge

1. It was realized that some investigators lack adequate knowledge. The problem is that during investigations, they at times do not understand correctly who should be the target of the investigation, what crime the offense constitutes, what evidence to look for, and how to interrogate the witnesses

and the suspects. The training offered to them during their recruitment is not job-specific and is usually very short (six months or, at most, twelve months). They, therefore, become ill-equipped for the job that they take on.

In some situations, the investigation is not fully carried out on alibi, the search is not fully conducted for the important evidence, the statements of witness as well as the accused person are not recorded correctly, and there may be contradictions among the evidence, which the investigator may not be able to notice due to the lack of adequate legal and investigative knowledge.

2. Due to advancements in communications and the introduction of the Internet, organized criminals use the modern techniques for which the investigators, police and prosecutors are not much trained. Consequently, they face difficulty in completing the investigations into offenses committed by use of such modern technologies.

D. Lack of Coordination between the Police and the Prosecution

In studying the system of countries, it was observed that the police and the prosecution are under different departments. The police and the prosecution sometimes lack coordination on investigative issues. The approach of police and prosecution are sometimes different. Sometimes the prosecutor has a different idea necessary for achieving good investigation results. However, due to the lack of coordination, it can not be communicated to the police.

In some countries, prosecutors only get to know of cases after the investigations have been completed and they are asked to prosecute the cases. It may be too late even for the prosecutor to suggest for additional investigations for the collection of additional evidence. Sometimes the police does not convey the necessary information to the prosecutor, and, in such cases, the prosecutor can not advise at the appropriate time.

E. Lack of Forensic Science Facilities

In some countries where the forensic laboratories for testing fingerprints, fire-arms, DNA, etc., can be conducted are few or situated at far distances. As a result, in the investigation of such related cases, the material evidence may arrive very late, thereby impairing the early completion of an investigation. Due to the lengthy procedures associated with scientific evidence, the police tries to avoid its use and rely on easy ways to collect evidence.

F. Political/Governmental Influence

In some countries where the police is controlled by the executive, political influence is exerted in some cases investigated by the police. These influences may come in the course of investigations, when high-ranking government officials and politicians have a direct or indirect interest in the case.

V. ROLE PLAYED BY PROSECUTORS IN OVERCOMING THESE DRAWBACKS

The group identified that prosecutors play diverse roles in solving the problems and drawbacks identified above. However these roles depend on the enactments establishing the police and the prosecution and the commitment to work together to achieve criminal justice in their countries.

The group members suggested the following roles which prosecutor could play in overcoming these drawbacks.

A. Suggestions for Inappropriate Procedural Approach

In such cases, the prosecutor should immediately study an investigation and

suggest to the police to undertake the investigation in the right way according to law. In cases where evidence is inadmissible in court due to illegal investigative procedure, the public prosecutor should tell the police that the evidence is inadmissible and request them to look for other evidence. In serious cases, the public prosecutor should release the suspect and drop the case. Also prosecutor can recommend for administrative action against the police officer.

While studying the systems as to this issue, it was observed that in Japan prosecutors carefully inquire and interview the suspects and witnesses regarding whether excessive force or threats and other mental pressures were used in seizing the physical evidence or obtaining the statements by the police. They also look into the admissibility of evidence, and if they feel that the evidence will be found inadmissible, the prosecutors will instruct the police to look for other evidence. In serious cases, the prosecutor releases the suspect and drops the case. In the Republic of Korea, the prosecutors have to inspect the police detention facility regularly. If any illegality by police is discovered, they release the suspects or order the police to submit the case to the prosecutors immediately. Similarly, in China, when the prosecutors learn of an illegal investigation through a complaint by the victim, a Bill is issued to the police demanding correction of the illegality. In Indonesia, prosecutors play role in cases of torture by asking the police to release the suspects as soon as possible. They ask the police to release and also recommend for action against the police.

In countries like Ghana, India, Pakistan and Zambia where prosecutors have no power of investigation, senior police officers make frequent visits to the police detention facility, and if any suspects are found to have been held beyond the legal detention time, their release is ordered. In some cases, the investigation is also transferred to another police officer.

B. Suggestions for Delays in Investigation

The group has suggested as under to avoid delays:

1. For cases of public interest, the prosecutor can ask the senior police officers to reduce the work load of a particular officer so that he can complete the investigation of such cases.

2. In a system where the prosecution is in a position to know the progress of a case or receive complaints from the public with regard to delay of investigation, the prosecutor can ask the police to report on the progress of an investigation form time to time and also to explain the reasons for any delay. The prosecutor should give instructions and guidance in order to expedite the investigation.

In those countries where the prosecutor has no legal authority to know the progress of an investigation, it is suggested that some legal provision be made so that this is possible.

3. Senior police officers should avoid transferring any investigation officer who is involved in an important investigation. The prosecutor may also suggest that the senior police officers to stay such transfer till the completion of the pending investigation.

C. Suggestions for Inadequate Legal and Investigative Knowledge

1. Regarding inadequate knowledge of investigation and law, it was suggested the prosecutors be allowed to give from time to time guidance to the police in each case. Also it was suggested that on-the-job training and short-term refresher courses be arranged where prosecutors are allowed to give lectures as to how cases are

conducted in the court and value of evidence.

2. In consideration of advancements in technology, special training programs should be introduced for the police and the prosecutors. In this case, immediate technical help can be taken by companies which are producing such technology. The opinion of such experts can be sought during investigation. The police and the prosecution departments should have experts on computers.

D. Suggestions for Lack of Coordination between the Police and the Prosecution

It was suggested that the police and the prosecution should have regular and *ad hoc* meetings from time to time. During such meetings, the police can discuss the position of pending investigations and prosecutors can advise on these so that the investigation can be completed in a correct and timely manner. In important cases, the police and the prosecutors should have meetings during the investigation and before the indictment for such cases, wherever needed.

In countries where prosecutors have a role during investigation like China, Japan and the Republic of Korea, such meetings are often held. But those countries where there is no such provision (though unofficially they might be holding meetings but not often), it is suggested that a system be initiated where the police and prosecutor have regular meetings.

E. Suggestions for Lack of Forensic Science Facilities

Regarding shortage of forensic science facilities and laboratories, the investigator should prioritize the collection of evidence. Those which are important and require technical opinion regarding fingerprints, chemical examinations, DNA testing, firearms report, etc., should be completed as early as possible. In such cases, the prosecutors should also give guidance to investigators in identifying the important scientific evidence.

It is also suggested that more forensic science laboratories be equipped, since in some countries there is only one.

The prosecutors should also advise the police about the importance of scientific evidence like blood tests in murder cases, or in cases where firearms are used, ballistic tests.

F. Suggestions for Political/ Governmental Influence

To avoid political pressure in serious organized or corruption cases against politicians and senior civil servants, the investigator should try to maintain the secrecy of evidence. After the arrest of the suspect, they can give proper information to the media so that they can get support from the public and can avoid such pressure.

Where prosecutors have the authority to investigate, they should give instructions to police for proper investigation. In spite of these instructions, if the police is still under political pressure, the prosecutors should take over the investigation.

Both the police and public prosecutors should show professionalism and act according to the law.

It is suggested that an agency be established which is free from influence from the executive and which has the authority to call case papers from police, when it feels that some political interference is involved. In such cases, it should take immediate legal action against such illegal influence.

VI. INVESTIGATION INITIATED BY PUBLIC PROSECUTORS

In Cameroon, China, Indonesia, Japan, Laos, the Philippines and the Republic of Korea where prosecutors also have the authority to initiate the investigation of

cases, they do not investigate all the cases in practice.

In China, according to Article 18 of the Criminal Procedure Law of the People's Republic of China, "with regard to the crime of corruption and bribery, the crime of dereliction of duty committed by state personnel, the crime of illegal definition, extorting confession by torture, retaliation and framing and illegal search to infringe on citizens' rights of the person committed by state personnel who take advantage of the functions and powers and the crime of infringement on citizens' democratic rights, peoples procuratorates (public prosecutors)" should file such criminal cases for investigation.

In Japan, Article 6(1) of the Public Prosecutors Office Law states "Public prosecutors may investigate any criminal offense," and Article 191(1) of the Code of Criminal Procedure states "A public prosecutor may, if he deems necessary, investigate an offense himself." In practice, however, they investigate major corruption tax evasion or bankruptcy cases, etc.

In Indonesia, the prosecutors investigate corruption and subversion cases. Moreover in subversion cases, the prosecutor is assisted by the police and the army for summoning witnesses and arresting suspects.

The Criminal Procedure Code of the Republic of Korea vests the power of the initiation and conclusion of criminal investigation solely on the public prosecutor. The police and other special investigative agencies serve only as assistants to the public prosecutor and should conduct investigation in accordance to the general standard and/or special directions issued by the public prosecutor. Most cases involving serious offenses such as organized crime, white-collar crime, corruption, drug offenses and environmental offenses are handled by the public prosecutor from the beginning.

In Cameroon, Laos and the Philippines, public prosecutors have authority to investigate the case, but in practice most cases are investigated by the police under the supervision of prosecutors.

In countries where prosecutors initiate investigation, it was realized that due to the effective role of prosecution, there are certain benefits which lead to a good investigation. As prosecutors have adequate legal knowledge as well as conversant in legal interpretation, they prepare good cases for indictment. Their ability and experience have been deemed as a benefit for the law enforcement system in combating crime. Earlier involvement by prosecutors in investigation, guarantees a successful prosecution and conviction.

VII. PROBLEMS IN INVESTIGATIONS INITIATED BY PUBLIC PROSECUTORS

In countries where prosecutors have the authority to initiate the investigation such as in China, Indonesia, Japan and the Republic of Korea, the group workshop has found some problems faced by the public prosecutors, namely:

A. Limited Number of Prosecutors

In most prosecution offices, there is a limited number of prosecutors and assistant officials, especially for initiating the investigation. As it has been realized, initiating the investigation has been time-consuming since the public prosecutors have to conduct investigation by themselves (such as collecting evidence interrogation of the suspects and witnesses, search and seizure, etc.). At the same time, the number of cases that must be handled has been increasing. This problem is more serious when the prosecutor's office has to deal with prosecution in the court and supervise the police investigation.

B. Difficulty in Finding Clues and Credible Evidence of Crime

The cases committed in secrecy like corruption and bribery are difficult to detect, as there is no direct victim. Evidence is hard to come by due to the secrecy surrounding these transactions.

In such cases, public prosecutors rely on the statements of witnesses and the confession of the suspects. However, the suspects tend to deny the facts and the witnesses tend not to cooperate with the public prosecutors in the trial stage.

C. Media Publicity

When competition for giving news starts in the media, it becomes difficult to keep the secrecy of an investigation, and once information is leaked, the related persons and suspects do not cooperate in the investigation, the suspects and the witnesses could escape and also the defense councel of suspects becomes more active, thereby making investigation difficult. In sophisticated cases, the suspects and the witnesses destroy the evidence, which further frustrates proving the offense.

VIII. SOLUTIONS TO THE PROBLEMS IN INVESTIGATION INITIATED BY PUBLIC PROSECUTORS

In view of the problems in investigations initiated by public prosecutors, the group workshop identified some possible solutions, namely:

A. Suggestions for Limited Number of Prosecutors

1. Investigation of Selected Cases

To overcome the problem of overwork, it can be suggested to the appropriate authority that the number of prosecutors be increased. However, while it is difficult, the investigation of selected cases like those of corruption against civil servants, politicians, subversive activities, cases of national interest, etc., could be given priority.

2. Temporary Attachment System

If in some offices the work load is too heavy, some prosecutors from other offices could be temporarily attached to assist.

3. Cooperation between Prosecutors with the Police and Other Investigative Agencies

In view of the limited number of prosecutors, when initiating and conducting the investigation of cases, public prosecutors can ask for cooperation from the police if necessary. There may be relevant cases which are found as offshoots of another investigation initiated by the public prosecutors and which can be investigated by the police. In such cases, the public prosecutors can ask the police to investigate such offshoots. It is suggested that when prosecutors need some help, the police should extend immediate cooperation.

As in China, Indonesia, Japan and the Republic of Korea, in special cases of taxes, customs, security transactions, the officers of respective department give permanent cooperation. In Japan, some tax officers are permanently attached to the special investigation department of the prosecutors offices.

B. Suggestions for Difficulty Finding Clue and Credible Evidence

Public prosecutors should have their own sources of information, which can provide clues to cases. The public prosecutors can also ask the public to assist in giving information. While investigating other cases and examining relevant documents, public prosecutors must try to find clues of other big offenses. Public prosecutors should also pay attention to the correspondence from the public relating to information on cases.

In Japan, public prosecutors can obtain information relating to all crimes directly from the public or government officials through all means of communication, complaints and so on. In China, there is a criminal report center in each public procuratorate office, where they receive information about crimes from the public. This information is subsequently sent to the most appropriate departments. In Indonesia, there is "P.O. Box 5000" for receiving such information.

While recording the statements of the witnesses and suspects, public prosecutors have to obtain credible and concrete statements, which will support a conviction.

C. Suggestions for Media Publicity

When the media competes for information, it becomes difficult for prosecutors to conduct an investigation. In such cases, the secrecy of information and investigation must be maintained.

The senior officers of public prosecutor's offices or the public relations department should brief the press from time to time so that the media does not publish articles based on mere speculation or conjecture.

IX. CONCLUSION

From the study and discussion of the criminal systems of different countries, it was gathered that for any criminal justice system to succeed, each pillar of criminal justice administration has to play an important role. The group workshop studied the role of prosecution and prosecutors in investigation. It was observed that prosecutors have a twofold role in investigation and prosecution. These roles are commonly established in the criminal procedures of each country, but tend to differ from country to country.

During the study of the criminal systems of those countries where prosecutors have an authorized role in police investigation or where they have the authority to investigate, the results of investigation are good and the conviction rate are higher. Conversely, in those countries where prosecutors are not authorized to investigate and do not have any role during investigation, the conviction rate is comparatively lower.

The other benefit can be that prosecutors could give reasonable instruction or advice to police, keeping in view their experience and knowledge. This also contributes to shortening the time period for the investigation.

As discussed in the proceeding paragraphs, it was acknowledged that investigation by prosecutors is very beneficial due to their adequate knowledge of law and legal interpretation. This experience improves the standard of investigation.

It is noteworthy that investigation and prosecution are fundamentally linked and inseparable. Consequently, where those powers are not deposited in one agency, the relevant investigation and prosecution agencies must complement each other, always realizing that neither function or agency is inferior.

The members of the group workshop concluded that the role of prosecution must be made effective in order to have a good criminal justice system. It is expected that those countries where prosecutors have no role in investigation, will also realize the importance of such role. In these countries, the system should be modified so that prosecutors can play an active role in the improvement of investigation and thereby assure due process of law.

GROUP 2

THE ROLE OF PROSECUTION IN THE SCREENING OF CRIMINAL CASES

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I. INTRODUCTION

1. As an introduction, a few preliminary issues such as the definition of screening, the importance and necessity of screening and who conducts screening have to be considered.

A. Definition

2. No legal definition to the phrase "case screening" is found in any of the legal lexicons or any dictionaries that we referred to. Hence, for the purpose of this report, the group has decided to define the word to give it a meaning that can bring forth the practical realities behind the process of case screening.

3. Case screening connotes a series of procedural steps that have to be followed at different stages of a criminal case by any body, be it an executive or a judicial authority, to determine the fate of a criminal case. It is a sieving process followed by a decision as to whether to proceed with the criminal case in a court of law or whether it should be concluded by any other means such as composition, discharge, nolle prosequi, suspension of prosecution, etc. In essence, this process is sine quo non to due process of law. According to Blacks Law Dictionary the definition of due process of law implies "the right of a person affected thereby to be present before a court or tribunal which pronounces judgement upon the question of life, liberty or property in its most comprehensive sense."

B. Necessity and Importance of Screening

4. The importance and the necessity of having a system of case screening is manifold. First, the system will enable the competent authorities to properly marshal and vet the evidence of a case before referring it to a court of law. Consequently the authorities will be able to keep a tab on all trial cases pending before that court and to minimize the delay in disposing of such cases. Secondly, case screening is important in order to meet the ends of justice. A criminal case which has not been properly screened may result in having the wrong person being accused of a crime or the actual culprit being discharged from further proceedings. This would stultify

the essence of due process of law. As a result of case screening, the harassment that an accused has to undergo by facing frivolous or vexatious cases would be obviated. Therefore, case screening essentially is a device adopted to preserve the quality of justice in any society. Thirdly, case screening also prevents overloading of the courts with trivial and unimportant cases. This would speed up the trial process, preserving the true quality of justice. Lastly, screening can resolve the problems of prison overcrowding.

C. Who Conducts Screening?

5. According to various procedures adopted by different jurisdictions of the world, screening is done by different authorities at different stages of a case. In some countries where cases are tried exclusively by a magistrate court or a sessions court, the police is entrusted with the powers of screening. Sometimes, such screenings are subject to the scrutiny of the prosecution. In some jurisdictions, the court is also involved in this process. For example, where preliminary inquiry is recognized by law, case screening is being done by the presiding magistrate.

6. The role of a prosecutor in case screening is one of the most important duties entailed to his job. From the very inception of his career, he is required to master this method by properly studying all the case records and investigation records submitted to him for scrutiny and making determination as to whether the matter should be tried by a court of law or whether other means of disposing the case should be employed. In some countries like Kenya, Malaysia and Singapore, police officers are employed as prosecutors. For the purpose of this report, police prosecutors will be considered as part of the prosecution.

7. The intention of this report is to discuss "case screening" in detail. In addition, attention will also be paid to the problems relating to case screening and we would endeavor to find practical solutions to the problems relating to the subject. New suggestions to find safeguards to protect and preserve the case screening system will also be discussed herewith.

II. SCREENING BY THE POLICE[1]

8. In addition to investigations, the police may in some instances screens cases.

A. Investigations and Screening

9. In almost every criminal justice system, the police plays a leading role in the investigation of criminal cases. The respective legislation on criminal procedure lays down the police powers to receive reports from any aggrieved party, record statements from witnesses, visit scene of crime, collect exhibits, records the investigation diary, arrest, search and summons, etc. In most countries influenced by the civil law, the powers of investigation are also bestowed on the public prosecutors. However, the initial investigations are usually carried out by the police.

10. The way investigations is conducted by the police has an important effect on the quality of screening conducted by the police, prosecution and the court. In a screening process, the agency that conducts screening has to review all the evidence that has been gathered throughout the investigations. An assessment of the cases is made based on the available evidence. Therefore, to a large extent, the accuracy of screening will depend on how well the investigations have been conducted. If the investigations are lacking, the screening will be less accurate.

B. How Screening is Done

11. There are two possible levels of screening by the police. The first level is at the initial stage when the first information report is received from any person, particularly the victim of the crime. The report is recorded in writing in the book maintained by the police for this purpose and the police reviews the evidence to determine whether any specific offence has being disclosed. If there is an offence disclosed, then the report is classified according to the specific section of the law. However, if there is no offence, the report may be closed and no further action is taken. Normally, screening at this stage is done by the senior officer at the police station or the officer in charge of the police station. This form of case screening is found in most countries.

12. The second level of screening occurs at a later stage practiced in several countries, which are influenced by the common law system. A report that discloses a specific criminal offence is referred to the investigation officer, who will take the appropriate action to investigate the case with the ultimate aim of solving it and arresting the offender. On completion of the investigations, he will submit his investigation report to his superior officers, who are experienced investigators themselves having served many years as investigators. The latter will peruse the report to determine whether or not there is sufficient evidence to substantiate the ingredients of the charge relating to the alleged offence committed by the offender. If there is a need to obtain further evidence or when further clarification is required, the report is returned to the investigation officer with the appropriate instructions to do so. If by then a suspect is under custody, he may be released on police bail or produced in the court for order of remand to facilitate further investigation by the police. If the investigation officer still cannot obtain any further evidence to supplement the earlier evidence he collected and that the earlier evidence collected is too weak to substantiate the charge, the police may then decide to close the case. In some countries, this applies to minor offences[2].

13. In some countries, for minor cases, the police will refer to the cases to court for trial after screening. However, if the police is doubtful as to whether the action of closing the case is a correct one or not, it may also seek the advice of the public prosecutor for direction[3]. In screening cases, the police normally considers the statements of witnesses and the accused, the documents including the expert reports and the investigation diary. An experienced officer will be able to detect whether the investigation officer has fabricated the evidence or not. This could be done by verifying the investigation diary of the investigation officer with that of his official diary or pocket book.

14. The police in most countries influenced by the civil law system such as Costa Rica, Laos, the Philippines and Thailand, does not screen cases at the second level. In Japan, there is a system of disposition of trivial cases by the police committed by adult offenders. These offences include theft, fraud or embezzlement involving a small amount of money. Instead of referring the case to the prosecution, the police will submit monthly reports. In the Republic of Korea, for offences punishable with imprisonment of less that 30 days or a fine of less than 200,000 won, the police may, after investigations, send the case directly to the court for trial.

C. Evidentiary Standard

15. From the deliberation in our group workshop, it is found that in most countries where the police decides to submit a charge to the court, the evidentiary standard of

proof required is "prima facie" or "reasonable prospect of securing the conviction"[4].

D. Relations with the Prosecution and The Court

16. In general, the police maintains a good and close relationship with the prosecution. The prosecutor is the friend and counselor of the police and will always be considered in that spirit. In addition to specific cases in which the laws requires the police to report to the prosecution, all other unusual cases and legal problems which present difficulty and require legal advice will be referred to the prosecution. The latter will willingly assist the police at all times and at all stages of the investigation. As regards the courts, the role of the police in screening cases will ensure that the courts are not clogged with unnecessary and trivial cases.

III. SCREENING BY THE COURT

17. In some jurisdictions, the court screens cases prior to the actual hearing. However, in some other countries such as Cameroon, China, Costa Rica, India, Indonesia, Japan, Laos, Malaysia, Maldives, Nepal, Pakistan and the Republic of Korea, the court does not perform such a function. Screening by the court can be done in the following ways:

A. Preliminary Inquiry or Hearing

18. A "Preliminary Inquiry" is a hearing held prior to trial during which the state is required to produce sufficient evidence to establish that there is probable cause to believe that a crime has been committed and that defendant committed it[5].

19. The presiding magistrate performs the function of screening[6]. Its function is not to decide on the guilt of the defendant. Hence, a different degree of proof or quality of evidence from indictment or conviction at trial is required. Preliminary inquiry or hearing by the court is observed in Ghana, Kenya, Singapore, Sri Lanka and Thailand. The majority of these countries conduct such proceedings to determine whether there is sufficient evidence to proceed with the trial or refer or commit the case to the High Courts for trial. For some of these countries, the purpose is to determine the truth or falsehood of the complaint against the offender.

20. The quantum of evidence to attain such objectives differs also in these countries. In some countries, the standard of prima facie is used, whilst in others, it is less than the proof of beyond reasonable doubt. In Kenya, Subordinate Courts conduct a preliminary inquiry in murder and treason only. For Ghana, a preliminary hearing is conducted by a community tribunal consisting of a judge and two lay persons in cases punishable by death and in first-degree felonies. Singapore and Sri Lanka limit such inquires to cases that are triable by the High Court such as murder, trafficking in drugs and rape. In Thailand, a preliminary hearing is, in practice, conducted only for private and not public prosecution.

21. The mechanics of the proceeding also vary in these countries because in some, it is akin to a trial whereby the prosecution and the defense present their evidence in support of their cause. In others, it is summary in nature because no evidence is presented by the contending parties and the court merely relies on the documents submitted by the police, the investigating officer or the prosecution. In some countries, a mere request to the magistrate for the transmittal of the case to the High Court will suffice.

B. Summary Proceedings[7]

22. Another form of screening by the court is the so-called "Summary Proceedings" which is practiced in Sri Lanka. These proceedings are not actual trials. During this process, the Magistrate Court examines the complaint filed by the police, the investigating officer or the private complainant. It will then determine for itself whether or not there are well-founded allegations to proceed with the trial of the person complained of. If there is none, the Magistrate Court will dismiss the case. Otherwise, it will issue a summon to the accused for him to answer the charge. The magistrate also drafts the charge against the accused.

C. Pre-trial Conference[8]

23. In Philippines, the court conducts screening by way of pre-trial conference. This is conducted before trial to consider the possibility of a plea bargain, the stipulation of facts, the marking for identification of evidence by the parties, the waiver of objections to admissibility of evidence and such other matters as will promote a fair and expeditious trial[9].

24. One of the purposes of such conference is plea bargaining, which is the process whereby the accused and the prosecution in a criminal case work out a mutually satisfactory disposition of the case subject to court approval. It usually involves the defendant pleading guilty to a lesser offense or to only one or some of the counts of a multi-count indictment in return for a lighter sentence than that for the grave charge. It takes place when an Information (charge sheet or bill of indictment in other countries) is already filed in court and the accused had already been arraigned (reading of the Information to the accused and asking him how he pleads). If he pleads not guilty, the case shall be then set for pre-trial conference where the possibility of plea bargaining may be discussed. However, the conduct of a pre-trial conference is not mandatory because it may be held only by the court when the accused and his counsel agree. Should the accused opt to plead guilty to a lesser offense during the pre-trial conference, the approval of the prosecutor and the victim or offended party must also be sought before the court approves the same[10].

D. Plea Bargaining Proceedings[11]

25. In Sri Lanka, there is a plea bargaining system where the prosecution and the defense discuss the possibility of the accused pleading guilty to a lesser offense. The approval of the court is required. However, unlike in the Philippines where the matter is discussed during the pre-trial stage, in Sri Lanka it is taken up before or even during the trial where the prosecution and defense can compromise on this aspect.

IV. SCREENING BY THE PROSECUTION

26. In various legal systems, like in Costa Rica, Indonesia, Japan, Laos, Maldives and the Republic of Korea, public prosecutors monopolize public prosecution. In other words, only public prosecutors can bring the case to the court. In China and Thailand, although public prosecutors can initiate prosecution, private prosecution by the injured party is also allowed. However, in reality, private prosecution in those countries is very limited.

27. It is noted that in countries influenced by the common law system like Ghana, India, Kenya, Malaysia, Singapore and Zambia, police prosecutors can prosecute cases. However, they are generally limited to less serious cases. While prosecuting, a police officer is acting as the representative of the Attorney General or the Director of Public Prosecution. In his capacity as a prosecutor, he is subject to the directions of the Attorney General or the Director of Public Prosecution.

28. Usually, in screening cases, the prosecution decides whether to prosecute based on the sufficiency of evidence. Additionally, it may exercise discretion to withdraw the prosecution or suspend prosecution, to do plea bargaining, or to proceed the case through summary proceedings for the interest of justice. According to the United Nations Guidelines on the Role of Prosecutors, the prosecutors must not commence and proceed with prosecution if there is no basis to frame the charge and in setting aside cases, the prosecutors must fully appreciate the rights of the suspects and also the victims.

A. Evidentiary Standard for Initiation of Prosecution

29. Generally, in all countries, one of significant functions of the prosecution is to make either a prosecution order against alleged offenders or a non-prosecution order. It is widely accepted that an innocent person should not be tried in court. Nonetheless, the evidentiary standard for initiation of a criminal trial varies from country to country. From the analysis of the group, it was found that different terminology, such as "prima facie" and "probable cause", was used to describe the different evidentiary standards. However, the same term can be used to describe different standards; for example, "prima facie" can mean less than a 50 percent chance of conviction in some countries but more than a 50 percent in others. Therefore, to analyze the level of proof, the group will endeavor to use percentages to explain the standard, which is only an estimation.

30. In countries like, India, Pakistan, Kenya, Malaysia, Pakistan and Sri Lanka, the evidentiary standard is prima facie. Nonetheless, based on the analysis of the group, it is interpreted that the standard for a prima facie case in those countries varies from a 50 percent to 60 percent certainty of guilt. In Singapore, the prosecution must be satisfied that there is reasonable prospect of securing a conviction before referring the case to the court for trial. This is more than a 50 percent possible proof of guilt[12]. In Costa Rica, a balance of probability of guilt or more than a 50 percent certainty of guilt obtained from the investigation is enough to send a case to trial. In Philippines, the evidentiary standard for the charge according to the law is also probable cause which is defined roughly as a 40 to 50 percent possibility of guilt. In Thailand, there is no written law identifying the evidentiary standard for the charge. In practice, the prosecution normally applies probable cause as a standard in prosecution. However, such standard, in practice, as opposed to the standard in the Philippines, accounts for more than a 70 percent prospect of a guilty verdict. In Sri Lanka, about 10 percent of the cases are closed at this stage for this reason.

31. In China, Indonesia, Japan and the Republic of Korea, the laws do not clearly mention the evidentiary standard. In practice, the standard is similar to the court in rendering a guilty verdict, which is beyond a reasonable doubt. In Japan, the percentage of cases closed by prosecution for insufficiency of the evidence was 1.2 percent in 1996[13]. In the Republic of Korea, the percentage of cases closed at this stage for the same reason was 10.1 percent in 1994[14].

32. The group has found that the difference in the standard used can be attributed to several reasons such as social, political and cultural differences, including the influence of the different legal systems. For example, one factor may be whether the prosecution is vested with the powers of investigations. In Japan and the Republic of Korea where a high standard of proof is used, the prosecution can conduct

investigations, including interviewing witnesses and the accused person. The prosecution can, therefore, decide whether to proceed with the cases based on additional facts and circumstances such as the veracity of the witnesses. Consequently, the standard used is higher than in countries where prosecution is not vested with the powers of investigations. In such instances, the prosecution cannot determine the strength of the evidence through investigations. The only way is to refer cases to court to have the evidence tested in a trial. More cases are sent to court for adjudication as such.

B. Withdrawal of Prosecution

33. From our comparative study, the extent of discretionary power exercised by prosecution differs from one state to another. In some countries like Costa Rica, Laos and the Philippines, the initiation of criminal trial is compulsory if there exists sufficient evidence to prove that the offender is guilty to the court. In these countries, the prosecution does not have the discretionary power to withdraw or discontinue the prosecution. In Indonesia, the prosecution is obliged to prosecute regardless of whether the case is minor or serious. One exception is that the Attorney General of Indonesia himself can exercise the discretion not to prosecute. In practice, this discretion is rarely exercised.

34. On the other hand, in various legal systems, the prosecution can be withdrawn even if there is sufficient evidence to proceed for trial. For the purpose of this report, the phrase "withdrawal of prosecution" is defined as:

> Any screening process where case is withdrawn by the prosecution before filing the charges or during trial even if there is sufficient evidence to prove the criminal guilt in view of the circumstances of the case.

35. It will include the notion of "Suspension of Prosecution", which is uniquely used in Japan and the Republic of Korea, discontinuance of prosecution as practiced in some countries and nolle prosequi.

1. Suspension of Prosecution

36. In Japan, a system known as "Suspension of Prosecution" exists. The prosecution in Japan has general and vast discretion to decide whether to prosecute suspects. If after considering the character, age and situation of the offender, the gravity of the offense, the circumstances under which the offense was committed, and the conditions subsequent to the commission of the offense, prosecution is deemed unnecessary, the prosecution may decide to suspend the case. This practice is consistent with the "Expediency" or "Opportunity" principle. The percentage of cases closed by the system is 30.9 percent or relatively one-third of all cases in 1996.[15]

37. Likewise, in the Republic of Korea, the prosecution may decide not to prosecute if the criminal trial does not accord public interest or is against the public morals or order or affects national security or important national interests after taking into account the suspect's age, character, pattern of behavior, intelligence, circumstance, relationship to the victim, motive, and method for committing the crime, results and circumstances after the crime. In 1994, 10.8 percent of the total cases were dropped by the public prosecutors[16]. Moreover, the Republic of Korea has two particular systems concerning the suspension of prosecution:

a) Suspension of prosecution: Decision for juvenile offenders on the "Fatherly Guidance Condition"

38. Prosecution is suspended on the condition that the offender, who is under

the age of 18, is subject to the protection and guidance of a member of the Crime Prevention Volunteers Committee. This is for a period of 6 to 12 months after the decision, depending on the possibility of committing a crime again in the future. To make this decision, the prosecution will select the person to protect the offender among the members to the Crime Prevention Volunteers Committee. The prosecution then hands in a referral document to the person and receives from that person a certificate stating that he or she has received the custody of the offender and would bear the responsibility of protecting and guiding the offender. If the offender does not comply with the volunteer's guidance or commits another crime, the prosecution may remand the suspension of prosecution decision and prosecute the offender.

b) Suspension of prosecution: Decision on the "Protection and Surveillance Committee Guidance Condition"

39. This is for adult offenders who need protection and guidance by experts for a period of 6 to 12 months, depending upon the possibility of the offenders committing another crime in the future. The prosecution entrusts the offender to a member of the Protection and Surveillance Committee. The offender is subject to the protection and guidance of the committee.

40. The discretionary authority of the prosecution in Japan and the Republic of Korea has proven to be a very useful means in the correction of criminals, the protection of society, alleviating the case loads of the court and preventing the overpopulation of prisons. It has been widely accepted among criminal justice agencies and the public.

2. Discontinuance of Prosecution or Non-prosecution

41. In various legal systems such as China, Maldives, Singapore and Thailand, the prosecution can withdraw prosecution even if there is sufficient evidence to prove the case. In other words, there is no mandatory prosecution in those countries. However, the detailed practice relating to this process still differs from one country to another. The number of cases in Singapore where the prosecution withdraws prosecution is small. Most of them are petty or minor cases. Likewise, in Maldives the cases are limited. In Maldives, the Attorney General can withdraw prosecution after writing to the office of the President and on his approval. In Thailand, according to the internal regulation of the Office of the Attorney General, the prosecution must refer the case to the Attorney General for further consideration as to whether prosecution should be withdrawn. However, in Thailand, this is rarely done. In China, non-prosecution is allowed in cases where the circumstances of offence are minor.

3. Nolle Prosequi

42. In some countries like Ghana, Kenya and Sri Lanka, there is power exercisable by the Attorney General to discontinue the case from trial at any stage after indictment and before judgment which is technically known as nolle prosequi. In general, it can only be exercised under the direction of the Attorney General. In these countries, there is no obligation for the Attorney General to mention any reason. However, it is exercised only when the interest of justice and state demands recourse to such action.

43. The grounds for discontinuance or withdrawal of proceedings are varied and may include the following circumstances:

(1) Additional evidence found later proving the innocence of the defendant;
(2) Amnesty or pardon;
(3) False implication of accused person as a result of political and personal vendetta;
(4) Adverse effects that the continuation of prosecution will bring on public interest in the light of changed situation; and
(5) Unavailability of a prosecution witness.

C. Plea Bargaining

44. In most countries, plea bargaining is not practiced. However, in Malaysia, the Philippines, Singapore, Sri Lanka and Zambia, plea bargaining is an acceptable practice. In Sri Lanka and the Philippines, plea bargaining is subject to the approval of the court as seen from the part of screening of cases by the court. On the contrary, in Malaysia and Singapore, the prosecution has the full authority to decide on plea bargaining matters to avoid prejudicing the judge. Therefore plea bargaining is done solely between the prosecution and the defense, and it usually involves negotiations for a reduced number of charges and or an amendment to less serious charges in exchange for the guilty plea. However, it should be noted that, as compared to the practice in the United States, plea bargaining does not occur quite often in such countries.

D. Alternatives to Ordinary Trial Proceedings

45. Besides ordinary trial proceedings, there exist some other alternatives as follows:

1. Summary Proceedings

46. Summary proceedings are proceedings whereby the court will usually impose only a fine on the accused as practiced in some countries such as Japan and the Republic of Korea. In such countries, the public prosecutors have the authority to decide whether to proceed the case to the court by summary proceedings or not[17]. Through such proceedings, ordinary trial is not proceeded. In summary proceedings, a single judge adjudicates the case based on documentary evidence. It is noteworthy that in Japan, only 4.7 percent of cases were tried by formal procedure whereas the percentage of summary procedure was approximately 49.2 percent in 1996[18]. Correspondingly, in the Republic of Korea, only 7.4 percent of cases were prosecuted for formal trial and 42.8 percent of cases was prosecuted for summary trial in 1994[19].

2. Imposition of Fines by the Police or Other Administrative Officials

47. The method whereby the case is settled outside the courtroom is applied in several countries such as China, Malaysia, Singapore, Sri Lanka and Thailand. In China, a public security organ may impose a penalty, that is a warning, a fine from one to 200 yuan and detention from 1 to 15 days, for petty offences as a final disposition. In Malaysia, Singapore and Sri Lanka, for minor cases such as traffic offences, the police or other administrative agencies will issue a summons to the offender who has committed the offence. The offender is informed that he is being offered a composition fine. If he pays the fine within a certain period, the offense is considered settled. Correspondingly, in Thailand, for trivial offenses punishable with only with a fine and offenses punishable with a maximum of one month's imprisonment or a small fine, the police can impose fines on the offenders. In cases where the accused does not agree with the

imposed fine, the cases will be prosecuted is the court as ordinary cases.

E. Relation with the Police

48. In most countries, the prosecution is vested with the power to require additional investigation from the police before making any decision on the case. The police is obliged to follow the prosecution's instructions regarding further investigation to be completed. In general, the police is cooperative to such directions.

49. In most jurisdictions, the screening authority of the prosecution is ultimate. As a result, the police can not contest it. However, there are some exceptions in a few countries. For example, in Thailand, the Chief of the Police Department can balance the power of prosecution regarding the non-prosecution order for cases occurring in Metropolitan Bangkok. This non-prosecution order, if not issued by the Attorney General himself, is not final unless concurred by the Director-General of Police. If he disagrees with the order, the case will finally be reviewed by the Attorney General and, therefore, his order, whether or not to prosecute, will be final. In Indonesia, if the investigator stops investigation, he shall inform the public prosecutor; likewise, if the prosecutor stops prosecution he shall inform the investigator. In India, if there is a conflict of opinions between the investigating officer and the prosecution as to the viability of prosecution, the ultimate decision whether to send a case for trial lies with the police authority which is the District Superintendent of Police.

V. PROBLEMS IN SCREENING

50. There are several factors, which can affect the screening process. Some of these factors can cause a decrease in the number of cases screened, resulting in an increase in the number of cases that are proceeded with in court. The net effect is an increase in the number of cases the court has to handle. This has overloaded the courts in some countries. The conviction rate may also be lower as a less stringent standard of proof is used in the screening process.

51. Excessive screening may result in fewer cases. This means that less cases are proceeded with to court for adjudication as the evidentiary standard used in the screening process is very high. The net effect may be that the conviction rate is unusually high.

52. It is important to note that these effects may not be considered a problem in a country if the people of that country do not perceive it as a problem.

53. For ease of discussion, the group has divided the problems into two categories: general problems and specific problems. In the former, all three components can be affected. In the latter category, these problems are specific to each component.

A. General Problems

54. The following are some of the general problems relating to screening for the police, the prosecution and the court:

1. Manpower and Management of Workforce

55. In some countries such as Laos and Sri Lanka, there are insufficient police officers to handle investigations. This could be due to several reasons; for example, in some countries, there is low motivation in the police force as there is a lack of incentives for officers to work. There are also problems with recruitment as not many people are interested in joining the police force. Sometimes, even if the manpower is sufficient, the organization of the personnel is ineffectively managed. Such problems affecting investigations can also hamper the proper screening of cases. A result of

such problems is to cause less screening. Some countries face another related problem: police officers that are already experienced in investigations are transferred to another department. This can create a depletion in the pool of competent investigating officers, which is very often hard to replace.

56. This problem affecting the police can also affect prosecution. In some countries, prosecution is viewed as a difficult job and hence, a lot of very competent graduates are shying away from the profession. Furthermore, in most jurisdictions, working as a private attorney in the private sector yields more returns. Therefore, some countries are experiencing a loss of bright young talents to the private sectors, resulting in an unbalance in the quality of the workforce. This can affect effective and accurate screening.

2. Facilities and Support

57. Several developing countries face problems relating to technical support and facilities, such as the availability of computers. These are essential requirements for the efficient disposition of cases, including the sieving of the evidence and correct decision-making. Undeserving cases or cases with weak evidence may be proceeded with in court for trial due to the lack of such facilities. For example, the police or the prosecutor may be unable to determine the antecedents of the accused due to the lack of facilities and, therefore, be unable to decide properly whether to bring the case to court.

58. It is essential for the police, the prosecution and the court to be updated with the latest legal developments, whether it is case law or a new enactment by the legislature. In some countries, legal materials such as such books and periodicals are not accessible as facilities are lacking. As a consequence, there may be less or inaccurate screening.

3. Abuse of Powers

59. Perhaps the greatest problem is the abuse of powers which can affect the fair and equitable screening of cases. This possibility exists whenever any agency is given the discretion to decide on such matters. In particular, problems such as corruption can also disrupt the screening process. In most jurisdictions, there have been incidents where police officers and prosecutors have been charged with corruption. The prevalence of such incidents will vary from one country to another, depending on factors such as whether the officers are satisfied with the salary and other incentives that their jobs provide. It also appears that corruption occurs quite often in offences where the public officers and the accused have direct dealings. There are also cases where the fabrication of evidence has occurred; for example, drugs were placed in an accused's bag to secure a conviction. Hence, this problem can result in both excessive screening as well as less screening.

B. Specific Problems

60. The group has identified several problems affecting screening. Specifically, they are:

1. The Police

61. The primary role of the police is to investigate. Hence, the problems in screening for the police will inevitably relate to the investigation process. These are:

a) Education

62. Generally, in most countries, the educational requirements for the recruitment of police officers into the police organization are less stringent than the prosecution. Unlike the prosecution, there

is also no requirement that they be law graduates. During investigations, the police officer in charge has to know the legal requirements for the particular offence which he is investigating so that important evidence is gathered and not missed. This is especially important for the screening process by the police where it has to decide whether to recommend suspension of sentence as in some countries[20]. Without adequate training in the law, the screening process is likely to be hampered.

b) Political influence

63. The duty of the police is to maintain law and order in the country. To ensure strong and effective command and control, it is necessary that the police be a part of the executive. Hence, in most countries, the police is the executive arm of the government. Because of this, the likelihood of political influence from the executive is higher as compared to a body that is independent of the executive[21]. The screening of cases can be affected to some extent.

2. The Court

64. Similar problems that affect the police and the prosecution may also affect the courts in screening. These will include lack of technical expertise, logistics and legal training.

65. Other specific problems that affect the role of the court in screening are as follows:

a) Problems relating to preliminary inquiry

66. In some countries influenced by the common law system, the courts screen cases by preliminary inquiry. However, there are several problems accompanying the use of preliminary inquiry:

(i) Inordinate Delay

67. Having another inquiry prior to the trial proper can cause unnecessary delay, since the inquiry is often a duplication of the trial itself. In Sri Lanka, the need to conduct preliminary inquiry for some cases has caused significant delay amounting to about one and a half years. Hence, preliminary inquiry can slow down tremendously the whole judicial process.

(ii) Duplication

68. Related to the above point is that preliminary inquiry creates a lot of unnecessary work, which is a duplication to the trial. This problem is compounded by the fact that in most cases, the accused will be committed for trial in the High Court in any case.

(iii) Unfair advantage to the defense

69. In a preliminary inquiry, the prosecution is expected to reveal a lot of information regarding the case against the accused. However, the accused need not reveal his defense at that stage. In fact, in certain countries, he is allowed to remain silent. Hence, there is some unfair advantage to the accused.

(iv) No avenue for appeal

70. In some countries, the decision of the judge not to refer the case for trial cannot be appealed or reviewed. This means that the aggrieved party does not have any avenue to lodge his complaint.

b) Problems relating to Summary Proceedings

71. In Sri Lanka, the Magistrate Courts utilize summary proceedings as a way to screen cases. The Magistrate Courts have to determine the appropriate charges that can be preferred against the accused based on the facts that are revealed in the proceedings. The problems relating to the use of such proceedings are:

(i) Overloading

72. In addition to the cases that the Magistrate's Courts have to handle, they have to deal with cases referred to them in the summary proceedings. This overburdens the courts and creates unnecessary delays.

(ii) Duplication

73. Ordinarily, in such proceedings, the police will assist the Magistrate's Courts in drafting charges. The court then decides on the charges based on these draft charges. This is a duplication of the work.

(iii) Mere formalities

74. The Magistrate's Courts usually will adopt the charges that have been drafted by the police. Hence, having such proceedings to determine the charges is in fact unnecessary.

(iv) Prejudice

75. If the magistrate is of the view that the case should be proceeded with for trial, the same magistrate will also hear the case. This means that the magistrate may be prejudiced by the previous knowledge of the case.

3. The Prosecution

76. The prosecution in most countries is tasked with the responsibility of examining the evidence gathered to support the charge. It is also involved in the screening cases to determine whether the cases should be proceeded with in court for trial. The problems relating to this screening process are as follows:

a) Knowledge in other fields

77. With an increase in the sophistication of the crimes being committed, the prosecution very often are expected to screen cases which are very complex in nature. Some of these cases may require very specialized fields of knowledge such as money laundering, international crimes and computer crimes. Even with the legal training prosecutors received in law school, it is impossible to be trained in every legal and non-legal field. Hence, a lack of knowledge due to insufficient training in these areas may result in less screening. Although this affects both the police and the prosecution, this problem is perhaps more serious for the prosecution as it has a supervisory role over the police.

b) Investigative skills and expertise

78. Prosecutors in countries which have been influenced by the common law system are not vested with the powers of investigation. As such, in countries such as Singapore, Sri Lanka and Thailand, the prosecutors can only depend on the police's files in coming to a decision whether to prosecute or not. If the evidence of the case is not accurately reflected, this can influence the decision-making process. In addition, an understanding of the investigation process is essential to the making of a proper and accurate decision, especially if the prosecution does not investigate the case personally. Therefore, it is important for prosecutors to be familiar with the investigation process in order to properly exercise the powers of discretion in the screening. Being handicapped in this area may affect the screening process.

c) Coordination with police

79. For the efficient disposition of cases by the prosecution, the prosecutors have to maintain a close working relationship with the police to ensure proper coordination. This is especially important in countries where the powers of investigation are only vested in the police and not the prosecution. In some counties, investigation papers are often not sent on time to the prosecutor's office. If there is insufficient time to screen, the prosecutors can either suspend the case or conduct a cursory examination of the evidence before sending the file for

prosecution in court. This can result in both an increase or decrease in screening. Having mentioned that there should be a close liaison between the police and the prosecution, there can also be problems if both these agencies become to familiar with each other. Too much familiarity may cause a lack of objectivity in the role of the prosecution in supervising the investigations and screening conducted by the police.

d) Problems relating to the extent of discretionary powers

80. Although prosecution has to possess some discretion to screen cases, the issue is the degree. The problem is that the more extensive discretion, the easier it is for errant prosecutors to abuse their discretion. The number of cases screened may either be increased or decreased in such a situation.

81. On the other hand, having a system of compulsory prosecution also poses some problems. In such a system, cases are referred to courts even if there are very strong mitigating factors to warrant the cases to be dealt with differently; for example, the accused is a first offender, the gravity of the offence is not serious or the accused expresses remorse over his misdeed. As a result, for some countries, the courts are clogged with cases that are trivial. Hence, precious court time, which could have been used more productively, is wasted in dealing with these cases. In addition, the prisons are overcrowded as a result.

e) Political influence

82. Prosecution in most countries is part of the executive branch of the government. Therefore, like the police, the prosecution can be influenced by political pressure not to prosecute even if there is sufficient evidence against the accused or vice versa. For example, a high-ranking political figure is charged for a crime and pressure may be put on the prosecutor to discontinue the case. This problem can affect any jurisdiction regardless of whether the country practices withdrawal of prosecution or not. The prosecution may be pressured to continue or discontinue the case on the basis of insufficiency of evidence or withdrawal of prosecution. Such external influences can either cause an increase or decrease in the number of cases being screened.

f) Police prosecutors

83. In some countries, police prosecutors are law graduates. However, in some other jurisdictions, they are not. For the latter, this may cause problems as screening a case to determine whether there is sufficiency of evidence requires a good knowledge of the law. In some jurisdictions, the promotion of police prosecutors depends on the police force. As a result, the exercise of their discretion could be unconsciously hampered in favor of the police. As a consequence, there will either be an increase or decrease in the amount of screening conducted by the prosecution.

g) Problems relating to private prosecution

84. In countries such as Indonesia, Japan and the Republic of Korea, the prosecution monopolizes prosecution; i.e., only prosecutors can bring a criminal case to the courts. On the other hand, in some jurisdictions such as Kenya, Singapore and Thailand, there is a system of private prosecution. In these proceedings, the injured parties bring criminal cases to the courts themselves. In some countries, private prosecution is restricted to certain offences, primarily those that violate private rights, such as defamation or petty bodily injuries. Elsewhere, the right of private prosecution may be exercised only

when the prosecution waives prosecution in a case due lack of public interest or insufficiency of evidence. In such cases where the prosecution has little or no actual control over the proceedings, screenings are lacking as compared to cases where the prosecution undertakes the prosecution on its own. There may be less screening.

VI. SAFEGUARDS AND RECOMMENDATIONS

85. From the above analysis, it is clear that some of these problems are common to all three components of the criminal justice system. These are:

(1) lack of requisite knowledge and qualifications;
(2) lack of technical facilities and support; and
(3) manpower and personnel problems

86. For lack of knowledge and qualifications, there could be improvement in training in the required fields. The qualifications of recruitment either to the police force or prosecution can also be increased. Facilities can also be improved. For example, in some countries where the use of computers is highly encouraged, latest case updates can be obtained very easily with the use of advanced search tools in computers. Manpower and personnel issues can be resolved by proper management of the workforce and increasing productivity.

87. For problems in relation to external influence and abuse of powers, one important safeguard is having honorable officers of high integrity. Hence, there is a need to consider these factors during the recruitment process. Regular ethics courses could also be conducted as part of the continuous legal training of the police and the prosecution.

88. The other specific safeguards and recommendations are as follows:

A. The Police

89. There are several ways to provide safeguards for screening by the police.

1. Supervision by the Prosecution

90. In several countries, the prosecution has a supervisory role over the police. The police can refer the case to the prosecution if the police wants to seek the advice of the prosecutors regarding difficult points of law. Sometimes, advice as regards further investigations is sought. In some jurisdictions like Maldives and Singapore, if the police wants to withdraw any case, the case has to be referred to the prosecution for concurrence. Therefore, for screening by the police, the prosecution can act as a check. This can further enhance the screening process.

2. Improved Co-ordination with the Prosecution

91. The primary responsibility of the police is to investigate and to gather evidence for prosecution. One of the primary roles of the prosecution is to examine these evidence to determine whether prosecution should be proceeded. For effective screening, the prosecution and the police should maintain close ties with each other.

3. Limit the Powers of Police in Screening Cases

92. In order to prevent possible abuses, there are two recommendations considered by the members of group. One of the recommendations is to abolish the powers of the police in screening cases[22]. The police in such a case has to refer all cases to the prosecution for the prosecutors to decide whether to proceed with the case. This is done in several countries like Costa Rica, Maldives and Thailand, where only the prosecutors have the power of screening. The other recommendation is to limit the

powers of the police in screening cases to some less serious offences. This has been cone in some countries such as Malaysia.

B. The Court

93. The opinion of the majority of the group is that the court should conduct the screening of cases. Screening by the court should not be abolished as it serves as an additional safeguard to the screening conducted by the police and the prosecution[23]. However, the group recommends enhancing the present screening proceedings. The safeguards and recommendations are:

1. Preliminary Inquiry

94. From the foregoing, it is clear that there are problems relating to preliminary inquiry. However, there are also some advantages in that it can provide a sieve in screening undeserving cases. It also serves as an additional check by the courts on the prosecution and the police. Therefore, in order to overcome some of these problems, some members of the group recommend improvements to the existing procedures; for example, disallow cross-examination at the stage of the preliminary inquiry which is to be reserved for the proper trial. Preliminary inquiry can also be restricted to complicated or controversial cases where re-screening is required. Other members are of the view that the preliminary inquiry should be abolished[24]. This has been done in Malaysia. It is noted that in Sri Lanka, preliminary inquiry was abolished but revived again subsequently. The reasons are perhaps peculiar to the circumstances of the county.

2. Appeal and Judicial Review

95. As a means of check on the powers of the courts to screen cases, there should be some provisions in law to allow for appeal and review to a higher court or body by the aggrieved party. For example, in Thailand, appeal procedures are available for cases that are not referred to the court for trial.

3. Abolition of Screening by Magistrates in Summary Proceedings

96. In Sri Lanka, there is a move to abolish the power of the magistrate to screen cases by way of summary proceedings. Another prosecutorial body coming under the supervision of the Attorney General will be vested with this power. This body will comprise law graduates.

C. The Prosecution

1. Powers of Investigations

97. In order to resolve the problems of the lack of investigative skills on the part of the prosecution, the prosecution could be vested with the powers of investigation as in Japan and the Republic of Korea. Alternatively, the prosecution could be allowed to investigate in some special cases. This is the position of China and Indonesia. This will enhance the ability of the prosecutors in screening cases as they can gain invaluable experience by understanding the investigation process. They can also supervise the legality of the investigations more effectively. In addition, if the prosecutor personally investigates, he need not depend merely on the files of the investigating officer to come to a decision. Hence, the screening by the prosecution is more accurate.

2. Security of Tenure

98. As mentioned before, the prosecution to some extent is part of the executive arm of the government. However, in the execution of its duties, it has to uphold the rule of law and protect the public interest. In order to ensure that the office of the prosecution is independent, one recommendation is to provide security of tenure for the prosecutors. Having security of tenure means that prosecutors will have no fear in the exercise of the powers of

screening. The office of the Attorney General can be protected by having it entrenched in the constitution. This has been done in countries such as Singapore. Other than constitutional protection, the removal process could be made more difficult by legislation or regulations. In Japan, prosecutors can only be removed under the following circumstances:

(1) voluntary resignation;
(2) reaching retirement age;
(3) found unsuitable for the position by the Public Prosecutors Qualifications Examinations Committee; and
(4) disciplinary action.

99. In the Republic of Korea, prosecutors can be removed from office through an impeachment process initiated before the Constitutional Court or upon conviction of a crime punishable with imprisonment. In the Philippines, the removal of the public prosecutors rests with the President. However, in practice, they are not usually removed. In Thailand, public prosecutors usually hold office until they reach their retirement age of sixty. They can be removed by the Public Prosecutor Commission.

3. Checks and Control

100. To prevent possible abuses during the screening of cases, there is a need to have some checks and control. There are two types of checks. One is external and the other is internal. External checks on the prosecution can include the following:

a) Check by an independent body

101. Abuses in the screening process could be taken up to an independent body that serves like an ombudsman. There are several examples in various countries. In Japan, if the prosecutor decides not to prosecute and the victim is not satisfied with this decision, the latter can appeal to the Prosecution Review Committee, which consists of lay persons[25]. After the Committee receives the application, it will examine the case and return a verdict. If the Committee rules that the non-prosecution is not proper, the prosecution has to reconsider its original position. In the Republic of Korea, a constitutional petition may be made to the Constitutional Court if the decision of the prosecution amounts to a violation of fundamental rights. In the Philippines, the appeal is made directly to the Secretary of Justice as to the propriety of non-prosecution. If the decision of non-prosecution amounts to an abuse of discretion, the aggrieved party can file a complaint to a Tanodbayan who can sanction an erring public official. In China, there exists a Standing Committee of the People's Congress which can review cases if a complaint is made to the Committee. A system of a slightly different nature but similar in effect exists in the United States. A "Grand Jury," which consists of lay persons representing the community, decides whether a person should be indicted after listening to the evidence as presented by the prosecution. One of the functions of this system is to serve as a check on the prosecution's discretionary power.

b) Media scrutiny

102. The media plays a significant role in modern criminal justice administration. In reporting news about crimes, the media can create public interest and awareness which in turn serves as a check on the prosecution in the exercise of its discretion. Hence, as a result of media scrutiny, the prosecution is accountable to the public in its decision-making process. In addition, in Thailand, when there is a non-prosecution decision, the Attorney General as a policy will make available the reasons for non-prosecution to the media. This will ensure transparency. The group also holds the view that the media can protect the independence of the prosecution. However,

there is a need to prevent sensationalisation by the media. The media should be responsible in its reporting of cases. In this respect, there are laws in some countries where the newspapers are prevented to report the names of the victims of sexual offences.

c) Interdepartmental consultation

103. Periodic interdepartmental consultation should be conducted among the institutions in the criminal justice administration. The aim is to develop policies and guidelines to minimize or eliminate interference or destruction as well as to monitor and evaluate the implementation of such policies and guidelines.

d) Judicial action

104. Another possible means of controlling the use of discretion is to utilize judicial proceedings. In Japan and the Republic of Korea, the codes of criminal procedure provide that if a prosecutor declines to prosecute an offender for an offence relating to the abuse of official power or for a violation against a citizen by a law enforcement officer, the complainant can request the court to re-examine the case and commit it for formal trial. If such request is granted, a private lawyer will be appointed by the court to exercise the prosecutor's function.

e) Internal checks

105. Internal checks can include the following:

(i) Check by higher authority

106. In most jurisdictions, there exist some form of internal control. Within the prosecution, there can be checks by superior officers. In Singapore and the Philippines, junior officers are required to obtain the concurrence and approval of senior prosecutors in discontinuing cases. Dissatisfied complainants can also appeal to a competent High Public Prosecutor's Office or to the Attorney General for review. In Japan, the public prosecutor generally has to seek the approval of the senior public prosecutor on whether to proceed with prosecution or not. If the aggrieved party is still not satisfied, there is an additional check of appeal to a higher supervisory authority in the organizational structure. In the Republic of Korea, if the decision of non-prosecution by the District Public Prosecutor's Office is not satisfactory, there can be an appeal to the High Public Prosecutor's Office. There can also be a further appeal to the Supreme Public Prosecutor's Office. This system of appeal is similar to the appeal in courts. An appeal to the Constitutional Court is also possible as a final resort. In China, the non-prosecution order made by the People's Procuratorate is delivered to the public security organ, which can review the decision.

(ii) Code of ethics

107. Drawing up a set of ethics (code or regulation) for the prosecution stipulating the standards expected of the prosecution in the performance of its duties with the necessary sanctions for its implementation is highly recommended. Senior officers within the department can administer the sanctions.

4. Enhance the Discretion to Withdraw Prosecution

108. As discussed previously, it appears that if there is a system of withdrawal of prosecution, there is a greater chance for abuse. For example, in coming to a decision to withdraw prosecution even if there is sufficient evidence, it may be difficult to understand the reasons why the case was withdrawn. This means that the prosecution can consider factors not relevant. The group, however, does not

recommend abolition of withdrawal of prosecution for the following reasons:

(1) Sometimes, bringing a case to court for prosecution may not be the best solution in the view of the circumstances of the case. These are minor offences or offences relating to young offenders. Withdrawing prosecution in these cases could give a chance to the offender to reform and reintegrate into society;

(2) Without withdrawal of prosecution, all cases except those with weak or no evidence are referred to court. This would include minor cases such as the theft of small items of insignificant value. This will overload the court with unnecessary and trivial cases. In addition, this will increase the time frame for hearing cases; and

(3) Having a system of withdrawal of prosecution can prevent the overcrowding of prisons. Before suspension of prosecution was introduced in 1884 in Japan, the prisons were overcrowded and a great amount of financial burden was caused to the government. This problem was resolved with the introduction of this system.

109. From the above analysis, it is clear that the benefits outweigh the possible abuses. In Costa Rica where withdrawal of prosecution is currently not practiced, a new legislation providing for suspension of prosecution will be in force in the near future[26]. In any case, abolishing withdrawal of prosecution may not prevent these abuses completely. The prosecution, if corrupt, can have the case withdrawn on the basis of no evidence even if there is in fact sufficient evidence to proceed with the trial. Hence, the group is of the view that the practice of withdrawal of prosecution should continue with the additional safeguard that all decisions of the prosecutors be accompanied with reasons. The reasons should be documented so that if need be, the basis of withdrawal of prosecution can be made known to the victim or any other interested party. This will ensure transparency and accountability in the decision-making process.

5. Police Prosecutors

110. In some countries where police prosecutors are not law graduates, there are steps to slowly reduce the number of police prosecutors. This to achieve 100 percent legally trained prosecutors. Additionally, it will also enhance the control of the prosecution. However, the group also recognizes the importance of the institution of police prosecutors in some jurisdictions and the need to preserve it. For these countries, it is recommended that in order to further enhance screening, police prosecutors should receive sufficient legal training, especially if they are not law graduates. The office of the police prosecution should also be independent from the police so that the discharge of its duty is not faltered by loyalty issues.

6. Private Prosecution

111. The group is of the view that the system of private prosecution should be retained for two reasons. First, it can resolve the manpower problems affecting the prosecution. Secondly, private prosecution can be considered a safeguard; for example, when public prosecution is refused, the injured party can institute private prosecution. To resolve the problems of private prosecution, it is recommended that some improvements be made to the existing system. For example, in Thailand, all private prosecutions have to be screened by a preliminary inquiry. In such a case, the court can provide the screening which is lacking.

VII. CONCLUSION

112. As discussed in this paper, case screening is a practice sine quo non to building up an effective criminal justice system in any society. It essentially helps to reduce the workload of a criminal court and consequently, prevents delay in the disposition of cases. The foregoing chapters have discussed, *inter alia*, the need and the importance of having a proper screening system, which authority should be vested with the power to carry out screening in a criminal case and a comparative analysis of the different systems of screenings. It is indubitable that the prosecution in many countries plays a very vital role in case screening. The prosecution is acting as a quasi-judicial entity, operating at an intermediate position between the executive and the courts. The prosecution with a proper legal background can decide best what cases should be brought for trial. At the same time, the prosecution is in the best position to decide what cases should be withheld from adjudication by the courts. Since the prosecution has a direct responsibility to a trial court, he is expected to carry out the screening carefully. That helps to save criticism and humiliation for bringing frivolous cases for trial. At the same time, in the eye of the public, he will be able to preserve his professional integrity. Moreover, this will help to keep a firm tab on the cases pending for trial before a court. Case load will be lessened. Public funds will not be wasted. Government's coffer will not be overburdened. The prisons will not be overcrowded. Consequently, justice will not only be done but seen to be done. Hence, it is the consensus of the group that the power of the prosecution in case screenings should be strengthened to enable the prosecution to discharge its duties more professionally, objectively, legally and independently. However, this should not be misapprehended as a statement to undermine the importance of having the police and the court also involved in case screenings at different stages of a criminal case. After all, for screening, the most important component parts of the criminal justice system are the police, the prosecution and the court.

113. The final part of this report is devoted to consider the various problems and safeguards relating to case screening. In considering the nature of the problems relating to screening, what is easily discernible is that the problems in screening could be due to various reasons. Sometimes, these reasons are peculiar to a society. For instance, manpower problems, problems relating to lack of technical facilities, etc. could be directly attributable to the economic and social conditions of each society. In the circumstances, any move to eliminate these problems should be considered in the backdrop of the economic development of a society.

114. However, some other major ethical and moral problems also have serious impact on case screening. For instance, the non-availability of constitutional safeguards providing an independent position to the authorities involved in case screening and the possibility of having some room for political or extraneous influences on case screening authorities, etc. are viewed as serious problems by the group. It is the consensus of the group that these problems can be resolved by making a firm joint commitment by a society to fight these social evils. One effective way of achieving this goal will be by introducing firm legal safeguards and entrenched clauses to the constitution to protect and nurture the case screening authorities. It is important to acknowledge sincerely these problems are not stemming out of basic social problems. Therefore, we believe that each society and all governments should find out the safeguards and

recommendations to make it possible. These matters are discussed in the paper. Of course, they are neither perfect nor consummate the whole issue fully. However, we hope that they may be of some help to find some realistic measures establish effective criminal justice systems in the global village.

ENDNOTES

1 In this report, the word "Police" refers to police officers only, excluding police prosecutors.
2 In some countries, all serious cases are referred to the public prosecutor for his advice and approval to withdraw prosecution. This means that the Prosecution screens the case.
3 According to our definition, if the prosecution's concurrence is needed to withdraw prosecution, screening is done by the prosecution.
4 The group has found that even if the same term is used in different countries, the standard is not the same. Please refer to discussion under the topic: Evidential Standard for Initiation of Prosecution under Screening by the Prosecution.
5 Definition in Black's Legal Dictionary, 5th Edition.
6 In Costa Rica and France, an examining judge plays a role in screening. This function is similar to the role of the presiding magistrate conducting preliminary inquiry.
7 Please note that the phrase "Summary Proceedings" used in this context refers to the procedures adopted by Sri Lankan courts to screen cases. It is different from the usual summary proceedings as in Japan as it is commonly known.
8 Please note that the phrase "Pre-trial Conference" used in this context refers to the procedures adopted by Philippine courts to screen cases.
9 Please refer to, Rule 118, section 1 of the Rules on Criminal Procedure—Philippines, which reads as follows:
"Pre-trial when proper—To expedite the trial, where the accused and counsel agree, the court shall conduct a pre-trial conference on the matters enumerated in section 2 hereof, without impairing the rights of the accused". Further, Rule 118, section 2, reads as follows:
"Pre-trial conference; subjects—The pre-trial conference shall consider the following:
(a) Plea bargaining;
(b) Stipulator of facts;
(c) Marking for identification of evidence of the parties;
(d) Waiver of objections to admissibility of evidence; and
(e) Such other matters as will promote a fair and expeditious trial.
10 Rule 116, section 2, reads as follows:
"Plea of guilt to as lesser offence—The accused, with the consent of the offended party and the fiscal, may be allowed by the trial court to plead guilty to a lesser offence, regardless of whether or not it is necessarily included in the crime charged or is cognizable by a court of lesser jurisdiction than the trial court. No amendment of the complaint or information is necessary. A conviction under this plea shall be equivalent to a conviction of the offence charged for purposed of double jeopardy."
11 Please note that phrase "Plea Bargaining Proceedings" used in this context refers to the procedures adopted by Sri Lankan courts to screen cases. The meaning may be different from the usual attached to it.
12 In Singapore, the meaning of "reasonable prospect" is similar to the standard of "prima facie" used in Sri Lanka.

13 This number represents the percentage of all cases the prosecution disposed of, including cases relating to offenses such as traffic professional negligence and road traffic violations. Please see, "The Annual Report of Statistics on Prosecution for 1996 of Japan" (Research and Training Institute of the Ministry of Justice).
14 This number represents the percentage of all cases the prosecution disposed of, including the offenses such as traffic professional negligence and road traffic violations. Please see, "The White Paper on Crime, 1995 of Korea" (Research and Training Institute of the Ministry of Justice).
15 This number represents the percentage of all cases the prosecution disposed of, including cases relating to offenses such as traffic professional negligence and road traffic violations. Please see, "The Annual Report of Statistics on Prosecution for 1996 of Japan" (Research and Training Institute of the Ministry of Justice).
16 This number represents the percentage of all cases the prosecution disposed of, including the offenses such as traffic professional negligence and road traffic violations. Please see, "The White Paper on Crime, 1995 of Korea" (Research and Training Institute of the Ministry of Justice).
17 In Japan, the defendant's consent is required. Otherwise, the prosecution cannot utilize the summary proceedings.
18 This number represents the percentage of all cases the prosecution disposed of, including cases relating to offenses such as traffic professional negligence and road traffic violations. Please see, "The Annual Report of Statistics on Prosecution for 1996 of Japan" (Research and Training Institute of the Ministry of Justice).
19 This number represents the percentage of all cases the prosecution disposed of, including the offenses such as traffic professional negligence and road traffic violations. Please see, "The White Paper on Crime, 1995 of Korea" (Research and Training Institute of the Ministry of Justice).
20 For example, in Singapore, the police usually states its views as to whether the cases should be suspended or proceeded with.
21 For example, the judiciary is an independent organ.
22 According to our paper, this refers to the second stage of screening by the police. The first part of the screening should not be abolished.
23 In Costa Rica, there is a move to abolish screening conducted by the courts.
24 In France and Costa Rica, the examining judge also acts like an investigative agency during screening. Such a procedure in Costa Rica will be abolished.
25 All non-prosecution decisions can be appealed to the Prosecution Review Committee.
26 The new law is found in Articles 25 to 29, Law No. 7594 of the Criminal Procedure Code.

GROUP 3

ISSUES CONCERNING PROSECUTION IN RELATION TO CONVICTION, SPEEDY TRIAL AND SENTENCING

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I. INTRODUCTION

The main objective of the criminal trial is to determine whether an accused person has violated the penal law and where found guilty, to prescribe the appropriate sanction. Prosecution is an executive function of the state and is usually discharged through the institution of the prosecutor. The burden of proof rests on the prosecution as per the prescribed standard of proof. The prosecutor faces several problems in proving the guilt of the accused person. Some of these problems fall beyond the scope of his duties and responsibilities. The legal framework, the law enforcement infrastructure and the quality of the personnel operating within the legal system, amongst other factors, considerably affect the conviction rate. In the first part of the paper, our group has defined conviction rate, and analyzed the reasons for variation in rates in different countries. The group has discussed some of the problems which may arise in proving the case in a court from the perspective of the prosecutor under four categories relating to investigation, prosecution, trial, and legal and systemic factors. The group has also proposed solutions to some of these problems.

The right to a speedy trial is a fundamental human right. It has been affirmed in the Universal Declaration of Human Rights 1948 and enshrined in the consitutions and statutes of some countries. Speedy trial is a vital element in the administration of criminal justice. In fact, unnecessary delay in the trial constitutes a denial of justice. The prevention and control of crime as well as the effective rehabilitation of the convict are enhanced by speedy trial. The prosecutor is at the center stage of a criminal trial and plays a leading role in its conduct. In the second part of the paper, the group has examined some of the laws and practices which prevail in different countries where this right is guaranteed. Factors affecting the realization of a speedy trial have also been discussed from the perspective of the prosecutor.

Sentencing is the final stage of a criminal trial. An appropriate sentence is one which strikes a balance between the preservation of social order and the rehabilitation of the convict. The participation of the prosecutor in sentencing and the stage of the such participation differ depending on the legal systems as practiced in different countries. Sentencing remains the prerogative of the

presiding judge/magistrate who usually enjoys wide discretion, and the recommendations of the prosecutor are not binding on him. In the third part of this paper, the group discussions revealed problems which may arise in the sentencing process. The countermeasures proposed therein, are intended to ensure that the prosecutor effectively assists the court in arriving at an appropriate sentence.

II. HOW WELL DOES THE PROSECUTION ESTABLISH ITS CASE AGAINST THE DEFENDANT?

A. Preface

The preservation of life and property is one of the fundamental functions of the state. Over the millennia, the state has endeavored to perform this function through various institutions. Crime and criminality are as old as humanity itself and their total elimination appears to be beyond human ingenuity. The investigative, prosecutorial, adjudicatory and correctional institutions aim at containing criminality within socially acceptable limits. The state causes sanctions to be imposed upon the criminals commensurate with the gravity of their crimes.

Any violation of the law is investigated by the competent agencies and if a prima facie case is made out, a charge sheet/bill of indictment is filed in the competent court. Prosecution is conducted by the prosecutor on behalf of the state. The court adjudicates the case on the basis of evidence adduced and either convicts the offender or acquits him. The court imposes the sentence on the convict after it has heard him and the prosecutor. The aforesaid procedure is followed in most jurisdictions, with occasional variations to punish the offender as per the procedure established by law. The correctional services attempt to rehabilitate him.

B. Conviction Rate

The conviction rate may be taken to mean the ratio of cases convicted out of the total number of cases decided in a given year.

Our group is of the view that the conviction rate is a reasonably good indicator of the efficiency and efficacy of the criminal justice system prevailing in a country. Of course, there is a limitation to the significance of the conviction rate as an indicator of prosecutorial efficacy. Distinctive conviction rates are caused by the differences in the evidential standard required at the initiation of prosecution, more fundamentally the differences in the role of investigators and prosecutors to refer cases to the court. In countries where a considerably low evidential standard is required to send a case to court, it should be tasked to pass judgement of conviction or non-conviction based on such prosecution, the conviction rate is systematically lower than the countries requiring a higher evidentiary standard. A high conviction rate, however, is not the primary objective of the criminal justice system.

Notwithstanding the aforesaid, a high conviction rate may be indicative of methodical and painstaking investigations and effective prosecution. On the contrary, an excessively low conviction rate definitely indicates unsuccessful and ineffective prosecution.

It should be made clear, however, that it is not the mandate of the prosecutor to secure conviction at any cost. He is required to be fair, impartial and must present all the facts, including facts and circumstances favorable to the offender, before the court for an appropriate decision. This is the general practice in most common law countries, where the prosecutor does not have the authority to withhold a case from prosecution.

Our group realizes that no conviction handed down by the court of first instance

is final until confirmed by the highest court in the event of an appeal. However, as no published data is available in relation to the decisions of appellate courts, data regarding the convictions as rendered by the courts of first instance is used. Similarly, the convictions obtained through the plea bargaining process shall be dealt with in this paper.

C. Overview of Conviction Rate in Some Countries

1. England and Wales[1]

The conviction rate in England and Wales was 90.6 percent in 1992-93; 90.2 percent in 1993-94 and 90.3 percent in 1994-95. It may, however, be added that the newly created Crown Prosecution Service has the power to withdraw a case from prosecution under certain circumstances. Further, about 85 percent defendants pleaded guilty.

2. India[2]

Under the Indian Penal Code offences, the conviction rate was 47.8 percent in 1991 and 42.1 percent in 1995. In 1995, the conviction rate for grave offences was as follows: murder, 37.0 percent; culpable homicide not amounting to murder, 36.3 percent; rape, 30 percent; kidnapping and abduction, 30.3 percent; robbery, 34.1 percent; and burglary, 42.7 percent. However, for the Special and Local Laws, the conviction rate was 85.8 percent in 1995. This is largely explained by a high conviction rate in traffic related offences i.e., 90.4 percent.

3. Indonesia[3]

The overall conviction rate was 98.4 percent in 1994. Of offenders, 84.17 percent were sentenced to terms of imprisonment and others were fined/paroled or given minor sentences.

4. Nepal[4]

According to a survey conducted in 20 districts of Nepal in 1996, the average conviction rate was found to be 16 percent.

5. Japan[5]

The conviction rate in Japan is extremely high. In District Courts, it was 99.91 percent in 1994; 99.92 percent in 1995 and 99.94 percent in 1996 in cases wherein the defendant had pleaded guilty. In cases wherein the defendant had not pleaded guilty, the conviction rate was 97.73 percent in 1994; 97.92 percent in 1995 and 98.01 percent in 1996. In Summary Courts, the conviction rate was 99.79 percent in 1996 wherein the defendant had pleaded guilty and 94.90 percent in cases wherein the defendant had not pleaded guilty. In grave offences such as homicide, robbery, bodily injury, rape or larceny, the acquittal rate is as low as between 0.1 to 0.3 percent.

6. Republic of Korea[6]

Conviction rate in 1993 was 99.5 percent. It was 99.11 percent in murder; 99.87 percent in robbery; 99.74 percent in rape and 99.59 percent in bodily injury cases. In special code offences, conviction rate was 99.61 percent.

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[1] Mr. G.D. Ethrington's paper on "The Crown Prosecution Service and the Public Interest" published in UNAFEI Resource Material Series No.49, p. 93.

[2] As per data published by National Crime Records Bureau, Ministry of Home Affairs, Govt. of India, in Crime in India, 1995.

[3] Bureau of Central Statistics, Government of Indonesia, 1994, p. 26.

[4] As per country paper presented by the participant of Nepal in this course.

[5] The White Paper on Crime, 1996, Research and Training Institute, Ministry of Justice, Government of Japan, p. 112.

[6] The White Paper on Crime published by the Government of Korea, 1993, p. 182.

7. Thailand

The conviction rate ranges between 97 to 98.40 percent from 1991 to 1993, as per statistics published by the Attorney General's Office. However, we have been informed that a large proportion of these convictions are reversed by the appellate courts.

8. United States of America[7]

The conviction rate turned by the federal courts in the U.S.A. was 82.7 percent for all offences in 1993. The rate in grave offences was as follows: murder, 78.6 percent; negligent manslaughter, 78.3 percent; assault, 76.3 percent; robbery, 92.5 percent; rape, 80.2 percent; and kidnapping, 64.0 percent. It may, however, be added that 90 percent of the convicts pleaded guilty and another 1 percent pleaded nolo contendere. The remaining 9 percent were convicted at trial.

9. Others

No published data is readily available about Costa Rica and China. Our group is, however, informed that the conviction rate in Costa Rica was 56 percent in 1996. In China, it was 99.75 percent in 1994 and 99.5 percent in 1995[8].

In Sri Lanka, the conviction rate was 86 percent in grave crimes in 1996[9] .

In the Sindh Province of Pakistan, the conviction rate was 40.96 percent in 1993; 36.86 percent in 1994 and 50.88 percent in 1995[10].

D. Analysis of Conviction Rates

The conviction rate is largely affected by the quality of investigation and the standard of proof prescribed by law to send the case to trial. The propensity of offenders to plead guilty also has a significant bearing on the conviction rate.

In Japan and the Republic of Korea, the conviction rates are extremely high. In these countries, prosecutors have the statutory discretion not to initiate prosecution due to insufficiency of evidence. They also have the authority to conduct investigation in addition to directing, guiding and supervising investigations conducted by the police. Resultantly, only strong cases are sent up to the courts. Further, in Japan 92 percent of offenders plead guilty, and the Japanese Criminal Procedure Code provides for exceptions to the hearsay rule in certain circumstances, which help in proving the cases. These factors largely explain the high conviction rate. In Indonesia, the conviction rate is also extremely high. This is largely explained by strict screening made by prosecutors at the pre-trial stage.

The conviction rates turned out by the U.S. federal courts are fairly high, even though 90 percent of convictions (including murder cases) are based on pleas of guilt. The same is true of England and Wales.

At the other end of the spectrum are countries like India and Sri Lanka. The conviction rate in Penal Code Offences in India was as low as 42.1 percent in 1995. The conviction rate in the Sindh Province of Pakistan is also comparatively low. In these countries, the standard of proof required for conviction is much higher than the one required for sending a case to the court. In most countries, cases are sent for trial on the basis of "prima facie" evidence. At the same time, the cases should be sent to the court where there exists "prima facie" evidence. The evidence should be such that the defendant has a case to answer.

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[7] Compendium of Federal Justice Statistics, 1993, U.S. Department of Justice, p. 43.

[8] As per responses to our questionnaire received from the participants from China and Costa Rica.

[9] As per the lecture paper presented by Mr. D. P. Kumarsingha, Additional Solicitor-General, Attorney-General's Department, Sri Lanka, in this course.

[10] As per the country paper presented by the participant of Pakistan in this course.

However, the case is required to be proved "beyond reasonable doubt" in court to secure a conviction. The evidence required should be conclusive in nature and inconsistent with the innocence of the defendant. Furthermore in most countries, the defendant is presumed to be innocent until proved guilty. The burden of proof wholly rests on the prosecution and only shifts as per the conditions prescribed by law.

This low conviction rate is also due to the inadmissibility of confessions made before the police; the lack of binding legal provisions for compelling the suspect/defendant to give samples of his blood, handwriting and fingerprints, etc. and the negligible percentage of offenders who plead guilty unlike the practice prevailing in England, Japan, the Republic of Korea, the U.S.A., etc.

Our group discussed whether prosecution initiated by police prosecutors undermines their capacity to establish the case against the defendant. There were several opinions about the validity of police prosecution.

E. Problems in Proving the Guilt of the Defendant

The conviction rate in countries like Indonesia, Japan and the Republic of Korea is very high, whereas in countries like India it is relatively low. It is now proposed to examine problems in proving guilt particularly in the context of countries having a low conviction rate. The problems are divided in four categories, namely; (a) investigation; (b) prosecution; (c) trial; and (d) legal and systemic problems.

1. Investigation-related

a) Insufficiency of evidence due to poor investigation

The investigating agencies are required to collect all available evidence during investigations. If painstaking and timely investigations are not conducted, valuable evidence maybe lost. Sometimes the police[11] fail to collect vital evidence from the site such as blood stains, fingerprints and other evidence in cases of physical violence, due either to lack of training or inefficiency. At times, the statements of key witnesses are not recorded as their importance in proving the case is not understood. Statements may also be recorded in a casual and slipshod manner by the investigating officer which leaves gaps in the evidence. Occasionally, the police fail to work in collaboration with forensic experts. As a result, forensic evidence is not collected for use against the offender. The police may send cases to the court even when the evidence is insufficient for reasons of expediency.

b) Inexperience and inadequate qualification of investigating officers

Investigations are often conducted by low-ranking officers who are new in service and lack experience. As the caliber of such officers is not high, they may be deficient in procedures. Hence their inability to conduct quality investigations. The lacunae left are often harmful in trial.

c) Non-separation of investigative staff

Even though some countries have set up specialized investigative agencies to handle specific category of crimes, the police still remains the main investigating agency to handle general crimes. In most countries, investigations are conducted at police stations where the police handle both investigations and duties to maintain social order. No staff is earmarked exclusively for investigative work. Generally, the police

[11] Hereinafter, we use the word "police" as a typical example of investigating agencies.

gives preference to activities related to the preservation of social order which results in lack of sustained and systemic investigation, inordinate delay and the consequential loss of valuable evidence.

d) Poor supervision by the superiors

Sometimes senior officers are unable to monitor and supervise investigations in a timely manner due to heavy work load or indifference. Hence, vital lacunae are left in cases and are exploited at the trial stage.

e) Lack of qualified personnel, logistics and financial resources

Investigating agencies do not have well qualified officers in sufficient numbers. Often they after have excessive work load and the quality of investigation is adversely affected. Efficient investigation necessitates qualified personnel commensurate with the work load. Besides, lack of resources such as transportation, communication and office equipment may affect the quality of investigations. Investigating agencies suffer from these constraints in some countries.

f) Lack of cooperation and coordination with prosecutors

The prosecution is separate from the police in most countries and they often function under separate ministries. In countries where the prosecutors do not enjoy the statutory authority to guide and supervise police investigations, they are not usually consulted by the police during investigation even when legal advice is necessary. Sometimes, prosecutors are consulted but their directions are not complied with due to departmentalized perceptions.

g) Lack of transparency and other forms of malpractice

In some countries, investigations are not always conducted in a fair and just manner due to extraneous factors such as lack of probity amongst the investigators, political pressures, etc. This leads to various forms of malpractice which include the failure to record statements from key witnesses or the intentional manipulation of statements with a view to screening the offenders.

2. Prosecution-related

Public prosecution is an executive function of the state which is conducted by the prosecutor. It is his primary responsibility to prove the guilt of the defendant. Public prosecution, *inter alia*, has a significant bearing on the conviction rate. The problems in efficient prosecution are enumerated hereinafter.

a) Inadequate or delayed scrutiny by the prosecutor

In Indonesia, Japan, Maldives, Nepal, the Republic of Korea and Sri Lanka, the prosecutor has absolute authority to determine whether a case should be sent for trial or not, and he alone determines if the evidence is sufficient. In some countries, the case file is sent to the prosecutor for screening at the pre-trial stage, even though he does not make the final decision. Sometimes, the prosecutor does not conduct proper screening due to heavy work load or other extraneous factors. In Sri Lanka, the police sends the case file to the Attorney General's Office for advice. Scrutiny may take a long time, and it may be too late for the State Counsel to make any meaningful suggestion to the police, to improve the quality of investigations. Hence, relatively weak cases are sent to court.

b) Inadequate supervision of investigations

In countries where the prosecutor is vested with the authority to supervise investigations, he may not exercise it sufficiently due to heavy work load or indifference. There is not always adequate cooperation with the police in the discharge of supervisory functions.

c) Inadequate preparation for trial

To conduct a trial is one of the most important functions of the prosecutor. It is observed that sometimes the prosecutors are not prepared for the trial and fail to examine the witnesses in a professional manner. As a result, court time is wasted.

d) Delay in trial

This is a serious problem in some countries and may be fatal to the prosecution. Due to delayed trials, some witnesses may die, suffer from memory loss, or lose all interest in prosecution. Some defense counsels apply for adjournments on flimsy grounds further contributing to unnecessary delay in trials. The prosecutor should oppose such applications.

e) Reluctance of witnesses to testify

It is a serious problem in crimes relating to organized gangs, terrorist groups and drug offenders. The witnesses are often reluctant to testify due to fear of reprisals or because they are compromised themselves with the defendant.

f) Difficulties in obtaining and adducing forensic evidence

Forensic evidence is extremely useful in proving the guilt of the defendant. The reports prepared by experts should be tendered in court and used with the testimonies of the said experts. Sometimes these reports are not available when needed court. It is not always easy to secure the presence of the experts in court as they have other functions.

g) Non-cooperation of victims

Victims may not cooperate with the prosecution and sometimes retract their previous statements.

h) Lack of cooperation between the prosecution and the police

For successful prosecution, the need for cooperation and understanding between these agencies which cannot be over emphasized. The police is required to secure the presence of witnesses when they are needed in court. Generally, the prosecutor also ensures the execution of court orders through the police agency. Any lack of cooperation may result in inefficient prosecution and delayed trial.

i) Quality of prosecution

For efficient prosecution, it is important that the prosecutor be preferably a law graduate, have adequate experience and a good command of the law.

3. Trial-related

a) Inadequate court structures

In some countries, the problem of "docket explosion" is very serious. The courts are overburdened and their number not commensurate with the needs. This often results in delayed trials, which may be prejudicial to the prosecution.

b) Lack of resources—human or otherwise

In some countries, the courts do not have adequate support services such as stenographers, typists and interpreters, modern office equipment (i.e., computers) and telephones, which consequently affects the work of the courts.

c) Numerous and unnecessary adjournments

Cases are adjourned on flimsy grounds, often at the request of defense counsel. Sometimes prosecutors do not oppose these applications. This impedes the trial process.

d) Stay on trial by the appellate courts

It is a serious problem in some countries. Stays disrupt the court schedule and delay trials.

e) Political pressures and other extraneous factors

The court may not conduct fair and impartial trials due to political pressure and other extraneous factors. Judgements may be intentionally delayed.

4. Legal and Systemic Factors

Apart from the problems enumerated above, there are some problems which are inherent with the legal structures and systems prevailing in certain countries. These problems are as follows:

a) Exclusion of evidence

In some countries, confessions made before police officers are not admissible in evidence irrespective of the rank of the officer. Due to this legal disability, valuable evidence against the defendant is lost. Furthermore, in some countries, the defendant is not legally bound to give his fingerprints, handwritings or blood samples, etc., either during investigation or the trial. Valuable forensic evidence is thus precluded, which makes the prosecution's task all the more difficult.

b) Inadequate salaries and status of criminal justice system authorities

The salary scales of the police, prosecutors and judges in some countries are relatively low. This makes it difficult to attract suitable hands in these professions. Investigations conducted by low-ranking police officers do not invoke the confidence of the public at large.

c) Lack of coordination between the police, prosecution and prison authorities

In some countries, these departments are placed in different ministries. Prisoners are not produced in court on the appointed dates because of lack of coordination. Lack of cooperation between the prosecutors and the police officers is prejudicial to the prosecution case, as mentioned earlier.

F. Solutions to the Problems

Our group has discussed in detail the countermeasures to overcome the problems enumerated above. Solutions to these problems are as follows:

1. Investigation-related

a) Investigation by experienced and qualified police officers

Investigations, particularly of grave crimes, should be conducted by experienced, well-trained and senior police officers. Certain statutes do prescribe the rank of officers competent to conduct investigations under special laws. However, our group suggests that investigations for serious offences be conducted by senior officers. The supervisory officers should be deeply involved in investigations from the inception to the end of the case.

b) Use of scientific methods of investigation

Forensic evidence is often conclusive in nature and difficult to rebut. Police officers should be trained to collect forensic evidence and to use other modern scientific methods of investigation.

c) Separation of investigating staff

Our group feels that specialization within the police force is essential for improving the quality of investigations. The group recommends the creation of a separate cadre of investigating officers in each police force.

d) Adequate logistical and financial resources

To improve the quality and speed of investigations, it is imperative that adequate resources—human and material—are made available to the police. Adequate budgetary provisions should be made for this purpose by the competent authorities.

e) The prosecutor and police should act in harmony on the basis of mutual trust and confidence

Our group feels that prosecutors should be involved in investigations as this may improve their overall quality.

f) Others

Political interference in the activities of the police is a fact in some countries, even though the degree may vary from country to country. The police needs to be insulated from political influence by creating a buffer between it and the political authority. The police also needs to improve its ethical standards and enhance its professional skills to better invoke greater public confidence.

2. Prosecution- and Trial-related

a) Thorough screening by the prosecutor

The prosecutor needs to meticulously screen cases so that only legally viable cases are sent up for trial. This would reduce the chances of acquittal and save the defendant from avoidable harassment (incarceration in some cases) and financial liability. In countries, where the prosecutor does not have the authority to drop prosecution of his own level, he should record his candid and categorical opinion in the case file so as to enable the competent authority make an appropriate decision. Strict scrutiny by the prosecutor would definitely lessen the burden of the courts.

b) Meticulous preparation and diligent production of parties during trial

The prosecutor should meticulously prepare both the facts and law in every case. He should review the case file, exhibits and also test witnesses, if necessary. In this regard, the ways and means of prosecutor's preparation vary, depending on the differences in the legal framework of the disclosure or discovery of evidence. Irrespective of the degree of one party's duty to disclose evidence to the other, it is always recommendable for the prosecutor to expect the potential defense and try to eliminate the room for reasonable doubt about his case. He should also secure police cooperation to ensure the production of witnesses in court on the appointed dates. The work load of the prosecutor should be kept within reasonable limits so that the quality of his output is not adversely affected.

c) Improving the court structure

In those countries that suffer from the problem of "docket explosion", the number of courts should be increased. Also, adequate secretarial services and other logistical support should be provided.

d) Strict attitude toward adjournments

The prosecutor should vehemently oppose frivolous applications by the defense counsel.

e) Improving the quality of prosecutors

Prosecutors should have a good command of the law, procedure and enough experience for effective prosecution. It is, therefore, essential that qualified personnel be inducted into the profession from the open market. This would necessitate improving the salary scales, perks and status of prosecutors.

3. Legal and Systemic Factors

a) Amendments in laws

In some countries, the law expressly excludes the admissibility of confessions made before police officers. Also in some countries, the witness statements before investigators may never be admissible as incriminating evidence (not merely as impeachment evidence) in the court without the defense's consent. Such provisions, apart from being out of line with the laws applicable in other countries, preclude valuable evidence from being adduced in court. These provisions should be considered for review by the competent authority[12]. Similarly provisions need to be incorporated in the procedural laws of some countries to compel suspects to give samples of handwriting, fingerprints, blood, etc., to the investigating agencies.

b) Mobile courts

In some jurisdictions, the transportation network is not well developed, and parties find it very difficult to attend court sessions. Besides, such travel involves extra expenditure. Setting up mobile courts in such jurisdictions may be a way of taking justice closer to the people and reducing expenditure.

c) Witness protection program

Witnesses who are reluctant to depose in court for fear of reprisals need protection from the state. In the U.S.A., there are legal provisions for the protection of witnesses, which also permit a change of their identity, their relocation and financial support until such time that they become self-reliant. This program has yielded good results in that several gangsters have been convicted on the basis of the testimony of such protected witnesses. A similar witness

[12] For reference, Article 322, paragraph 1 of the Code of Criminal Procedure of Japan provides as follows:
"A written statement made by the accused or a document which contains his statement and is signed and sealed by him may be used as evidence against him, if the statement contains as admission by the accused of the fact which is adverse to his interests, or if the statement was made under such circumstances as secure a special credibility. However, where the written statement or document contains an admission by the accused of the fact which is adverse to his interests and there exists any suspicion that the admission has not been made voluntarily, it shall not be used as evidence against the accused as well as in cases prescribed by Article 319, even though the admission is not a confession of a crime."
Also, Article 321, paragraph 1, item 2 of the same Code provides for the exception to hearsay rules, approving on the following conditions the admissibility of a written statement made by a person other than the accused, or a document which contains his statement and is signed and sealed by him:
"As regards the document which contains a statement of a person given before a public prosecutor, where he does not appear or testify on the date either for the preparation for public trial or for the public trial because of death, unsoundness of mental condition, missing, staying outside of Japan or being so physically incapacitated that he cannot testify, or where he, appearing on the date above mentioned, has given a testimony contrary to or materially different from his previous statements; however, in the last case this shall apply only where there exist special circumstances, because of which the court may find that the previous statements are more credible than the testimony given in the course of interrogation on the date above mentioned."

protection program may be launched in countries affected by organized crime and terrorism.

III. IS SPEEDY TRIAL REALIZED?

A. Preface

Courts are the citadels of justice—they are the vanguards of life, liberty and property. They radiate the last ray of hope to those in despair.

Indeed courts perform a very vital role in society. They have the enormous task of deciding cases and controversies so that justice may be rendered. The fulfillment of this duty by the court in promptly resolving controversies is necessary for the people's continued belief in them and respect for the law.

B. What is Speedy Trial?

Speedy trial is considered a fair process conducted within a reasonable period of time. Our group considered speedy trial an indicator of the efficiency of a criminal justice system because where it exists:

- There is a faster flow of cases.
- It may facilitate the writing of court judgements.
- There will resultantly be more cases heard and disposed of.
- Litigation expenses are reduced as cases may be heard and completed in one or more court sessions.
- Tension on the part of the parties, especially those in police or prison custody, will be eased, since the pendency of a case is reduced to the minimum period. People will, thus, resort to the judicial process instead of taking the law into their hands.

"Justice delayed is justice denied" runs the proverb. Delay in the criminal justice system is a matter of major concern. It raises a number of issues of legal significance, some constitutional, others of statutory dimensions.

It cannot be denied that speedy trial is in the interest of both the defendant and the society. It is a guarantee to the defendant against his infinite incarceration without trial, (if he is in custody) and tends to minimize anxiety if he is admitted bail. Speedy trial serves the public interest in that it minimizes the possibility of the defendant jumping bail or influencing witnesses. Besides, pre-trial incarceration is costly and delayed trial may cause key witnesses to suffer from memory loss, or become unavailable.

It is difficult to determine a precise time frame for a speedy trial. However, speedy trial not only means the commencement of trial within a statutory prescribed time frame from the time the suspect is arrested, it also encompasses the completion of the trial within the legally prescribed time frame. It is the endeavor of our group to address these issues in the light of legal and constitutional provisions prevailing in some countries.

C. Present Situation in Some Countries

The legal and constitutional provisions prevailing in some of the countries are as follows:

1. India

Article 21 of the Constitution of India guarantees the right to life, which has been interpreted by the Supreme Court of India to mean right to speedy trial.

According to section 167 of the Criminal Procedure Code, the charge sheet must be filed against the defendant within 90 days from the date of arrest in offences punishable with death, imprisonment for life or imprisonment of not less than 10 years, and within 60 days in other offences, failing which he will be released on bail. The failure to file the charge sheet in the afore time frame, however, does not prejudice the trial. Besides, there is no law in India which prescribes a time frame for the completion of trial.

2. Indonesia

The Indonesian Criminal Procedure Code prescribes the time frame of detention of a suspect at pre-trial stage. If the arrest is made by police, the maximum detention period is 20 days, which may be extended to 40 days by the prosecutor and another 60 days by the District Court, the total being 120 days. Detention is ordered by the District Judge is 150 days. The Code also prescribes the maximum period of detention by the High Court to 150 days and the Supreme Court to 170 days. If the trial or appeal is not finalized within the above time frame, the defendant has the statutory right to be released on bail but it would not prejudice the ongoing trial.

3. Japan[13]

Article 37-1 of the Constitution of Japan guarantees the right to a speedy trial. Furthermore, Article 253-2 of the Public Officers Election Law, mandates completion of the trial within 100 days from the date of the institution of a case in respect of election fraud and other election related offences.

As per the statistics published by the Supreme Court of Japan, the average time for the completion of trials by district courts was 3.3 months in 1994 and 1995, while in 1996 it was 3.2 months. The average number of trial dates was 2.8 months. In summary courts, the average time taken for trial was 2.3 months in the aforesaid years. The average number of trial dates was 2.4 months. This means that the disposal in summary courts was faster than in the district courts.

4. Nepal

The Common Code ("Muluki Ain") of Nepal (Part II, Section 14) prescribes the time frame for the completion of a trial by the court. If the case pertains to an area located adjacent the court; the time limit is 6 months. This may be extended to 1 year for cases wherein the cause of action lies in remote and distant areas.

The Public Offences Act, 1972, empowers the police to arrest a suspect without warrant if he is found to be indulging in street violence, teasing or the molestation of women, obstructing public servants in their duties; disrupting public transportation; power supply lines or postal services; illegally occupying public property or indulging in any acts harmful to the society, etc. The police are mandated to file the charge sheet against the arrested person within 7 days of arrest in the court of Chief District Officer. As per this Act, if the Chief District Officer does not complete the trial within 90 days, the defendant will be released on bail but the trial will not be prejudiced. Section 6 of the Act, however, mandates the completion of trial within 90 days.

5. Republic of Korea[14]

The Republic of Korea has enacted a law, the Special Act for Speedy Proceedings, 1981, which prescribes a time frame of six months for the completion of a trial. The Appellate Courts have four months within which to complete the proceedings[15].

It may be pointed out that non-completion of trial in the above time frame does not prejudice the trial. The available data shows that only 55.3 percent of cases were disposed of by the District Courts within three months. This disposal was 70.6 percent in the Summary Courts. However, within six months the disposal

[13] The White Paper on Crime, 1996, Government of Japan, p. 7.

[14] The White Paper on Crime, 1993, Government of Korea, p. 181.

[15] Article 22 of said Act reads, "A judgement must be pronounced within six months in the court of the first instance calculated from the day when the public action was instituted, and within four months in the court of other levels calculated from the day when the record of proceedings was sent".

in both the courts went up to, 97 percent and 96.47 percent respectively.

6. United States of America[16]

The right to a speedy trial has been guaranteed by the sixth Amendment in the Constitution of the U.S.A. It was followed by the Federal Speedy Trial Act, 1974[17]. According to the aforesaid Act, an indictment or information is to be presented to the defendant within 30 days from arrest or issuance of summons, with a 30-day extension if no grand jury is in session. If the accused person pleads not guilty, he must be brought to trial within 70 days, but not less than 30 day from the date of information or indictment or from the date he appeared before a judicial officer of the court in which the charge is pending, whichever of the dates occurs last. In computing this time period, the Act specifically excludes any period of delay resulting from other proceedings concerning the accused person, etc. The U.S. Supreme Court while interpreting the law has recognized the right to a speedy trial to be a relative one[18].

The statistics published by the Justice Department indicate that the average time for trial disposal in U.S. federal courts was 8.2 months in 1993. Felony cases on average took 9.5 months; violent offences 7.8 months; property offences 8.4 months; drug offences 10.8 months; and misdemeanors only 3.3 months. The time taken was less in cases wherein a plea of guilty was entered.

In some countries, the law prescribes the time frame for the commencement of the trial from the time of arrest of the suspect. There are also laws which set a time limit for completion of trial. Our group is of the view that speedy trial is in the interest of justice and also protective of the human rights of the defendant. It reflects on the efficiency of the criminal justice system.

The group feels that trials must be completed with utmost speed but refrained from prescribing any time frame as this would depend on the nature of the case, the legal framework, in which the trial is being conducted, geographical and infrastructure-related factors.

In some of the countries where a common law system is predominant, it inevitably takes a certain period of time to complete a trial by adversarial court proceedings. Due process requires a hearing wherein both parties present evidence to establish the facts of the case, and the burden of proof, lies with the prosecutor. It has been observed however, that while "the search for truth is best aided by allowing both parties to argue the same question, the process is time-consuming".

The group also emphasizes that the quality of trials should not be compromised, for the sake of speed.

D. Causes of Delays in Trials

Our group in its deliberations considered that delays may be classified under four categories:

- court-related,
- prosecution-related,
- defense counsel-related, and
- general.

1. Court-related Factors

a) The split trial process

Cases are generally tried on a piecemeal basis. This means that the trial proceedings are conducted in sessions spread out over a period of time. Usually one witness testifies for an hour or less in one hearing

[16] Compendium of Federal Justice Statistics, 1993, U.S. Department of Justice, p. 44.

[17] 18 U.S.C.A. sections 1361-3174.

[18] Criminal Justice Administration, by Frank. W. Miller and Robert O. Dawson, p. 752, "The right of speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice."

and then continues at the next hearing for "lack of material time", a stereotype reason stated.

b) Incompetence and ignorance of the law

As a factor in unnecessary delay, our group has considered the incompetence of some judges/magistrates. The failure to keep abreast with the law and jurisprudence also causes undue delay, particularly when a judge is unfamiliar with the rules of procedure.

c) Heavy case load and poor case flow management

Due to the increase in the population in most countries and the deterioration of economic conditions, considerable number of new cases are added yearly to the already overcrowded dockets of the courts. There seems to be a tendency to schedule cases over a long lapse of time. This is so because there are too many cases scheduled for a given trial date and it is impossible for the trial judge to hear them all. Those that cannot be called are re-scheduled for some other date. As a result, only a few cases are heard on any given trial date.

d) Delay caused by court personnel

Delay may be caused by court personnel who are unprofessional or who lack proper managerial and technical skills. The scheduling of cases, issuance of summons, record keeping, the retrieval of information and the docketing of cases are done by court staff, thus relieving the judges/magistrates of the "house keeping" chores of the court. Since the jobs of court staff are interrelated, the absence or incompetence of any one of them can scuttle trial proceedings, e.g., the absence of a court stenographer will cause the postponement of all the cases scheduled for hearing and may delay the completion of records of proceedings for those cases that are appeal.

2. Prosecution-related Factors

a) Inadequate preparation and lack of evaluation of evidence

The excessive workload of a prosecutor may result in inadequate preparation for trial. Additionally, the lack of cooperation between the prosecution and the investigating agencies would undoubtedly result in non-production of exhibits and/or witnesses during the trial date, hence leading to adjournment.

b) Failure to show a clear outline of proving cases

Failure by prosecutors to show a clear outline as to how they intend to present their cases, makes it difficult for the court to allocate sufficient time to hear and determine cases. Factors such as documentary evidence, statements of witnesses and of the defendant should enable prosecutor to calculate the number of witnesses and the length of time necessary for their respective testimonies.

3. Defense Counsel-related Factors

a) Abuse of court process

Defense counsel are known to use dilatory tactics to gain an advantage over the opposing party. By filing unnecessary motions for the review of court orders, a defense counsel hopes that the prosecution may lose interest in the case. Defense counsel think that by prolonging the cross-examination of a material witness, he may become tired and will simply disappear. Other dilatory tactics include the presentation of corroborative witnesses to prove matters that have already been established; filing of writs for certiorari, mandamus or prohibition; and seeking a review of orders by a trial court.

b) Heavy volume of cases

The heavy volume of cases handled by a defense counsel eventually leads to

scheduling conflicts which, may result in adjournments, thereby inadvertently delaying court proceedings.

c) Incompetence and failure to prepare

The heavy case load of the defense counsel may result in inadequate preparation for trial. The defense counsel thus unprepared for the trial may ask for a adjournment, thereby delaying the disposition of the case.

4. General

a) Our group considered other general factors such as lack of discipline and moral probity in the execution of different functions. External pressure and interference from politicians and/or other senior government officials with vested interests in particular cases and other forms of malpractice such as corruption within the criminal justice system were also considered contributory to unnecessary delay in trials. In addition, the group observed that sufficient initial and continued professional training was lacking in the judiciary and the prosecution.

b) Our group observed that there is wide-spread poverty and ignorance of the law in many developing countries, which was identified as one of the factors contributing to the delay in trials. The group cited examples where a defendant or a witness could not travel to court due to lack of bus fare or a means of transportation. In some countries where defense counsel is not provided the defendant by the state, they apply for adjournment on the ground that they were still making arrangements for such defense counsel. In this respect, the courts found it difficult to deny them their constitutional right to defense counsel and grant such applications.

E. Measures to Be Taken for the Realization of Speedy Trial

To combat delay and reduce the court backlog, our group considered the following measures:

1. To exercise better case control, the trial court judges should conduct an inventory of their cases to determine the actual number of cases pending in their respective courts. The cases could then be categorized into those which are pending trial, those adjourned for judgement and those which have been completed but are pending appeal. It is, therefore, important for judges to allocate their time so as not only hear and determine cases but also to dispose of pending cases.
2. With regard to effective court management, the Supreme Court should urge judges to observe strict rules of punctuality and minimum hours of daily work. The presiding judges should closely supervise their clerks of court to ensure that they perform their functions in an appropriate manner.
3. Judges should observe the rules of procedure regarding issues such as restraining orders or preliminary objections, and act promptly on all motions and interlocutory applications before the courts.
4. The courts should make appropriate schedules for trials by seeking the cooperation of the parties concerned. More than one court session should be allocated in advance and most desirably on consecutive trial dates.
5. The prosecutor should be able to calculate the time necessary to present his case, and propose a concrete schedule for the case. This will enable the court to plan the time frame for the cases with a view to avoiding unnecessary delay in trial.

6. Witnesses and exhibits should be produced and tendered on the relevant dates. This objective may be achieved with the cooperation between prosecutors and the investigating agencies. Additionally, prosecutors must assure the security of witnesses by ensuring that their legal rights are strictly observed during their respective testimonies. This security should be extended to the witnesses before and even after testimony to avoid possible intimidation. Prosecutors should therefore liaise with the investigating agencies dealing with the case to achieve this objective.
7. Our group observed that for effectiveness and efficiency in the administration of justice, there is a need for professional training of judges/magistrates and prosecutors before they join their respective professions. This will ensure that all legal issues are addressed in view of a fair application of the law.
8. The prosecutor should scrutinize the case files by anticipating the rebuttal of the case by defense counsel.

IV. IS THE APPROPRIATE SENTENCE IMPOSED ON DEFENDANTS?

A. What Is Appropriate Sentence?

Appropriate sentence should reflect the major objectives of punishment which include retribution, general and specific deterrence and rehabilitation.

The court has wide discretionary powers in the selection of the type of punishment considering the gravity of the offence and personality of the convict. The prosecutor has professional duties as a representative of the public interest to ensure that the appropriate sentence is meted out by the court. It is for this reason that prosecutors in most jurisdictions are required to assist the court by disclosing as much information as possible relating to sentencing, that is, the circumstances of the commission of the offence and the personality of the convict.

B. Present Situation

1. An Overview of Sentencing Process

The degree of involvement and the time of such involvement by prosecutors in sentencing, varies depending on the system in application in different countries. In some common law countries, the prosecutor makes general recommendations relating to sentencing at the end of the trial during the closing statement/argument. Following conviction, he is only expected to disclose the past criminal record of the convict to the court. In countries following the civil law system, the prosecutor makes recommendations which may be detailed or not in his submissions to the court at the end of the trial. The past criminal record of the convict is contained in the case file, which is transmitted to the trial judge or magistrate before the commencement of the trial.

Before imposing sentence, the court shall provide the defense counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally to ask him if he wishes to make a statement or to present any information in mitigation of punishment. In some common law countries, the pre-sentence inquiry is a procedural step prior to sentencing at which the judge of a court may examine the pre-sentence report and all other relevant documents before imposing sentence. Sentencing is a crucial stage of criminal prosecution requiring the assistance of an appointed defense counsel. The prosecutor shall also have an opportunity to speak to the court.

In Japan, during the trial, mitigating circumstances are presented to the court by the prosecutor and the defense counsel respectively. The prosecutor submits, in addition to the charge, any other

aggravating evidence such as the past criminal record of the defendant. On the other hand, the defense counsel may produce witnesses to present mitigating circumstances. In this case, the defense counsel examines the witnesses in relation to mitigating circumstances. In his closing argument, the prosecutor makes a detailed recommendation for specific punishment to be determined by the court.

2. Involvement of Prosecutors

The prosecutor may be involved at various stages of criminal proceedings from investigation to sentencing:

a) Plea bargaining

Plea bargaining in a criminal case is the process whereby the defendant and the prosecutor work out a mutually satisfactory disposition of the case subject to court approval, which usually involves the defendant's pleading guilty to a lesser charge or to only one or more of the counts of an indictment in return for a lighter sentence than that possible for the graver charge.

b) Examination of witnesses

As mentioned above, in some countries like Japan, the defense counsel calls witnesses (relatives, employers, friends, etc.) only to disclose mitigating circumstances to the court. By examining the witnesses, the prosecutor can ascertain whether they present sufficient guarantees that they will care for the convict.

c) Closing argument

The closing argument is the final statement made by the prosecutor and the defense counsel respectively to a jury, or the court summing up the evidence that they think the other has failed to establish. The prosecutor may disclose the past criminal record of the defendant and argue that the defendant's past record is not good, therefore, maximum punishment should be imposed on him. At this stage, in some countries like Japan, the prosecutor recommends specific punishment, that is, the type of penalty, the nature and duration of the term of imprisonment and/or the sum of the fine.

d) Victim Impact Statement

In cases where the victim experiences loss over and above the ordinary pain and suffering, this fact may be revealed to the judge after the defense has pleaded for mitigation. The judge may take this into consideration in sentencing. This is to ensure a fair and equitable sentence. This system is in practice in New Zealand and Singapore.

e) Appeal

In most countries, the prosecutor can appeal to the higher court if the sentence passed by the lower court is insufficient or excessive in proportion of the gravity of the offence. In case the defendant was sentenced to excessive punishment when he was not represented at trial, the prosecutor may, to discharge his duty impartially, appeal the sentence. In some countries, namely, the Philippines and the U.S.A., to protect the defendant from double jeopardy, the prosecutor cannot appeal in the event of an acquittal.

In addition to the above involvement, prosecutors may collect evidence relating to sentencing and select the appropriate procedure and competent courts for initiating prosecution.

C. Problems in Obtaining Appropriate Sentence

The following are some problems, which adversely affect the appropriate sentence:

1. In some countries, the opinion of the prosecutor is not considered. Opinions are divided as to whether the prosecutor should participate in the sentencing process. Our group discussed the pros and cons of the

matter and is generally of the view that the prosecutor should partake in the process. This is because he is a unique position to provide the court the viewpoints not only of the victim but also the law enforcement agencies. His intervention is also essential as he may restrain a judge with a propensity for leniency. The group was the opinion that legislative reform may be necessary in those countries where the prosecutor does not enjoy such authority.

2. The prosecutor always requests for the maximum punishment. In some countries, especially in those countries where the prosecutor enjoys enormous authority, he always requests for the maximum punishment for the defendant. This is a serious problem in sentencing. Because of the system, some prosecutors cannot participate in sentencing even when they wish to do so.
3. The police and the prosecutor may lack information about the past criminal record of the defendant. In some developing countries, the prosecutor may find it difficult to obtain the past criminal record of some convicts due to poor conservation of such records or lack of cooperation with the police.
4. Some prosecutors may be too ardent, rigid and overzealous, thereby affecting sentencing.
5. Prosecutors and judges face political, social and other problems in some countries in the form of undue pressure and external interference. Moreover, some of them purposely involve themselves in various forms of malpractice, which adversely affects sentencing.
6. The untimely and sudden transfer of prosecutors is a problem in some countries. In such a situation, the prosecutor handling a case may not be able to complete the case, and may not have the opportunity to brief the incoming prosecutor. The new prosecutor may not understand the case so as to conduct the prosecution efficiently.
7. It has been observed that the court may impose heavy punishment on one defendant and a lighter punishment on another defendant, even when they committed the same offences and they are similarly placed in life. When the convicts compare notes with each other, such disparity in sentencing may cause them some frustration and bring into focus discrimination in the sentencing process.

D. Countermeasures

As underlined above, our group revealed several problems in relation to appropriate sentencing. In a country where the above-mentioned problems prevail, necessary measures should be taken for the effective and efficient administration of criminal justice. Bearing in mind the gravity of the above problems, the group suggests the following countermeasures from the perspective of the prosecutor, the defense counsel and the court:

1. Adduce Sufficient Evidence, Disclose Mitigating Circumstances and Other Information About the Defendant to the Court

To assist the court in sentencing, the prosecutor should adduce sufficient evidence and disclose all information about the defendant and the offence he is alleged to have committed. It has been noted that prosecutors often lack information about the defendant's past criminal record. Similarly, the defense counsel may contribute to a greater extent in obtaining appropriate sentencing by disclosing all

possible mitigating factors favorable to the defendant. In some countries such as New Zealand, Singapore and the U.S.A., the victim of an offence is allowed to make a statement to the court as to the loss he has suffered as a result of the commission of the offence. The court may take the aforementioned statement into consideration to determine the appropriate sentence.

2. The Prosecutor Should File an Appeal

Where the prosecutor is dissatisfied with the sentence of the trial court, he may consider an appeal to the appellate court with a view to securing the appropriate sentence for the convict. Such legal provisions do exist in most jurisdictions and should be used to as a remedy to disparity in sentencing or to realize the objectives of punishment.

3. To Resist Undue Pressure and Other Forms of Malpractice

The prosecutor, the defense counsel and the judge should resist undue pressure and all interference in a case. None of them should try to take undue advantage. All of them should honestly adhere to the ethics of their professions.

4. To Work in Good Harmony

The prosecutor and the defense counsel usually resist till the end of a case in favor of their party, which is quite natural to some extent. But, to obtain an appropriate sentence, they should cooperate and work together, instead of being rigid. They should be flexible and objective.

5. Avoid Disparity in Sentencing

Disparity in sentencing is a serious problem and may occur due to the personal predilections of judges. The lack of sentencing guidelines and the nonavailability of data on sentencing by superior courts aggravates the problem. It is suggested that national training programs and seminars should be organized for judges, focusing on this aspect. It may be useful to widely publish important decisions in the media for judges and prosecutors. Research is necessary to determine the dimensions of the problem. The issuance of sentencing guidelines by the legislature or apex to the courts is another viable option. Available data in relation to sentencing should be computerized for easy access to judges and prosecutors. Furthermore, as prosecutors play an important role in sentencing, they should be conversant with sentencing standards and assist the court in this regard.

V. CONCLUSION

The importance of the role played by the prosecutor in a criminal trial cannot be overemphasized. Adequate initial and continued professional training are necessary for the efficient and diligent performance of prosecutorial functions. Furthermore, probity should be a requisite for admission into the profession. The prosecutor should adhere to the professional ethics throughout his career.

There is a need for sustained cooperation between the prosecutor, the investigating agencies, defense counsel, judges, supporting staff and all persons involved in the administration of criminal justice. The quality of investigations, prosecution and trial in some jurisdictions needs to be improved.

The legal framework may require substantial reforms to better respond to prevailing circumstances in different countries, so as to meet the challenges posed by the sophistication of crime and its transnational character resulting from technological advancement. These reforms can only materialize where there is a firm political commitment and necessary funds are made available by the competent authorities.

The group fully understands and respects the systems prevailing in different countries. The political, social and economic conditions of some countries may not be conducive to the implementation of some of the measures proposed. The intention of the group is to make meaningful contributions with a view to optimizing the efficacy of the different systems and practices.

PART TWO

RESOURCE MATERIAL SERIES
No. 53

II. The Ninth Meeting of the Ad Hoc Advisory Committee of Experts on UNAFEI Work Programmes and Directions

UNAFEI

REPORT OF RECENT ACTIVITIES AND FUTURE PERSPECTIVES OF UNAFEI

THE NINTH MEETING OF THE AD HOC ADVISORY COMMITTEE OF EXPERTS ON UNAFEI WORK PROGRAMMES AND DIRECTIONS
OCTOBER 27, 1997

*Toichi Fujiwara**

Mr. Chairperson,
Distinguished Members of the Ninth Meeting of the Ad Hoc Advisory Committee,
Ladies and Gentlemen,

As the Director of UNAFEI, the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders, it is my great privilege and honor to introduce the recent activities of our Institute. In this report, I would like to focus upon our activities since the last Meeting of the Ad Hoc Advisory Committee in March of 1992.

I. INTRODUCTION

1. UNAFEI was established in Tokyo, Japan in 1961 pursuant to an agreement between the United Nations and the Government of Japan. Its goal is to contribute to sound social development in the Asia and Pacific region by promoting the prevention of crime and the improvement of criminal justice administration through training and research. Since its foundation, UNAFEI has been placing the highest priority on the training of criminal justice personnel of the region. At the core of the Institute's various activities are the 2 three-month International Training Courses and the 1 five-week International Seminar which are conducted annually.

2. During its 36 years of existence, UNAFEI has conducted a total of 107 international training courses and seminars, in which more than 2,593 criminal justice personnel have participated, representing 89 different countries not only from the Asia-Pacific region but also from the Middle and Near East, Latin America and Africa. UNAFEI participants are selected from among experienced practitioners and top-level administrators holding senior positions in their respective countries. Thus, UNAFEI alumni play leading roles and hold important posts in the fields of crime prevention and the treatment of offenders in their countries.

3. In addition to these international training courses and seminars, UNAFEI has conducted a considerable number of seminars with the cooperation of other governments, dispatching UNAFEI staff members overseas. Moreover, UNAFEI has undertaken several research projects and has published the results of such research as well as the results of the training programmes. Thus, the Institute has been endeavoring to fulfill the important responsibilities entrusted to it by the countries in the region and the United Nations.

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* Director of UNAFEI.

II. TRAINING PROGRAMMES AT UNAFEI

4. When the Director of UNAFEI reported to the members of the last Meeting of the Ad Hoc Advisory Committee in March 1992, the total number of participating countries in the UNAFEI international training courses and seminars was 67 and the total number of participants was 2116. In comparison, presently, the corresponding number of countries is 89—increasing by 22 over the last five and half years. Additionally, during the same period, the total number of participants to these training programmes (91st Course through 107th Course) increased from 2116 to 2593.

5. UNAFEI training programmes have four distinct characteristic features:

a. Practice-oriented programme

First of all, the training programmes are organized with particular attention to the actual conditions and urgent problems in the administration of criminal justice in the region. Socio-economic changes have generated the increasing number of crimes and juvenile delinquency and crimes have become more sophisticated, organized and internationalized. Moreover, there exist such persistent problems as the low detection rate of crimes, the inordinate delay in investigation and trial proceedings, prison overcrowding, insufficient treatment programmes for offenders and the high rate of recidivism. Thus, by selecting these problems as the main themes and topics for the training courses and seminars, the Institute has attempted to reflect the changing and contemporary needs of the region. At the same time, UNAFEI has paid the utmost attention to the priority themes identified by the Crime Prevention and Criminal Justice Programme of the United Nations, which reflect common and urgent problems throughout the world. Moreover, the participants comprise experienced practitioners from the different criminal justice fields. As a result, current problems are identified and practical solutions to the problems are discussed and recommended in the training programmes.

b. Integrated approach

The second feature is an integrated approach to the criminal justice system as a whole. UNAFEI usually chooses themes or topics which are relevant to and inter-related with every field of the criminal justice system, recognizing that the improvement of criminal justice administration in its entirety can only be realized through systematic cooperation among different related agencies. Consequently, the composition of the participants is unique, representing a variety of professions. This wide variety enables the participants to examine issues and problems from different angles and discuss solutions from the various perspectives of the whole criminal justice system. Thus, the Institute has encouraged participants to pay special attention to the need for coordinating policies and practices between all related agencies of their respective criminal justice systems.

c. Participant-centered process

The third point is a participant-centered process. Of course, the UNAFEI faculty actively assist participants in obtaining productive training results by sharing their knowledge of different criminal justice systems, delivering lectures and giving advice in the group discussions. Visiting experts also impart their broad knowledge and extensive experience to the UNAFEI participants.

However, another equally beneficial way for participants to learn is from each other, since all the participants have considerable practical experience in the criminal justice field and a high level of professional integrity. Through the individual presentations and the group workshops, participants are expected to identify common problems and to work out their suitable solutions primarily by themselves, based upon their professional knowledge and experience.

d. Family atmosphere

The fourth feature concerns our family atmosphere. Since the participants live together for an extended period of time during the UNAFEI programme, a real sense of family and unity is fostered among them. This atmosphere deepens the understanding among participants from different nations and professional backgrounds, thus furthering the training results and creating lifelong friendships well beyond national boundaries. Furthermore, the pleasant memories and recollections about UNAFEI strongly tie its alumni together in many countries regardless of the differences in the training programmes they attended. Thereby, the exchange of information and coordination among different criminal justice agencies are promoted and international cooperation can be facilitated.

A. International Training Courses

6. The International Training Courses, which last for three months, are organized to provide participants with ample opportunities to discuss common contemporary issues and problems in the field of crime prevention and criminal justice. In each training course, 15 to 20 overseas participants and about 10 Japanese participants are invited to UNAFEI. They hold relatively high senior positions in their respective professions. The training courses have been divided into two kinds: courses on the treatment of offenders (spring) and courses on the administration of criminal justice (autumn). Primarily, the training course curriculum is composed of the individual presentations by each participant, lectures of visiting experts, *ad hoc* lecturers and faculty, and group workshops. These programmes are supplemented by observation visits and study tours to various agencies including the police, public prosecutors offices, the courts, and correctional and rehabilitation institutions.

7. In each training course, under the guidance of the UNAFEI faculty and visiting experts, participants identify current problems and discuss countermeasures and recommendations, taking differences in criminal justice systems and practices into consideration. They draft reports of their discussions in the group workshops, which are later published in the UNAFEI Resource Material Series, along with selected papers of the participants and the visiting experts' papers.

8. The main themes of the international training courses since April 1992 are as follows:

1992:
- Further Use and Effectual Development of Non-Custodial Measures for Offenders (91st International Training Course)
- Quest for Effective Methods of Organized Crime Control (92nd International Training Course)

1993: • Current Problems in Correctional Treatment and Their Solution (94th International Training Course)
• Effective Countermeasures against Crimes Related to Urbanization and Industrialization—Urban Crime, Juvenile Delinquency and Environmental Crime (95th International Training Course)
1994: • Effective Treatment of Drug Offenders and Juvenile Delinquents (97th International Training Course)
• Economic Crime and Effective Countermeasures against It (98th International Training Course)
1995: • The Institutional Treatment of Offenders: Relationships with Other Criminal Justice Agencies and Current Problems in Administration (100th International Training Course)
• The Fair and Effective Administration of Criminal Justice: The Proper Exercise of Authority and Procedural Justice (101st International Training Course)
1996: • Improvement of the Treatment of Offenders through the Strengthening of Non-Custodial Measures (103rd International Training Course)
• International Cooperation in Criminal Justice Administration (104th International Training Course)
1997: • The Quest for Effective Juvenile Justice Administration (106th International Training Course)
• The Role and Function of Prosecution in Criminal Justice (107th International Training Course)

B. International Seminars

9. The International Seminars are attended by top administrators, department heads, senior prosecutors and judges who work at the policy-making level; generally 20 to 25 overseas participants and about 6 Japanese participants. The programmes of the seminars mainly consists of individual presentations by each participants, lectures by visiting experts and *ad hoc* lecturers, and general discussions. These programmes are supplemented by observation visits and study tours to criminal justice agencies.

10. The individual presentations and general discussion sessions are carried out almost in the same manner as the individual presentations and the group workshops in the training course. Also, the results of the general discussion sessions are carried in the UNAFEI Resource Material Series, along with selected papers of the participants and the visiting experts' papers.

11. The main themes of the international seminars since April 1992 are as follows:
1993: • Policy Perspective for Organized Crime Suppression (93rd International Seminar)
1994: • Promotion of International Cooperation in Criminal Justice Administration (96th International Seminar)
1995: • The Effective Administration of Criminal Justice: Public Participation and the Prevention of Corruption (99th International Seminar)
1996: • Crime Prevention through Effective Firearms Regulation (102nd International Seminar)

1997: • The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials (105th Seminar)

C. Summaries of Specific Courses and Seminars: Past, Present and Future

12. From 29 January to 1 March 1996, the 102nd International Seminar took up the contemporary issues of firearms regulations. Thirty-one participants from 24 countries attended this Seminar. Being fully aware of the United Nations' role in this field, UNAFEI selected as the main theme of the Seminar, "Crime Prevention through Effective Firearms Regulation"; thus implementing the resolution "Firearms and Regulation for Purposes of Crime Prevention and Public Safety" adopted by the Ninth United Nations Congress in Cairo, Egypt in April 1995. The Seminar participants introduced and explained their countries' situation regarding firearms regulation and actively exchanged opinions in order to explore some effective measures to regulate firearms applicable to participating countries. They discussed important issues such as the enhancement of investigation techniques, the detection of smuggling by border control, international cooperation, the appropriate qualifications for possessing firearms, effective prosecution and sentencing, and cooperation from the general public. Acknowledging wide differences in the social, political and economic backgrounds of each country, the participants reconfirmed that each state has the responsibility to protect the life and property of its people by implementing appropriate firearms regulations which are suitable to each country.

13. The 103rd International Training Course, "Improvement of the Treatment of Offenders through the Strengthening of Non-custodial Measures", was conducted from 15 April to 5 July 1996. Twenty-eight participants representing 18 countries reviewed the current situation and problems in the implementation of non-custodial measures for the treatment of offenders, and sought practical solutions to them, paying due respect for the United Nations Standard Minimum Rules for Non-custodial Measures, the so-called Tokyo Rules. It was agreed that prisons in various parts of the world suffer from overcrowding problems as a result of the excessive use of custodial measures and the insufficiency or nonexistence of non-custodial measures for the treatment of offenders. It was reaffirmed that since non-custodial measures are effective for rehabilitating offenders, as well as alleviating the overcrowding problems of prisons, such measures should be extended and strengthened at every stage of criminal justice, striking a balance with such traditional objectives of punishment as retribution, deterrence and rehabilitation.

14. UNAFEI welcomed 32 participants from 20 countries in the 104th International Training Course (held from 2 September to 22 November 1996). Discussions of the main theme, "International Cooperation in Criminal Justice Administration" involved such topics as mutual assistance, extradition and the transfer of foreign prisoners. The participants made full reference to the United Nations Manuals on the Model Treaty on Extradition and on the Model Treaty on Mutual Assistance in Criminal Matters. Traditionally, in the field of international cooperation, the conflict between so-called treaty prerequisite countries and treaty non-requisite countries has been an unsolved difficult issue. This has hampered cooperation in criminal justice administration at the international level and, perhaps of greatest concern, has enabled criminals to evade justice. The participants of the 104th Course concluded that extradition arrangements and mutual assistance should be provided not only in the context of a treaty obligation

but also on the basis of reciprocity. In other words, even between countries without a treaty, extradition or mutual assistance should be realized by amending domestic laws and taking a flexible attitude on the principle of reciprocity. Additionally, during this Training Course, the Asia Crime Prevention Foundation and UNAFEI held a Working Group on Extradition, inviting many eminent experts.

15. From 27 January to 28 February 1997, 25 participants from 19 countries attended the 105th International Seminar and took up the contemporary issues of corruption. Being fully aware of the United Nations' role in this field, UNAFEI selected as the main theme of the Seminar, "The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials." In many countries, corruption exists at various levels of government. The criminal justice agencies of some countries have actively tackled this problem and produced successful results. On the other hand, in a large number of countries, corruption is still prevalent and law enforcement agencies have not established the required countermeasures to effectively tackle and deter the crime. The Seminar participants respectively introduced their countries' experiences regarding corruption, and analyzed the causes and dynamics of corruption in order to seek concrete measures for its eradication.

16. UNAFEI conducted the 106th International Training Course (from 14 April to 4 July 1997) with the main theme, "The Quest for Effective Juvenile Justice Administration." This Course consisted of 29 participants from 19 countries. The Institute's selection of this theme reflects its concern that juvenile delinquency is becoming increasingly serious and rampant in the world, and that juveniles committing heinous offences are becoming younger and younger and coming from all walks of life. Criminal justice practitioners should seriously cope with such situations by improving the juvenile justice administration. The participants identified the causes and nature of juvenile delinquency and searched for effective countermeasures and prevention activities. Also considered were the proper dispositions and treatment programs for juvenile delinquents, making reference to the role, use and application of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

17. At present, UNAFEI is conducting the 107th International Training Course with the main theme, "The Role and Function of Prosecution in the Criminal Justice." This Course consists of 29 participants from 19 countries. Although the degree of prosecutors' authority and responsibility varies from country to country, it is commonly recognized that they play a crucial role in the effective and efficient administration of criminal justice. There are a large number of countries which suffer from a low conviction rate due to insufficiency of investigation and inefficiency of prosecution; as well as prison overcrowding due to delayed proceedings in investigation and trial and the lack of alternative ways to dispose of the criminal cases. Based on such actual and specific problems faced by each country, the 107th Course participants are exploring solutions to further improve prosecution systems and practices from the prosecutor's point of view, which would thereby contribute to the development of the whole criminal justice system. Particularly, during this Training Course, the role and function of prosecutors at the stages of investigation, initiation of prosecution and trial are being extensively deliberated.

18. UNAFEI will hold the 108th International Seminar from 26 January to 27 February 1998, inviting about 20 overseas and 6 Japanese participants. The Seminar will focus on the main theme, "Current Problems in the Combat of Organized Transnational Crime," recognizing that the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders will take up the issue as an important theme. In light of the growing threat by organized transnational crime at both national and international levels, the Seminar will examine the current situation of organized transnational crime and legislation against such crime as well as the problems faced by criminal justice agencies.

D. Special Seminar for Senior Officials of the People's Republic of China

19. From 10 to 29 July 1995, UNAFEI—under the sponsorship of ACPF—conducted a special seminar for 30 high-ranking and influential officials from the People's Republic of China involved in the field of criminal justice. The participants represented the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Public Security and the Ministry of Justice. They and the UNAFEI faculty discussed specific problems particularly faced by Chinese criminal justice administration and explored practical solutions to such problems.

20. In light of the successful realization of this Seminar and the strong request made by the Chinese Government, the Special Seminar for Senior Officials of the People's Republic of China was conducted the following year, from 2 to 20 December 1996, under the sponsorship of JICA. On this occasion, 10 high-ranking Chinese officials from the same fields of criminal justice mentioned above participated. They and the UNAFEI faculty comparatively discussed the problems faced by Japan and China, placing emphasis on corruption issues. Another similar Special Seminar will be held from 1 to 19 December of this year and particular attention will be given to juvenile justice issues.

III. OVERSEAS SEMINARS

A. Joint Seminars

21. Since 1981, UNAFEI has conducted 17 joint seminars under the auspices of JICA and in collaboration with host governments in Asia including China, Fiji, Indonesia (2), the Republic of Korea, Malaysia (2), Nepal, Pakistan, Papua New Guinea (2), the Philippines (2), Singapore, Sri Lanka (2) and Thailand. Joint Seminars are held on a large scale (inviting about 100 participants) and are customarily attended by national cabinet members such as Ministers of Justice. With the participation of policy-makers and high-ranking administrators, including members of academia, the joint seminars attempt to provide a discussion forum in which participants can share their views and jointly seek solutions to various problems currently facing the criminal justice administration in the host country. Discussion topics based on such problems include public participation in crime prevention, the prevention of juvenile delinquency, drug trafficking, organized crime, fair and speedy trial, overcrowding, the effective institutional treatment of offenders, and the strengthening of non-institutional measures.

22. UNAFEI contributes to these joint seminars by carefully selecting the discussion topics in advance, delivering lectures and actively participating in the discussions. In this respect, these seminars are also marvelous opportunities for UNAFEI to convey and disseminate the fruitful results of the UNAFEI programmes. The host country can effectively benefit from the knowledge and expertise which UNAFEI has accumulated through its training programmes and research. Moreover, since participants from different fields of criminal justice system attend the joint seminars, the so-called integrated approach is readily taken to identify problems and discuss solutions. In principle, the Institute conducts a seminar once a year. In March 1998, the Bangladesh-UNAFEI Joint Seminar will be held in the capital city of Dhaka. About 80 criminal justice officials of the country are expected to attend. Additionally, preparatory discussions have already been made toward the organization of a joint seminar with India in fiscal year 1998.

B. Other Overseas Seminars

23. In addition to the Joint Seminars, UNAFEI frequently and actively participates in other seminars overseas. This month, under the financial assistance of JICA, UNAFEI dispatched two professors to Kenya. They assisted the Kenyan Government in holding a seminar on crime prevention and the treatment of juvenile delinquents. They researched the actual needs in the criminal justice fields in Kenya and contributed to the seminar by delivering lectures and giving advice during discussion sessions.

24. Since 1989, UNAFEI has actively assisted the Latin American Institute for the Prevention and the Treatment of Offenders (ILANUD) in organizing regional seminars in Costa Rica entitled “Effective Countermeasures against Drug Offences and Advancement of Criminal Justice Administration”. In the past, 10 seminars have been held (approximately once a year) with the cooperation of JICA and the Government of Costa Rica. Each two-week seminar is attended by about 20 participants from Latin America and the Caribbean, mostly high-ranking judges, public prosecutors and administrators. They have focused on drug problems within the context of such contemporary issues as money laundering, international cooperation, the prevention of drug abuse and the treatment of drug offenders.

25. Since 1992, UNAFEI has sent two experts to Thailand each year to assist the Office of the Narcotics Control Board (ONCB) in organizing regional training courses entitled “Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration”. Thus far, five courses have been held with the cooperation of JICA and the Royal Thai Government. Approximately 20 participants from various Asia-Pacific countries have attended each two-week course and have discussed drug-related issues and identified the actual problems in the participating countries. Discussion topics in the courses have included the improvement of investigative techniques, effective measures against money laundering, the implementation of the Vienna Convention, international cooperation, and the treatment of drug offenders.

IV. RESEARCH AND PUBLICATIONS

26. Research is also one of the important activities of UNAFEI. Its staff members have made great efforts to conduct research both inside and outside of the Institute. They have regularly visited overseas countries to study and research the actual situation in crime prevention and criminal justice administration. The useful results of such research are reflected in the comparative studies of the training programmes and other UNAFEI activities.

27. The Institute is particularly conscious of the actual crime situation in the Asia-Pacific region. The UNAFEI faculty has been striving constantly to collect useful statistics and other pertinent data as a part of its daily research activities. These efforts have crystallized into such UNAFEI publications as "Asia Crime Report No.1" (1993), which compiled extensive data regarding nine Asian countries. "Crime Trends in Asia and the Pacific" (1995), another publication, represents efforts by UNAFEI to keep the international community abreast of the actual crime situation in the Asia-Pacific region. It incorporates the Fourth United Nations Survey of Crime Trends and Operations of Criminal Justice in the region and was submitted to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Cairo, Egypt in April 1995.

28. Comparative studies are undertaken by the Institute as well on criminal justice systems and practices in the region. For example, "Criminal Justice Profiles of Asia", published in 1995, complies the salient features of investigation, prosecution and trial in 12 countries. In the near future, the Institute intends to publish the results of two other comparative research projects conducted in the fields of corrections and probation respectively.

29. The publications of the Institute are designed to meet the practical needs (including training) of criminal justice personnel. Since 1971, the Institute has published 50 editions of the UNAFEI Resource Material Series. They contain informative papers by participants, visiting experts and faculty members of UNAFEI as well as the discussions results in the Group Workshops and General Discussion Sessions. The Institute also has been issuing the UNAFEI Newsletter, in which a brief report of each training programme and other timely information are incorporated. Additionally, UNAFEI has published ten editions of "Ajiken Shoho", a report of UNAFEI activities in the Japanese language, since December 1991.

30. Apart from such regular publications, UNAFEI has published "Criminal Legislation of Japan" (1993). In commemoration of the 100th UNAFEI International Training Course, "The History of 100 International Training and Seminar Courses at UNAFEI" (1995) was published to provide an overview of the Institute's history.

V. OTHER UNAFEI ACTIVITIES

31. UNAFEI cooperates and collaborates with ACPF to further improve crime prevention and criminal justice administration in the region. Since UNAFEI and ACPF have many similar goals and a large part of ACPF's membership consists of UNAFEI alumni, the relationship between the two is strong. Some examples of cooperation and collaboration can be seen as follows:

a. UNAFEI has assisted ACPF extensively in all its World Conferences, as both a coordinator and a contributor, including the Sixth ACPF World Conference which will be held in Tokyo from 28 to 31 October 1997. Additionally, the participants of the 107th International Training Course will attend the Symposium to be held on October 29 which focuses on the theme of prosecution.
b. An ACPF Working Group meeting was held at UNAFEI in October 1996, and the 104th Course participants joined the meeting to discuss international cooperation. Also, a UNAFEI faculty member attended another ACPF Working Group meeting held in Malaysia in May 1997 regarding international cooperation and drug-related crimes.
c. UNAFEI dispatched faculty members to Manila to collaborate with ACPF and Asia Crime Prevention Philippines, Incorporated (ACPPI) in establishing the first halfway house in the Philippines. (Established in June 1997.)
d. To proceed with an ACPF project to foster volunteer leaders in the crime prevention field, UNAFEI sent two professors to Thailand in December 1995 and one professor to Papua New Guinea in December 1996.

32. In November 1992 and June 1994, UNAFEI organized at the Institute two workshops on computerization of criminal justice information systems. The results of the workshops were presented to a workshop in the Ninth United Nations Congress held in Cairo in 1995.

33. Under the auspices of JICA, UNAFEI has dispatched its faculty members once every few years to conduct follow-up studies of its training programmes. UNAFEI alumni have brought back new knowledge and ways of thinking to their respective home countries and have utilized such training results to improve their respective criminal justice systems and practices. By researching and evaluating the impact of training results to actual situations, enhancements to the future training programmes can be made. In October 1996, two UNAFEI faculty members visited Peru and Venezuela to conduct such a follow-up study. To assess the effects and results of the programmes, questionnaires were distributed to UNAFEI alumni and their working agencies, and interviews were also conducted. The follow-up study provided UNAFEI with valuable information in order to better grasp training needs and enhance training.

34. UNAFEI staff tries to meet with alumni to exchange opinions for the development of criminal justice administration when traveling overseas. On these occasions, UNAFEI provides a forum where alumni from different criminal justice fields can meet and talk, thereby contributing to the enhancement of coordination among them for promoting the aims of criminal justice. Alumni meetings have recently been held on the following occasions:

- Bangladesh in August 1996,
- China in September 1996,
- Peru and Venezuela in October 1996,
- Hong Kong in January 1997,
- Indonesia, Singapore, Malaysia and Thailand in July 1997,
- Costa Rica in August 1997, and
- Kenya in October 1997.

35. UNAFEI is now assisting the International Penal and Penitentiary Foundation (IPPF) in organizing the latter's Eighth Colloquium, which is scheduled to be held at UNAFEI in January 1998. IPPF is an international organization which has as its aim the promotion of studies in the field of the crime prevention and the treatment of offenders, especially by scientific research, publications and teaching.

VI. FINANCES AND ADMINISTRATION

36. In 1970, the Government of Japan assumed full financial and administrative responsibility for running the Institute. The director, deputy director and seven professors are selected from among public prosecutors offices, the judiciary, corrections and probation. UNAFEI also has approximately 20 administrative members, who are appointed from among officials of the Government of Japan, and a linguistic adviser. Each year, about 20 visiting experts from abroad are invited by the Ministry of Justice to each training course or seminar (For example, 5 experts in the 105th International Seminar, 7 in the 106th International Training Course, and 7 in the 107th International Training Course). The Institute has also received valuable assistance from various other experts, volunteers and related agencies in conducting its training programmes.

37. The Institute's budget is primarily provided by the Ministry of Justice. The total amount of the UNAFEI budget is approximately ¥350 million this year. JICA also provides financial assistance for the Institute's international training courses and seminars. Participants from various overseas countries receive fellowships from JICA which cover their travel expenses and meal and accommodation costs, and provide a daily subsistence allowance. JICA also sponsors UNAFEI's joint and regional seminars by bearing such expenses as the rental fee for the seminar sites and air fare for dispatching overseas experts from Japan.

38. ACPF is another constant and reliable supporter of UNAFEI activities through its financial contributions. ACPF hosts friendship parties for the UNAFEI participants to provide opportunities for the international exchange of ideas. ACPF kindly invites the UNAFEI participants to their branches located in various prefectures. The Foundation also assists the UNAFEI participants in experiencing Japanese cultural activities. Additionally, ACPF financially assists UNAFEI staff in visiting overseas countries.

VII. GOALS AND PROSPECTS FOR THE FUTURE

A. Research and Publications

39. UNAFEI fully recognizes the importance of research activities and has taken advantage of its uniquely advantageous position as a regional institute which invites a number of criminal justice officials from various countries. Research activities are indispensable to making the training programmes more productive and fruitful. Furthermore, UNAFEI is in the position to provide criminal justice officials in the region with comprehensive and current information. Although UNAFEI places its first priority on enhancing its training programmes, research has never been neglected nor treated lightly. Thus, UNAFEI continues to make the utmost efforts to implement research projects.

40. UNAFEI serves as a clearinghouse of information on crime prevention and criminal justice administration in the region. In this regard, the Institute regularly surveys the crime situation in the Asia-Pacific region and publishes the research results. UNAFEI also continues to conduct comparative research in the various fields of criminal justice systems and practices, focusing on the current situation, problems and their countermeasures. The Institute aims to compile and publish the results. Towards this goal, UNAFEI alumni should be encouraged to conduct research or to find appropriate resource persons to fulfill this task. For those who contribute to such research activities, financial assistance should be provided to complete the research and publish the results.

41. Since the work products of the training programmes themselves are valuable resources of comparative study, UNAFEI has been compiling such training results as reference material. Primarily, these efforts have been realized through the Resource Material Series.

42. The Institute is in the process of updating the library and information services. Collecting the most current criminal justice publications and legislations of various countries is one important project to complete. Another scheme is to provide such necessary information on the internet. Presently, UNAFEI publications are sent by mail to its alumni and other concerned individuals and organizations twice a year. However, UNAFEI is considering to make its publication materials available on the internet, so as to widen the scope of its audience and disseminate information in a more timely manner.

B. Staff Intensification

43. The professors of UNAFEI consists of criminal justice professionals seconded by the Government of Japan from the fields of prosecution, the judiciary, corrections and rehabilitation. However, the Institute has never been provided with police officers as a part of its regular teaching staff. Since the United Nations Crime Prevention and Criminal Justice Programme has been increasingly placing emphasis on the prevention of various types of crimes and their control, the themes and features of UNAFEI training programmes have turned in the same direction. This necessitates the attendance of police officers as lecturers as well as participants. UNAFEI continues to invite regularly a representative from the police as a lecturer to meet training needs. However, in light of the considerably large number of overseas participants from the police, it is desirable that professors from the police give day-to-day advice to the participants.

44. Those who are assigned as UNAFEI staff have an international outlook or a sense of internationalism. Its faculty members are given opportunities to go abroad and to experience various activities in an international setting. Considering the role and function of UNAFEI as a regional training and research institute, its teaching staff should make continued efforts to develop their knowledge of criminal justice systems and practices as well as communication skills.

C. Establishment of UNAFEI Branch in Osaka

45. UNAFEI has established its status as an affliated regional institute of the United Nations for crime prevention and criminal justice and has enjoyed a high reputation for its quality programmes. As a result, it has been repeatedly pointed out that the number of UNAFEI programmes and participants should be increased to a great extent. However, presently, UNAFEI yearly conducts 2 three-month training courses, 1 five-week seminar, 1 special three-week seminar for high-ranking Chinese government officials, and 1 overseas joint seminar for two weeks. The entire UNAFEI staff is involved in the implementation and preparation of these programmes, which nearly occupy a whole year. Thus unless the UNAFEI staff is increased, it will be very difficult for the Institute to expand its programmes and continue to maintain the same level of quality expected by the international community. Moreover, the accommodation capacity in the UNAFEI dormitory is also limited. Considering these limitations in human resources and facilities, the Ministry of Justice is planning to establish a UNAFEI branch in the city of Osaka by 1999 in order to increase the number of UNAFEI programmes. I am hopeful that the project will successfully proceed and an entirely new programme will be additionally organized in the new environment.

D. Strengthening the United Nations-UNAFEI Relationship

46. As you know, the Government of Japan has assumed full financial and administrative responsibility of UNAFEI. However, since it is still an affiliated regional institute of the United Nations, UNAFEI maintains a close relationship with the United Nations in the following ways:

a. The director of UNAFEI is assigned in consultation with the United Nations.
b. The programmes of the Institute duly respect and reflect the United Nations Crime Prevention and Criminal Justice Programme, taking up the agendas of the Programme as its training themes and thus providing opportunities to discuss appropriate measures for implementing United Nations instruments.
c. UNAFEI submits an annual report to the United Nations, informing it of the Institute's activities.
d. As one of the regional institutes of the United Nations, UNAFEI attends the United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The Institute also participates and makes statements every year at the Commission on Crime Prevention and Criminal Justice.
e. UNAFEI has invited criminal justice professionals as visiting experts from the United Nations and its related agencies including UNAFEI's sister institutes so that UNAFEI can benefit from their guidance and lectures.

47. Additionally, UNAFEI has recently extended its support to the efforts by the United Nations Crime Prevention and Criminal Justice Programme Network to establish "UNOJUST", a computer network which will make readily available online criminal justice resources and will enhance collaboration among the members of the Network.

48. UNAFEI believes that its steady and continued activities in line with the general policy of the United Nations are most conducive to the countries in the region. Therefore, the Institute intends to strengthen and develop its relationship with the United Nations.

VIII. CONCLUSION

49. The present staff of UNAFEI has endeavored to continue in the fine tradition of excellence and achievement which has been established since 1961 by the United Nations, the Government of Japan, the countries of region, and its predecessors. We are making the utmost efforts to maintain and develop the successful administration of UNAFEI programmes. UNAFEI, as an affiliated regional institute of the United Nations, has taken up contemporary and urgent issues in its training programme themes, respecting the United Nations Programme and paying close attention to the actual needs of the Asia-Pacific region. In this way, the Institute contributes to countries of the region by promoting the sound development of their respective criminal justice administrations. UNAFEI invites criminal justice practitioners to its training courses and seminars to identify actual problems and discuss solutions. Such a practice-oriented and problem-solving approach has been most beneficial to the participating countries' crime prevention and criminal justice administrations. UNAFEI will maintain this fundamental attitude under the support of the United Nations, the Government of Japan, the countries of the region, JICA and ACPF. Moreover, the Institute will continue to upgrade its training and research activities and intensify its staff and organization. By taking up actual criminal justice issues in its training programmes, UNAFEI will further strive for the improvement of crime prevention and criminal justice administration in the region.

REPORT OF THE NINTH MEETING OF THE AD HOC ADVISORY COMMITTEE OF EXPERTS ON UNAFEI WORK PROGRAMMES AND DIRECTIONS

FUCHU, TOKYO, JAPAN 27 OCTOBER 1997

INTRODUCTION

The Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) convened the Ninth Meeting of the Ad Hoc Advisory Committee of Experts on the 27th day of October 1997. It was held during the 107th International Training Course and on the eve of the Sixth ACPF World Conference. It was convened for the purpose of reviewing, evaluating and assessing the work accomplished by UNAFEI in the past and to consider proposals to improve and enhance future programmes.

In attendance were representatives from the United Nations, the director and faculty of UNAFEI, directors and international directors of ACPF, distinguished experts from different countries and distinguished university professors. The list of experts is attached herewith.

FORMAL PROCEEDINGS

The meeting commenced its proceedings with the welcome address by UNAFEI Director Toichi Fujiwara. He stated that since UNAFEI's establishment in 1961, the United Nations and the Government of Japan have jointly operated the Institute for the training of personnel and research in the fields of crime prevention and criminal justice. According to him, UNAFEI has respected and reflected the views of the United Nations Crime Prevention and Criminal Justice Programme by taking up the Programme agenda as the themes of UNAFEI's training programmes. UNAFEI also has been submitting an annual report to the United Nations and has received its valuable guidance and advice.

ELECTION OF OFFICERS

The following officers were nominated and elected by acclamation:

Chairperson:	Mr. Minoru Shikita (Japan)
Vice-Chairpersons:	Mr. Thomas G.P. Garner (Portugal/Hong Kong)
	Dr. Kanit Nanakorn (Thailand)
Rapporteurs:	Mr. H.G. Dharmadasa (Sri Lanka)
	Mr. Severino H. Gaña, Jr. (Philippines)

ADOPTION OF AGENDA

The Committee adopted by consensus the following provisional agenda:

1. Election of Officers (Chairperson, Vice-Chairpersons, Rapporteurs)
2. Adoption of the Agenda and Other Organizational Matters
3. Report of UNAFEI Programmes by the Director of UNAFEI: "Recent Activities and Future Perspectives of UNAFEI"
4. Assessment and Recommendations
5. Others
6. Adoption of Report

ADDRESS BY UNITED NATIONS REPRESENTATIVES

After the adoption of the agenda, the Chairperson, Mr. Minoru Shikita introduced Mr. Joseph Acakpo-Satchivi the representative of the United Nations and Mr. Mohamed E. Abdul-Aziz, Senior Crime Prevention and Criminal Justice Officer.

Mr. Joseph Acakpo-Satchivi in his address stated that international cooperation for crime prevention and criminal justice is an important item and on the development agenda of the United Nations. The repeated calls for strengthened technical or material assistance to developing countries attest to the pressing need to build a solid foundation of justice in our modern society through peace and development. Both peace and development are seriously undermined by inequities, corruption, social disorders and escalating crime. Furthermore, Mr. Satchivi pointed that it is the right moment to start a thorough review of the work programme of the Institute in all its aspects with a view to rationalizing it and improving its efficiency and effectiveness as the wind of reform is blowing everywhere across the globe.

Mr. Satchivi concluded his address by reiterating the call to the United Nations Institutes for the prevention of crime and treatment of offenders to further develop their research, training and technical assistance capacities. Collaborative networks through non-governmental organizations and national research and educational institutions must meet the growing requests from developing countries for technical and scientific assistance.

Mr. Mohamed Abdul-Aziz in his address stated that the achievements of UNAFEI were due to the effective leadership, a dedicated staff and a viable programme of work. He applauded the good work done by UNAFEI to advance policy and practice in the field of crime prevention and criminal justice not only in Asia and the Pacific region but also in other developing countries. The training activities of UNAFEI provided an opportunity to practitioners from different countries to compare practices and learn from each other's experience.

Mr. Abdul-Aziz stated that the efforts of the institute to collect data on crime trends, crime prevention strategies and the treatment of offenders should be strengthened. He suggested that UNAFEI develop a pragmatic strategy to raise awareness of its mission among individuals and nations, publicize its activities and receive feedback from the outside world. He also suggested the creation of a more solid base for a regional information system on crime trends and crime prevention practices.

Mr. Abdul-Aziz further stated that in the re-defined role of the United Nations Crime Prevention and Criminal Justice Programme, contributions made by the institutes such as UNAFEI are not only desirable but essential. He assured the leadership and staff of UNAFEI of the readiness of the United Nations Programme to further strengthen the existing collaborative ties with it and undertake joint initiatives on issues of mutual concern and interest.

THE NINTH MEETING OF THE AD HOC ADVISORY COMMITTEE OF EXPERTS ON UNAFEI WORK PROGRAMMES AND DIRECTIONS

DIRECTOR'S REPORT

In presenting his report, Mr. Toichi Fujiwara, the Director of UNAFEI said that the goal of the Institute is to contribute to sound social development in Asia and the Pacific region by promoting the prevention of crime and the improvement of criminal justice administration through training and research. UNAFEI has conducted a total of 107 international training courses and seminars in which more than 2,593 criminal justice personnel have participated, representing 89 different countries of the Asia-Pacific region, Middle and near East, Latin America and Africa. In addition, UNAFEI conducted a considerable number of seminars with the cooperation of other governments. Reporting on the training programmes of UNAFEI, the Director stated that the training programmes have four distinct characteristic features: a) a practice-oriented programme; b) an integrated approach; c) a participation-centered process; and d) a family atmosphere.

By selecting urgent problems in the administration of criminal justice in the region, the Institute has attempted to reflect the changing and contemporary needs of the region. At the same time, UNAFEI has paid the utmost attention to the priority themes identified by the Crime Prevention and Criminal Justice Programme of the United Nations. Moreover, experienced practitioners are invited as participants from the different criminal justice fields.

He explained that the three-month international training courses are organized to provide participants, who hold relatively high senior positions in their respective professions, with ample opportunities to discuss common contemporary issues and problems in the field of crime prevention and criminal justice. The training courses have been divided into two kinds: courses on the treatment of offenders (spring) and courses on the administration of criminal justice (autumn). Primarily, the training course curriculum is composed of the individual presentations on the theme by each participant, lectures by visiting experts and faculty, and group workshops. These programmes are supplemented by observation visits and study tours to various agencies including the police, public prosecutors offices, the courts, and correctional and rehabilitation institutions.

International seminars are attended by top administrators, department heads, senior prosecutors and judges who work at the policy-making level. The seminars have a similar curriculum as the training courses.

He presented summaries of specific courses and seminars held from the 102nd International Seminar to the 107th International Training Course. The themes of these programmes introduced are as follows:

1996:
- Crime Prevention through Effective Firearms Regulation (102nd International Seminar)
- Improvement of the Treatment of Offenders through the Strengthening of Non-Custodial Measures (103rd International Training Course)
- International Cooperation in Criminal Justice Administration (104th International Training Course)

1997:
- The Effective Administration of Criminal Justice for the Prevention of Corruption by Public Officials (105th International Seminar)
- The Quest for Effective Juvenile Justice Administration (106th International Training Course)
- The Role and Function of Prosecution in Criminal Justice (107th International Training Course)

Additionally, the 108th International Seminar, which will be held from 26 January to 27 February 1998, was presented.

The Director further stated that in July 1995 a special seminar was conducted for 30 high-ranking officials from the People's Republic of China under the sponsorship of ACPF. These officials and the faculty of UNAFEI discussed specific problems particularly faced by the Chinese criminal justice administrators and explored practical solutions to such problems.

Following the success of this seminar and at the request of the Chinese Government, another seminar for senior officials was conducted the following year. According to the Director, the third seminar will be held from 1 to 19 December 1997.

Regarding joint seminars, the Director reported that since 1981, UNAFEI has conducted 17 joint seminars under the auspices of JICA and in collaboration with host governments. These joint seminars, with more than 100 participants, are customarily attended by national cabinet members such as Ministers of Justice. It has the participation of policy-makers and high-ranking administrators as well as members of academia. The joint seminars provide a discussion forum in which participants share their views and jointly seek solutions to various problems facing the criminal justice administration in the host country. UNAFEI contributes to these joint seminars by carefully selecting the discussion topics in advance, delivering lectures and actively participating in discussions. The next joint seminar will be in Dhaka, Bangladesh in March 1998.

In addition to the joint seminars, UNAFEI frequently and actively participates in other seminars overseas. In October this year and under the financial assistance of JICA, two professors from UNAFEI were sent to Kenya to assist the Kenyan Government in holding a seminar on crime prevention and the treatment of juvenile delinquents.

Since 1989, UNAFEI has actively assisted the Latin American Institute for the Prevention of Crime and Treatment of Offenders in organizing regional seminars. In the past, 10 such seminars have been held in cooperation with JICA and the Government of Costa Rica. These two-week seminars have about 20 participants, most of whom are high-ranking judges, public prosecutors and administrators. They focus on drug problems within the context of such contemporary issues as money laundering, prevention of drug abuse, the treatment of drug offenders and international cooperation.

Since 1992, UNAFEI has sent two experts to Thailand each year to assist the Office of the Narcotics Control Board in organizing regional training courses on the theme "Effective Countermeasures against Drug Offenders and the Advancement of Criminal

Justice Administration". Five such courses have been conducted with the cooperation of JICA and the Royal Thai Government.

Regarding research conducted by the UNAFEI, the UNAFEI faculty constantly strives to collect useful statistics and other pertinent data as part of its daily activities. These efforts have crystallized into such UNAFEI publications as "Asia Crime Report No. 1" (1993), which compiled extensive data regarding nine Asian countries. "Crime Trends in Asia and the Pacific" (1995), another publication, represents efforts by UNAFEI to keep the international community abreast of the actual crime situation in the Asia-Pacific region. The latter publication was submitted to the Ninth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Cairo, Egypt in April 1995. Additionally, the results of a comparative study were compiled into a book entitled "Criminal Justice Profiles of Asia," in 1995. UNAFEI also intends to publish the results of two other similar projects in the fields of corrections and probation respectively.

The publications made by the Institute are designed to meet the practical needs of criminal justice personnel. Since 1971 the Institute has published 50 editions of the UNAFEI Resource Material Series. The UNAFEI Newsletter and Ajiken Shoho (a report on UNAFEI activities in the Japanese language) are regularly published. In addition, UNAFEI has published "Criminal Legislation of Japan" (1993) and "The History of 100 International Training and Seminar Courses at UNAFEI" (1995) in commemoration of the 100th UNAFEI International Training Course.

Regarding its activities, UNAFEI has collaborated with ACPF in all its World Conferences and Working Group Meetings. Moreover, faculty members were dispatched to Manila to assist in the establishment of the first halfway house in the Philippines, as well as to Papua New Guinea and Thailand to help develop the projects of ACPF Headquarters to foster volunteer leaders. He further elaborated on the follow-up activities conducted by the UNAFEI faculty by visiting the countries of former participants.

Reporting on the finances, the Director explained the vital role played by the Ministry of Justice and JICA , as well as the supportive role of ACPF.

On goals and prospects for the future, the Director said that future work would include efforts to implement research projects. While serving as a clearinghouse for information on crime prevention and criminal justice administration in the region, UNAFEI would also continue to conduct comparative research focusing attention on the current situation, problems and countermeasures. UNAFEI is in the process of updating the library and the information services including the provision of necessary information on the internet.

Regarding staff intensification, the Director emphasized the desirability of having professors from the police on the UNAFEI faculty. This is for the prevention of various types of crime and their control by the United Nations Crime Prevention and Criminal Justice Programme.

The most encouraging part of the Director's report was his announcement of the opening of a UNAFEI branch in the city of Osaka by 1999. This would considerably enhance the UNAFEI programmes. The Director concluded his report by assuring that UNAFEI will continue to maintain its direction on a practice-oriented and problem-solving approach to benefit the participating countries in crime prevention and criminal justice administration.

GENERAL DISCUSSIONS

Chairman Minoru Shikita thereafter invited comments and suggestions from the participants of the Ad Hoc Committee.

Mr. Thomas G.P. Garner, International Director, ACPF, commended the very valuable work done by UNAFEI in helping to shape the criminal justice system in this part of the world. He said the UNAFEI "Resource Material Series" and the "Newsletter" are very valuable publications for information. Mr. Garner praised the supportive role played by the JICA and ACPF in the activities of UNAFEI. He recommended the inclusion of police personnel as faculty members of UNAFEI.

Mr. Wang Lixian, the representative from the People's Republic of China, said the participants from his country who attended seminars and training courses at UNAFEI have benefitted immensely from the training. He also thanked UNAFEI for the special attention paid to his country by organizing special seminars. Mr. Wang Lixian made the following suggestions: a) more senior officers at a policy-making level to participate at seminars and the dissemination of the outcome of the seminars; and b) internationalization of the UNAFEI staff by increasing the involvement of visiting experts. He also proposed the preparation of a list of experts from among UNAFEI alumni and the establishment of a permanent Advisory Committee that would replace this Ad Hoc Committee.

Mr. Kanit Nanakorn, the former Attorney General from Thailand, said that Thailand has the largest number of UNAFEI Alumni—numbering over 130. These officers now have assumed high-ranking positions in the country, and with the training given them, UNAFEI has made a direct and substantial contribution to the administration of Thai criminal justice. He made the following suggestions for the further development of UNAFEI activities: a) UNAFEI should arrange more international training courses and seminars in order to keep up with the current demands; and b) UNAFEI should expand its regional activities, and for this purpose the Institute should invite capable researchers from countries in the region.

Dato' Ismail B. Che Rus, Commissioner of Police from Malaysia, thanked UNAFEI and JICA for the opportunities granted in the past to Malaysian criminal justice officials to participate in the training courses and seminar. He said that UNAFEI alumni are active in Malaysia and are working on many projects with the Malaysian Crime Prevention Foundation. Dato' Ismail B. Che Rus made the following suggestions for consideration in the criminal justice activities of UNAFEI: a) to grant opportunities to non-governmental organizations to participate in UNAFEI programmes; and b) JICA should suggest to governments to select participants from well-established training

institutes as they will be in a better position to impart knowledge to others. He further suggested that participants attending UNAFEI training programmes should be encouraged to acquaint themselves with other areas of the criminal justice system. He suggested that police officers should also be included in the faculty of UNAFEI.

Professor Koichi Miyazawa of Chuo University stated that his interest in the work of UNAFEI started when he first visited the Institute. Professor Suzuki was then the director, and he was a visiting lecturer. He observed that the frequent transfer of faculty members of UNAFEI is a disadvantage to the participants as they cannot maintain long lasting contact with them. There was the possibility of providing the services of a professor from his university (Chuo University) if necessary. UNAFEI and universities should cooperate with each other. Professor Miyazawa stressed the need to improve the library and made a promise to donate his personal library to UNAFEI upon his demise.

Professor Koya Matsuo of Jochi University stated that he endorsed the proposal of the Chinese representative on the internationalization of UNAFEI. He said UNAFEI is well known internationally, but it was necessary to make it well known in Japan as well. To achieve this goal, he suggested visits by university professors to UNAFEI and the sending of UNAFEI publications to universities.

Mr. Masaharu Hino, Superintending Prosecutor of the Nagoya High Public Prosecutors Office, commented on the Osaka branch of UNAFEI. Osaka is the second largest city in Japan, and the city planners welcome international activities. A large portion of the new prosecution service building will be set aside for UNAFEI.

Mr. Han Youngsuk, Vice-Chairman of the Korean Crime Prevention Foundation, said that UNAFEI alumni consist of 95 members who have distinguished themselves in their respective fields. In his suggestion, he said that the training courses and seminars must be arranged more flexibly to meet the urgent need to explore ways and means to cope with new kinds of crime. Three areas to be considered are: a) the protection of the payment of cyber cash or electronic cash from forgery and abuse; b) a legal framework to protect the electronic information from destruction by hackers along with protection from piracy; and c) a new mode of judicial cooperation in the international society quite different from the traditional one. He further suggested that UNAFEI become an international clearinghouse for information on the prevention of crime and criminal justice. Lastly, he suggested joint seminars on a multinational basis.

Dr. B.N. Chattoraj, the distinguished expert from India, while highly appreciating the substantial contribution made by UNAFEI during the last 36 years, made the following suggestions: a) creating a small section for research work; b) appointing a Research Advisory Committee; c) developing and upgrading the UNAFEI library, and for this purpose appointing a Library Development Committee and publishing a quarterly or bi-annual pamphlet on the progress of the library; d) identifying of crime prevention and justice institutes in different countries and keeping close contact with them in order to exchange information (UNAFEI is to act as a clearinghouse for this information); and e) for UNAFEI to consider publishing a journal that includes articles on various developments in the field of criminal justice. Mr. Chattoraj also supported the idea of including police officers in the UNAFEI faculty.

Mr. Ved Kshetri, Public Service Commissioner from Nepal, suggested considering more UNAFEI joint seminars for the benefit of training lawyer members. With the establishment of ACPF branches in many countries, their assistance could be obtained to conduct these joint seminars.

Ms. Nazhat Shameem, the Director of Public Prosecution from Fiji, suggested that UNAFEI should play a more proactive role in the selection of participants. She also proposed to UNAFEI the inclusion of United Nations human rights instruments in its day-to-day work and assist in keeping an updated knowledge on law reform initiatives in other countries of the region.

Mr. Chronox D. Manek, Deputy Public Prosecutor from Papua New Guinea, suggested the inclusion of NGOs in the UNAFEI programmes in order to increase community awareness.

Mr. Severino Gaña, Jr., Senior State Prosecutor from the Philippines, suggested the expanding of UNAFEI activities to challenging areas and increasing the numbers of training programmes.

Professor Yoshio Suzuki, a former Director of UNAFEI, said that sufficient data was not available for research, and UNAFEI should obtain the necessary information from other countries through alumni associations and ACPF.

Mr. H.G. Dharmadasa, retired Commissioner of Prisons in Sri Lanka, mentioned the difficulties in collecting the necessary information for research, as experienced by UNAFEI when researching the implementation of the United Nations Standard Minimum Rules for the Treatment of Offenders.

Mr. Hiroyasu Sugihara, a former Director of UNAFEI, also confirmed this problem faced by UNAFEI.

Dr. S. Chandra Mohan from Singapore suggested that some positions on the UNAFEI faculty be offered to other governments. He also said UNAFEI should consider publishing information on law reform in other countries.

Mr. Thomas G.P. Garner suggested that UNAFEI's financial constraints could be eased if the represented nations and UNAFEI alternately paid for the sponsorship of a participant.

Mr. Kunihiro Horiuchi, a former Director of UNAFEI, suggested that richer Asian countries could contribute to the work of UNAFEI by sending some staff members at their own cost and bearing the expenses of their country's participants.

Mr. Shinichi Tsuchiya, an observer of the meeting and a former Deputy Director of UNAFEI, stressed the importance of comparative research and suggested conducting a seminar on this topic. He also said that training programmes on combatting computer crime should be included.

Mr. Kiyoshi Isaka, Managing Director of JICA, said that it was important to make an assessment on the effects of UNAFEI's 35 years of work. He also suggested that some rich countries could assist in the work of UNAFEI.

CONCLUSION

Final comments were made by Director Fujiwara of UNAFEI in response to various proposals made during the discussions. He said every effort will be made to improve the work of UNAFEI, giving consideration to the suggestions made at the meeting. Some proposals have already been implemented, while others need time. The Director appreciated the high valuation of the integrated approach. Though sometimes training is focused on narrow fields such as prosecution, the general approach is an integrated one. He agreed that topics such as legislation reform, research and human rights must be incorporated further into UNAFEI training programmes.

On the inclusion of NGOs in the training programmes, there were no restrictions as far as UNAFEI was concerned, but the financial assistance for their participation depended on the policies of JICA.

The Director admitted that the research activity at UNAFEI is relatively weak due to the limited staff and their involvement in the main activity of training. Nevertheless, much attention is paid to this area and cooperation from outside experts such as UNAFEI alumni is necessary. He also said that UNAFEI will develop close contact with universities.

Regarding the composition and the internationalization of the UNAFEI staff, the Director said that UNAFEI would continue to invite as many visiting experts as possible from various regions of the world. Internationalization needs much effort. UNAFEI will try to make its staff visit and study in foreign countries. Some developed nations like Singapore may offer the services of a faculty member and such help would be greatly appreciated. The Director stated further that the necessity of the inclusion of police officers in the UNAFEI faculty was mentioned in his report. He expressed hope that when the Osaka branch of UNAFEI is established in 1999, police officers would be included in the faculty.

He wanted very much to increase the training programmes according to emerging needs such as victimology, human rights and organized crime. However, the restraining factors are the limited staff and other facilities.

The Director also admitted that the library needs improvement. He thanked Professor Miyazawa for the intended donation of his personal library to UNAFEI. He requested participants and alumni to assist in the development of the library by sending relevant publications from their own countries.

The Director observed that the effect of training provided by UNAFEI has not been fully researched and evaluated. However, he expressed that the results of UNAFEI training programmes are well reflected by the achievements of its alumni in the sound improvement of criminal justice systems and practices in their respective countries.

For example, the development of community policing in the region such as the introduction of the "Police Box" in Singapore has been influenced by the teachings at UNAFEI. As another example, a halfway house has been established in the Philippines by ACPF Nagoya Branch with the cooperation of UNAFEI.

The Director concluded by assuring the members of the committee that every effort will be made to improve the training at UNAFEI.

Mr. Garner—who had earlier taken the chair at the invitation of Mr. Shikita—concluded the proceedings of the Ad Hoc Committee with a vote of thanks to UNAFEI, the United Nations and the Government of Japan.

Prepared and submitted by the rapporteurs:

H.G. DHARMADASA
Sri Lanka

SEVERINO H. GAÑA, JR.
Philippines

LIST OF EXPERTS

United Nations

Mr. Joseph Acakpo-Satchivi	Secretary, Fifth Committee of the General Assembly and the Committee for Programme and Coordination United Nations, New York
Mr. Mohamed E. Abdul-Aziz	Senior Crime Prevention and Criminal Justice Officer, United Nations Crime Prevention and Criminal Justice Division United Nations Office at Vienna

Overseas

Mr. Wang Lixian	Director-General, Foreign Affairs Department, Ministry of Justice People's Republic of China
Ms. Nazhat Shameem	Director of Public Prosecutions Fiji
Dr. Barindra Nath Chattoraj	Professor and Head of National Institute of Criminology and Forensic Science, Ministry of Home Affairs India
Dato' Mohd Ismail B. Che Rus	Commissioner of Police, Director, Criminal Investigations Department, Royal Malaysia Police Headquarters Malaysia
Mr. Ved V. Kshetri	Public Service Commission Nepal
Mr. Chronox D. Manek	Deputy Public Prosecutor, Public Prosecutors Office, Department of Attorney General Papua New Guinea
Mr. Severino H. Gaña, Jr. **Rapporteur*	Senior State Prosecutor, Department of Justice Philippines
Mr. Thomas G.P. Garner **Vice-Chairperson*	Editor, New Society, The Newsletter of ACPF, and former Commissioner of Prisons, Hong Kong Portugal/Hong Kong
Mr. Han Youngsuk	Vice Chairman, Korea Crime Prevention Foundation Republic of Korea
Dr. S. Chandra Mohan	Official Assignee & Public Trustee Singapore
Mr. H.G. Darmadasa **Rapporteur*	Rtd. Commissioner of Prisons Sri Lanka

Dr. Kanit Nanakorn **Vice-Chairperson*	Former Attorney General and Professor, Faculty of Law, Thammasat University and Chulalongkorn University Thailand

Japan

Mr. Masaharu Hino	Superintending Prosecutor, Nagoya High Public Prosecutors Office, and a former Director of UNAFEI
Mr. Kunihiro Horiuchi	Private Practitioner, Ex-Director of UNAFEI
Mr. Kazutomo Ijima	Supreme Court Justice
Mr. Kiyoshi Isaka	Managing Director, Hachioji International Training Center, JICA
Dr. Koya Matsuo	Professor, Faculty of Law, Jochi University
Dr. Koichi Miyazawa	Professor, Faculty of Policy Studies, Chuo University
Mr. Minoru Shikita **Chairperson*	Chairman of the ACPF Board of Directors, and a former Director of UNAFEI
Mr. Hiroyasu Sugihara	Director-General, Public Security Investigation Agency, and a former Director of UNAFEI
Mr. Yoshio Suzuki	Professor, Faculty of International Relations, Asia University, and a former Director of UNAFEI

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

- ***107th International Training Course***
- ***Ad Hoc Advisory Committee of UNAFEI Work Programmes and Directions***

THE 107TH INTERNATIONAL TRAINING COURSE

Left to Right:

Above:

Tseng (Visiting Expert), Lee (Visiting Expert), Manella (Visiting Expert), de Larosière de Champfeu (Visiting Expert).

5th Row:

Kai (Staff), Saito (Staff), Suenaga (Staff), Matsushita (Staff), Mitsui (Staff), Nakamura (Staff), Tezuka (Staff), Kaneko (Staff), Matsuda (Staff), Komatsu (Staff).

4th Row:

Yamanishi (Japan), Takahashi (Japan), Kubo (Japan), Ueda (Japan), Cheng (Singapore), Pholsena (Lao People's Democratic Repubic), Somjai (Thailand), Miyamoto (Staff).

3rd Row:

Saito (Japan), Sudo (Chef), Gamalath (Sri Lanka), Izumi (Japan), Ito (Japan), Ishikawa (Japan), Kurashige (Japan), Sharma (India), Abe (Staff), Okeya (Staff), Todaka (Staff), Tatsumi (Staff).

2nd Row:

Iizuka (Staff), Kobayashi (JICA Coordinator), Suzuki (Japan), Chilufya (Zambia), Mwalili (Kenya), Corpuz (Philippines), Ansah-Akrofi (Ghana), Abdul Razak (Malaysia), Zafar (Pakistan), Ngo Mandeng (Cameroon), Guan (China), Lee (Republic of Korea), Cordero (Costa Rica), Jameel (Maldives), Ersyiwo (Indonesia), Poudyal Chhetri (Nepal), Nakazawa (Japan).

1st Row:

Takayama (Chief of Secretariat), Kurosawa (Professor), Yoshida (Chief of Research, Professor), Akane (Professor), Tauchi (Deputy Director), Mrs. Kanit, Kanit (Visiting Expert), Takahashi (Programming Officer, Chief of Training, Professor), Yamashita (Professor), Konagai (Chief of Information and Library Service, Professor), Imafuku (Professor), Vander Woude (Linguistic Adviser).

THE NINTH MEETING OF THE AD HOC ADVISORY COMMITTEE OF EXPERTS ON UNAFEI WORK PROGRAMMES AND DIRECTIONS

Left to Right:

3rd Row:

Imafuku (Professor, UNAFEI), Kurosawa (Professor, UNAFEI), Wang (China)*, Horiuchi (Japan)*, Ijima (Japan)*, Matsuo (Japan)*, Suzuki (Japan)*, Kittipong (Thailand)*, Shameen (Fiji)*, Chandra Mohan (Singapore)*, Takahashi (Chief of Training, Professor, UNAFEI).

2nd Row:

Tauchi (Deputy Director, UNAFEI), Kshetri (Nepal)*, Han (Republic of Korea)*, Gaña (Philippines)*, Ismail (Malaysia)*, Manek (Papua New Guinea)*, Sugihara (Japan)*, Miyazawa (Japan)*, Dharmadasa (Sri Lanka)*, Vander Woude (Linguistic Adviser, UNAFEI).

1st Row:

Konagai (Chief of Information and Library Service, Professor, UNAFEI), Akane (Professor, UNAFEI), Mrs. Gaña, Isaka (Japan)*, Hino (Japan)*, Garner (Portugal/Hong Kong)*, Acakpo-Satchivi (United Nations, New York)*, Shikita (Japan)*, Abdul-Aziz (United Nations Office at Vienna), Kanit (UNAFEI Visiting Expert, Thailand)*, Fujiwara (Director, UNAFEI), Chattoraj (India)*, Kumarasingha (UNAFEI Visiting Expert, Sri Lanka), Yoshida (Chief of Research, Professor, UNAFEI), Manella (UNAFEI Visiting Expert, United States), Mrs. Garner.

* denotes member of the Ad Hoc Advisory Committee.