TOPIC 2

THE ROLE OF PROSECUTION IN THE CHANGING SOCIETY

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I. INTRODUCTION

The criminal justice system comprising of the police, prosecution, judiciary, probation officers and the prison authorities are important in administering justice to the society. Amongst the above named components of the criminal justice system, the prosecution is the backbone of a successful system. It would not be an exaggeration to state that the prosecution is pivotal to the practical functioning of the criminal justice system. The prosecution plays a balancing act between the apprehension of criminals by the police and the finding of guilt as well as punishment by the judiciary.

In many jurisdictions, the police, apart from maintaining law and order, also conduct investigations as provided by law. Upon completion of the investigation, the police then turn to the prosecution. The prosecution at this juncture, in many countries, advises further investigation or makes a decision on whether to proceed to the trial stage or not. The prosecution ought to play a major role in ascertaining that justice is done not only for the society but also for the accused, as the case may be. In any jurisdiction, the prosecution fails to play its role in the criminal justice system if the prosecutor does not maintain control of prosecutions. In order to maintain equilibrium, the prosecution must ascertain whether a particular criminal case should be proceeded with to prosecution, or whether some other alternative steps should be taken. The prosecution at all times should consider the necessity and effect of a prosecution or non-prosecution.

In the changing society where new types of crime, such as organized transnational crimes, large scale economic crimes, money laundering, etc, are emerging and prevailing, we should think about whether the prosecution can cope with these new phenomena and, if not, effective tools should be provided for the prosecution to cope with these new type of offences. Furthermore, the quality of public prosecutors is an issue of our discussion. Whether the high quality of public prosecutors is maintained or not is the foremost question in order for them to fulfill their important duties.

This report will discuss and identify problems faced by the prosecution in the changing society. It will also propose solutions to the problems raised.

II. INEFFECTIVE AND INEFFICIENT PROSECUTION

A. General Observations

In practice, there are many causes of ineffective and inefficient prosecution. However, all these causes may be grouped into two main problems namely:

(a) Low conviction rate; and
(b) Overloading of courts and prosecution.

In dealing with the issues of low conviction rates and the overloading of the courts, it is inevitable that the public prosecutor plays a major role in most jurisdictions. Amongst the participant countries in this seminar, varying methods to commence prosecution are adopted.

In countries such as Bangladesh, Hong Kong, Pakistan, India and Sri Lanka the decision to prosecute at the lower courts rests with the police. Meanwhile in all other countries, the decision to prosecute at lower courts lies with the public prosecutor. The other main practical issue in prosecution is the basis of initiation of criminal prosecution. In practice, public prosecutors, apart from satisfying that there is sufficient evidence to prosecute, would also consider the issue of the standard of evidence for the commencement of prosecution. In this regard, countries such as Algeria, Bangladesh, Japan, China, Colombia, Pakistan and Republic of Korea require evidence which is beyond reasonable doubt as a basis to commence prosecution. Meanwhile, in Malaysia, Indonesia, Laos, Peru and Viet Nam there must be 80% chance for conviction in order to commence prosecution. Public Prosecutors in Hong Kong, Mozambique, Nepal and the Seychelles would commence prosecution if there exist more than 50% chance to obtain conviction. Lastly, in Brazil and Sri Lanka prosecution is initiated even if there is less than 50% chance for conviction.

B. Low Conviction Rate

One of the measurements of the effectiveness and efficiency of any prosecution system is the conviction rate. If the prosecution system of any country produces too low a rate of conviction it could be seen as a symptom of a serious problem within. It must be stressed at the outset that low conviction rates *per se* might not be the only objective of prosecution. However, since this report is mainly interested in the quality of prosecution, then naturally the rate of conviction should be considered as one of the measurements of the quality of prosecution. In this regard, in some countries the prosecution is conducted by either the police or the prosecution under the direction and control of the Attorney General/Prosecutor General. The conduct of prosecution by both these arms of the criminal justice system depends upon the nature of the offence, and the jurisdiction within which the case would be tried. In countries like Japan and the Republic of Korea, all prosecutions, irrespective of the jurisdiction of the courts and the nature of the offence, are prosecuted by the public prosecutors. However, in countries like India, Sri Lanka, Hong Kong, and Bangladesh, cases at the lower courts, which carries lighter punishment of imprisonment, are conducted by the police prosecutors. In this regard the police prosecutors are under the direct supervision of the Superintendent of Police or the senior police officer of each district. As such, the public prosecutor does not play a major role in the conduct and direction of prosecutions in these jurisdictions. Meanwhile, in Hong Kong, the prosecution is conducted by lay prosecutors.

For the purpose of this report, a survey was conducted among the participants of

each country as to their respective conviction rates in recent years. Countries such as Japan (99.9%), China, Republic of Korea (99.6%), Indonesia, Malaysia and Vietnam obtained a conviction rate of above 80%. Meanwhile, India (77.6%), Thailand, Nepal, Peru (65%) and Pakistan obtained a conviction rate of between 80% and 40%. Bangladesh, Laos and Sri Lanka obtained a conviction rate below 40%, and in some countries, the conviction rate is becoming lower. It is to be noted that these are the rates of conviction upon completion of trials. As such, the rate of percentage as above does not include cases concluded with a conviction summarily or upon a plea of guilt.

It is evident that countries attaining low rates of conviction would face serious difficulty in the changing society. In countries where there is a low conviction rate, the problems are manifold. There are questions on the integrity of the prosecution, the cost of maintaining the criminal justice system, i.e. the police and the prosecution. The result of the low rate of conviction reflects unwarranted prosecution; a waste of judicial time and money; unnecessary expense incurred by the defendant or accused in preparing for trial; the mental agony suffered by the accused; possibility that the wrong person was charged or indicted; possibility that the true culprit of the offence was not brought to justice; ineffective investigation; ineffective prosecution; and that justice was not attained for the benefit of the victim. As such, in any criminal justice system, the prosecution, in order to be effective and efficient, should strive to attain a high rate of conviction.

III. LOW CONVICTION RATE: COUNTERMEASURES

A. Screening

The participants in general propose screening as a method to solve the problems stated above. For the purposes of this

Diagram 1

report, screening is defined as a process where available evidence in the cases is evaluated from the viewpoint of whether there is a reasonable chance of conviction; if not, the case is dropped (before filing charges) or withdrawn during trial. The application of a screening process is further shown as in diagram1 (below).

The process of screening is applied only where there is the insufficient evidence to prosecute. Screening can be done before indictictment or charge, or even during trial but before the court delivers its judgment. It has come to light that screening is done by the public prosecutor in all participant countries except Bangladesh, Pakistan and Sri Lanka. However in Bangladesh, Colombia, Mozambique, Nepal, Peru, Sri Lanka and Thailand, screening is done by the inquiring magistrate.

It must be noted that even though screening is done in most countries in one way or another, there still exists a low conviction rate in most countries such as Thailand, Mozambique, Pakistan, Nepal, Peru, Bangladesh, Laos and Sri Lanka. The inevitable conclusion is that there are weaknesses in the screening process.

The participant from India expressed an opinion that dropping too many cases by screening does not realize justice, even if the conviction rate becomes higher. In his view, the charges should be sheeted for the maximum cases, and conviction should be obtained for the maximum cases. It was also stated that the percentage of cases charged, and the conviction rate, should both be the criteria to ascertain the efficiency of prosecution. However, in general, the participant's of this seminar acknowledge the importance of screening as a solution for low conviction rates. In general they agreed on the need for screening, for the following reasons, namely:

(a) as a tool to overcome the existing problem of low conviction rates;
(b) as a tool to avoid unwarranted prosecution in the courts;
(c) to ensure that society's trust in the criminal justice system is not diminished by acquittals; and
(d) to ensure convictions.

B. Practical Approach to Screening

Screening, being acknowledged as a solution, is not sufficient. There is a need for a practical approach to screening. The participant from Indonesia informed this seminar that in Indonesia, the public prosecutor, upon receiving the dossier or investigation paper from the police, has to fill out two types of checklists, namely;

(a) formal- dealing with the Criminal Procedure Code ; and
(b) material- dealing with the Penal Code.

It was informed that upon completing the said checklist, the public prosecutor must ensure that there is 90% sufficient evidence before prosecution can be initiated. It was also to be noted that the public prosecutor, in screening, should study the following factors:

(a) statement of the relevant witnesses.
(b) age of the witnesses.
(c) the need for corroboration (if any).
(d) the requirement of the evidentiary rule for admissibility.
(e) existence of the relevant exhibits recovered by the police.
(f) all investigations have been completed by the investigation officer.
(g) the value to be attached to each piece of evidence.
(h) the value of the confession or statement of the suspect (where applicable) ; and

(i) whether investigation has been conducted towards the possible defence of the suspect.

The above list is not exhaustive.

C. Safeguards of Screening

The participants agree that there must be a method to avoid abuse of the screening process. In dealing with the safeguards, it is accepted that the superior officers in the Public Prosecutors Office can play a role as a safety valve to ensure non-abuse.

An independent review body of the screening process, such as the Committee for the Inquest of Prosecution in Japan, can also be a safeguard. The Committee, on receiving a complaint from the victim about the decision of prosecution, reviews the case and if necessary, recommends prosecution to the Public Prosecutors Office. Further, in Japan, where offences are committed by public officials, if not prosecuted, the victims have other recourse. The victim can complain to the court. The court, based upon the complaint, would ascertain whether there is sufficient evidence for trial. Apart from this recourse, the victim can also lodge a complaint at the High Public Prosecutors Office. Possible abuse may also be dealt with by usage of private prosecutions as is currently being used in many countries.

D. Advice to Investigators

It is acknowledged that in the majority of the participant countries, the manner and method of investigation rests solely in the domain of the police. The police officers are trained and possess sufficient knowledge as regards how to investigate. However, it cannot be disputed that laws constantly change, especially certain special legislation or the law of evidence. The problem arises that despite investigation, the task is to adduce the investigated evidence without infringement of the law of evidence. The public prosecutor is in a position to know what is lacking or necessary, based on the situation of the trial court and what is admissible as evidence in the court. In such regard, the necessity arises where the public prosecutors might have to advise the investigator of the need for further investigation.

It has been acknowledged by participants from India, the Seychelles, Japan, Republic of Korea, Thailand and Hong Kong that advice from public prosecutors is needed and appreciated by the police. However, it was cautioned that such advice should not be in a manner which would be construed as direction or instruction. The feeling amongst the participant countries is that the police and public prosecutors should work hand in hand and show a high degree of cooperation. The aim of both these bodies is to combat crime. However, the feelings and office of one another should be respected.

E. Admissibility of Confessions

Confession is important for the following purposes:

(a) to overcome the low conviction rate;
(b) to reduce unnecessary prosecution in the courts; and
(c) to know the possible defence, or the suspect's version, which would assist in screening.

In Algeria, Bangladesh, Colombia, Peru, India, Indonesia, Pakistan and Sri Lanka confession or statement given by the suspect or accused is not admissible if it was made to a police officer. However, in all other participant countries, a confession or statement is admissible even if made to police officer, provided certain conditions are met. The prosecution must prove that the confession or statement was made

without any inducement, threat or promise, as a condition for admissibility.

In Algeria, Colombia and Peru, a confession or statement is only admissible if it is made before a public prosecutor. In the Republic of Korea, in order to ensure admissibility of the confession, it must have been made to the prosecutor and must have been made voluntarily. In the Republic of Korea, confessions may also be made to the police. However, such a confession is only admissible if the accused admits to the contents of the said confession.

In India and Bangladesh, a confession or statement is only admissible if it was made before a magistrate. However, in Malaysia, Thailand and Hong Kong, a confession or statement is admissible if it was made before a police officer, provided it was voluntary. Meanwhile, in Pakistan and Sri Lanka, a confession made to a police officer above the rank of Deputy Superintendent is admissible only in cases of terrorism.

Most participants were concerned with the use of force by police officers in some countries, and this is the first and foremost problem to be solved before the confession is made admissible. As a safeguerd to ensure voluntariness of a confession or statement, certain measures can be put in place. For instance, in Hong Kong, video recording is done while the confession or statement is being made. In other countries, members of the public are present when the confessions are being recorded.

However, the particimants in general agreed that legislation should be amended so that a confession or statement can be made to a police officer above the rank of Inspector. However, as a safety measure, such a confession should only be made admissible if it is proved at the trial to have been made voluntarily. It is generally accepted that admissibility of a confession or statement of the suspect or accused would be a tool to overcome the problem of low conviction rates. All participant countries agreed that it would be good to allow for admissibility of a confession or statement, so long as it was made voluntarily.

F. Securing Appearance Before the Court and Testimony of Witnesses

One of the main causes for the low conviction rate and overloading of the courts and prosecutors is the problem of witnesses. In most countries, the courts have to postpone trials due to the unavailability of witnesses, thus causing delays. In other countries, courts acquit the accused persons since the witnesses are missing and cannot be found, in order to prove the charge.

In all participant countries, except Mozambique, there seems to be a problem in securing witnesses for trial. Amongst the reasons are:

(a) witnesses refuse to attend trial to avoid enmity.
(b) no protection for witnesses who testify.
(c) no allowances or transportation costs paid to witnesses.
(d) frequent adjournments cause witnesses to lose interest in trials.
(e) hesitation to testify in front of the accused.
(f) witnesses don't understand the rule of law.
(g) mobility of witnesses and difficulty in tracing them.
(h) witnesses regard testifying as a waste of time; and
(i) no trust in the police and unfriendly environment of the court.

Due to the reasons mentioned above, there is a need to educate society about the

legal system. Futher, in most countries except Brazil, Colombia, Hong Kong, Laos, Nepal, Pakistan, Republic of Korea and Viet Nam, there does not exist a witness protection program. A witness protection program would enable the State to place the witness in a safe house and this would ensure that the witness is present in court in order to testify. In Colombia, the witness protection program is very effective and the State plays a major role to ensure that the witness is equally safe after testifying. In countries where there is no witness protection program, such as Algeria, Bangladesh, Japan, China, Indonesia, Mozambique, Peru, Sri Lanka and Thailand, they support the creation of such programs in their jurisdiction. However, the participants from Malaysia and the Seychelles find that the need does not arise for the creation of witness protection programs in their country.

G. Immunity

The provision of immunity would be useful to ensure an increase in the conviction rate. In crimes involving two or more persons, the prosecution may provide immunity against prosecution for the accomplice. In the United States of America, immunity is being accorded to co-accuseds where there is no independent witness, in order to obtain conviction. In the United States, immunity is being given formally and informally. Formal immunity must obtain the sanction of the Attorney General. However, this is a long and time consuming process. On the other hand, the prosecutors in the United States also apply informal immunity whereby the sanction of the Attorney General is not required. Once the prospective witness is prepared and willing to reveal the truth as a witness, a formal document is executed.

In Sri Lanka, a similar system is used and known as a conditional pardon. This is only done with the sanction of the Attorney General. However, a person is conditionally pardoned on the condition that s/he testifies against the co-accused. It is to be noted that this is only used in very rare cases involving heinous crimes. In Pakistan, the principle of immunity is equally applied, but it is known as an approver system. Meanwhile in Hong Kong, immunity is given to the co-accused depending on whether the co-accused's prospective evidence is worthy of credit. However, it is only done if there is sufficient corroborative evidence. On the other hand, in Malaysia and Hong Kong, the principles of this system are used but the public prosecutors would prefer the co-accused to plead guilty and later be used as a witness. In Thailand, there is no specific law as regards immunity, but in practice the prosecution applies the immunity principle. However, it is hoped that usage of an immunity system and witness protection program would ensure that the problem of low conviction rates could be solved.

IV. OVERLOADING OF COURTS AND PROSECUTORS

It has been noticed that in some jurisdictions there is a principle of mandatory or compulsory prosecution. This is a situation where as long as there is sufficient evidence, the public prosecutors should or are compelled to institute criminal proceeding without any discretion. On the other hand, there are some countries such as Thailand, Indonesia, Malaysia and Peru, which allow the public prosecutor discretionary powers of non-prosecution of certain categories of cases. However, this discretionary power is not exercised as a rule but rather as an exception.

Apart from these two categories, there are some countries which allow for discretionary prosecution such as in Japan

and the Republic of Korea. Even though this discretionary power is exercised, it is done with stringent conditions and counter-checks, so as not to be abused.

Against the background of the abovementioned prosecutorial system, there exist a severe problem of overloading of the courts and the prosecutors with minor, petty and unwarranted prosecutions. Where prosecutions are instituted without exercising discretionary powers, inevitably the result would be overloading of the courts. When the courts are overloaded with criminal cases, the consequential effect would be delayed trials. This would lead to unhappy victims who would further suffer the agony of waiting for justice to be meted out. It is of utmost importance that the public prosecutor should, at all times, ensure that the interest of society or the public, for whom s/he acts, is their main priority.

V. OVERLOADING: COUNTERMEASURES

A. Alternative Measures

In the changing society it is acknowledged that the criminal justice system needs some overhaul. Most of the cases in our courts, at the present time, which end up with fines could be disposed of in a much speedier manner. As such, this could reduce the biggest problem of overloading of the courts and prosecutors. In this regard, we propose two solutions namely;

(a) Summary procedure; and
(b) Administrative measures.

1. Summary Procedure

At present, this mode is being practiced in the Republic of Korea and Japan. When the public prosecutor examines the dossier or investigation paper, s/he would be able to form an opinion as to whether such an offence is suitable to be dealt with by fine or formal trial. When the prosecutor forms the opinion that the criminal case could be disposed of with a fine, then the proceeding is conducted as a summary procedure. In cases where summary procedure is followed, the documents involving the case are sent to the judge. The judge examines the documents and issues an order to the accused or the defendant as to the amount of fine imposed. If the accused or defendant is not satisfied with the fine imposed, the accused may request a formal trial; only then is a formal trial held. In the Republic of Korea, a total of more than 1 million cases are registered, out of which 85% are disposed of by the courts through summary procedure. This percentage reflects that about 900,000 cases are dealt with summarily. As such, the adoption of summary procedures can and does, to a great extent, reduce the overloading of the courts and prosecutors.

2. Administrative Measures

In Japan for instance, about 2.1 million cases involve offences of traffic violations. These offences are: driving beyond the speed limit, marginal overloading of trucks and cars, and other minor traffic violations. Such cases are disposed of with offenders being allowed to pay an administrative fine. If such an administrative fine is paid, then the matter ends. However, where the administrative fine is not paid within the stipulated time, or without reasonable cause, the matter is then taken up as a criminal case to the court. Such a system is also being used in Malaysia, India, Indonesia and Sri Lanka.

B. Plea Bargaining

Plea bargaining is an effective method to obtain conviction rather than acquittal. In this system, counsel for the accused would correspond with the public prosecutor for the charge to be reduced on certain cogent grounds, such as the

problem of adducing evidence and the existence of strong mitigating factors. Upon examination of the written request, and studying the investigation paper, the public prosecutor might agree to reduce the charge or alternatively withdraw some charges and merely proceed on one charge, on the condition that the accused pleads guilty. This process contributes in reducing the problem of overloading and to ensure that justice is done. This process is being applied, for example, in Malaysia, the United States, the Seychelles and Sri Lanka. However in Malaysia and the United States, plea bargaining is done between the prosecution and the defence, without any role of the judge, so as not to prejudice the mind of the court in sentencing. On the other hand in Sri Lanka, plea bargaining is conducted between the prosecution and the defence, however they must obtain the approval of the judge. It must be admitted that only a small number of cases are disposed of through plea bargaining. However, there is room for prosecutors and defence counsel's to utilise plea bargaining for the interest of justice to all. In dealing with this issue, participants did not raise objection to the usage of plea bargaining.

C. Discretionary Suspension

Discretionary suspension is being practiced in Japan and the Republic of Korea. Discretionary suspension is applied in cases where there is sufficient evidence, however the prosecutor might prefer not to charge a suspect (please refer to diagram 1). In the application of this system, despite sufficient evidence for conviction, a charge is not preferred or instituted against the suspect when considering the following instances:

(a) minor offence/less serious crime;
(b) first offender;
(c) age- whether young or old;
(d) little criminal tendency of the suspect;
(e) restitution has been made to the victim;
(f) the suspect has repented; and
(g) contributive factor of victim, eg. provocation.

This system has proven to be useful to correct criminals, to protect society, to reduce overloading of the courts and also to prevent overloading of the prisons. However, if the same suspect commits another crime then, as in Japan, s/he would face prosecution for the offence which s/he was not prosecuted for before. The same system is also being practiced in Hong Kong in relation only to juvenile offenders, as compared to Japan and the Republic of Korea, where it is being applied for adult offenders. In the Republic of Korea, about 10% of the total number of cases end up with suspended prosecution, which amounts to about 199,000 cases. Meanwhile in Japan, about 30% of cases are classified as suspended prosecution. In Hong Kong, about 35% of the total number of juvenile offenders are not prosecuted under this system, and rehabilitation of juvenile offenders is done through the Superintendent Discretion Scheme. As a safeguard against possible abuse, the victims can lodge an appeal with the High Public Prosecutors Office or the High Court or the Constitutional Court against the decision of the public prosecutor, as in the Republic of Korea. In Japan, the Committee for the Inquest of Prosecution in Japan acts as a safeguard. The Committee, on receiving a complaint from the victim about the decision of non-prosecution, reviews the case and, if necessary, recommends prosecution to the Public Prosecutors Office.

D. Discretionary Withdrawal

Discretionary withdrawal is an instance where there exists sufficient evidence for prosecution and the accused is indicted or charged for an offence. However, between

the indictment period and the judgment or sentence, the charge is withdrawn by the prosecution in the exercise of its discretionary power. The application of discretionary withdrawal is shown in diagram 1.

However, participants from Brazil, Sri Lanka and Hong Kong raised much reservation about the usage of discretionary suspension and withdrawal, on the grounds that it would lead to impunity and corruption. The participant from Hong Kong feels that all adult offenders must be punished and that the prosecution must uphold justice. Meanwhile, the participant from Sri Lanka stated that the public would lose confidence in the criminal justice system if this proposal is applied.

On the other hand, the participant from Indonesia suggested this proposal is very useful to avoid overloading of the courts. However, he suggested that there must exist some form of countermeasure in order to avoid abuse, this was eventually supported by the participants from Hong Kong and Malaysia. However, it is agreed that there might exist some form of probable abuse, but countermeasures would help the application of this system. Victims of crime may lodge an appeal with the Attorney General or the Public Complaints Bureau, as in Malaysia.

The main aim of this system is to prevent overloading of the courts and to correct first time offenders. This system has been proven to be successful in the Republic of Korea and Japan. Currently, all countries except Algeria, Bangladesh, Brazil, China, Indonesia and Mozambique apply discretionary withdrawal. Meanwhile, as regards discretionary suspension, it is only being used in Japan, the Republic of Korea, the Seychelles, Viet Nam and Hong Kong (only for juvenile cases).

VI. LACK OF EFFECTIVE COUNTERMEASURES AGAINST NEWLY EMERGING OR PREVAILING CRIMES IN THE CHANGING SOCIETY

In most countries, the current laws were enacted between the 1880's and 1970's. The society then and now has changed. Thus the types of crime has changed, together with the changing society. As we approach the 21st century, newly emerging crimes are seen to be prevalent. In some countries, with the opening of multi-media super-corridors related to high technology, there emerge new crimes relating to computers. Sadly, the criminal justice system cannot keep pace with the newly emerging and prevailing crimes. The members involved with the criminal justice system are not equipped either technologically or with knowledge as to how to combat these emerging crimes. Society now sees itself facing crimes such as organized crime, economic crime and computer crime.

A. Organized Crime

As the name speaks for itself, this type of crime is organized in nature. Various types of crimes are committed by members of an organized group. These crimes range from theft, robbery, kidnapping to murder. The members of these organizations use violence and collect protection money from businesses. In Japan, these organized groups are known as '*boryokudan*'. In other countries, there are various triad groups carrying out criminal activities with their own trademarks.

In Japan for instance, the Japanese government, realizing this growing problem, enacted the Anti-boryokudan Law in 1991, aimed at combatting crimes committed by these organized criminal groups. The main objective of this law is to maintain peace and order within society. The mere fact of such a specific law being

enacted clearly shows the seriousness of this crime. In Colombia, these organized groups of criminals involve themselves with crimes relating to drugs, kidnapping and murder. Realizing the seriousness of these crimes, the Attorney General of Colombia has set up a group of special officers to investigate offences such as drugs, kidnapping and murder involving organized groups. There have been instances where public prosecutors have had to flee Colombia due to threats by these organized groups.

The characteristics of these organized groups impede proper and thorough investigation. It would be difficult for investigators to obtain detailed information about these groups. The members of organized crime are always bound by secrecy. This is usually done by *boryokudan* members by cutting off their fingers to show alligence to the said group. More often than not, the activities of the organized groups are only within their own knowledge. Therefore, it is important to combat this type of crime in new way.

B. Economic Crime

Economic crime has exisred for a long time in many jurisdictions. However, the manner and seriousness of this crime in the past years have been different compared to the 1980's. Thus since the 1980's, the authorities noticed new complexity in investigation this type of crime. Economic crimes range from deception to fraud, forgery, using false document as genuine, and criminal misappropriation of property. As regards Hong Kong, in 1990 there was a total of reported cases of deception, business fraud and forgery amounting to 2,017 cases; 637 cases of fraud and 448 cases of counterfeit/ forgery. The total amount involved (in 1990) was HK$348 million. However in 1997, the total reported cases of deception, business fraud and forgery was 3,240 cases. Meanwhile, 313 cases of fraud and a total of 668 cases of counterfeit and forgery were reported to the Commercial Crime Bureau. The total amount involved was HK$1,165 million. This clearly shows the growing trend of these cases. However, the complicated nature of these offences and the voluminous documents involved, causes great problems not only to investigators, but also to public prosecutors and judges. Apart from this, economic crimes are committed internationally and involve different jurisdictions. Thus, legal issues arise, namely, jurisdiction, which law is to be applied etc. Therefore a solution needs to be found for these issues.

C. Computer Crime

Crime involving the usage of computers has been a recent problem not only for investigators, but also prosecutors. The invention of the computer in the early days was merely as a word processor. However in recent years, every home in most countries has not only a computer, but also the Internet. Most countries are expanding the usage of computers into Internet and E-commerce. Society can use the computer for business transactions between one part of world and another. Electronic money and goods can be transferred from one jurisdiction to another within seconds, leaving no trace to track. Further, there are no documents being used in these transactions. In recent years, some countries such as Hong Kong have been planning for the implementation of banking, purchase of goods and related activities through the computer.

However, problems will arise if computers are not used for the correct purpose. In the changing society there is bound to exist some who will misuse computers, such as by hacking, Internet gambling and publishing obscene articles. In Hong Kong, there were only 4 reported cases relating to computer crimes in 1993.

However in 1998, this figure rose to 32 cases. Meanwhile, the total value of loss in 1993 was HK$600,000 and in 1998 it had risen to HK$2 million. Even though the number of cases in 1998 is not big in terms of figures, it clearly shows a large increase from the 4 cases in 1993 to the 32 cases in 1998. As such, time is ripe for countries to address this issue and find practical solutions to overcome and curb this crime.

D. Special Legislation

As regards organized crime, there is a need for the enactment of special legislation. This special legislation should enact provisions for the criminalization of organized crime groups and their membership.

In Japan, the Anti Boryokudan Act has been legislated to combat and suppress criminal organizations known as '*Boryokudans*'. This Act designates certain groups as mobster groups or *boryokudan*. A special procedure has been devised for hearings to be conducted by the police in order to inform the group that such a group has been designated as an organized group. The police, by using this Act, can regulate these organizations by giving them a time period of three months and a further extension of one month. This Act forbids the groups from expanding and the imposition of tattooing among juveniles. The police are permitted to issue a suspension order. This suspension order would, in effect, order the groups to stop its activities. If such order is ignored, then the police may issue a re-occurance order, failing which the criminal justice system would be activated and the group or members would be detected. In Tokyo, between January and November 1998, the police issued 268 suspension orders, 7 re-occurance orders and 1 case of detection.

In other jurisdictions, such as Malaysia, legislation has been used to prevent organized criminal groups from mushrooming. The Emergency (Public Order and Prevention of Crime) Ordinance 1969 was enacted for suppression of violence or prevention of crimes involving violence. This law provides for the members of organized crime to be detained for a period not exceeding two years. However, such detained persons may make representations for a review of detention by the Advisory Board. The members of the Advisory Board are appointed by His Majesty, the King. As far as Malaysia is concerned, the enactment of this legislation has proven to be successful in curbing not only the spread of organized crime, but also the activities of its members.

In some jurisdictions such, as Colombia, laws have been legislated providing severe punishments for criminal activities conducted by organized criminal groups and their members. The Penal Code has been amended for increased imprisonment from 25 to 40 years for the offence of kidnapping. Meanwhile, the same applies in cases of homicide involving organized groups and their members. It is hoped that legislation, such as in Japan, Malaysia and Colombia, would be effective in curbing the activities of organized criminal groups and the members thereof.

E. Anti-Money Laundering Legislation

Anti-money laundering legislation is found to be an effective tool in fighting against organized and economic crime. This type of legislation has been enacted in Hong Kong. However in Japan, Malaysia, the Seychelles, Pakistan and Thailand, such legislation has been enacted to seize ill-gotten proceeds of criminal activities connected to drugs. Such legislation proposes to seize all ill-gotten proceeds and property acquired by persons involved with certain crime, as envisaged by the specific legislation. In Hong Kong,

the Organized Serious Crime Ordinance provides the mechanism for investigating and seizing all ill-gotten proceeds of criminal activities. This Ordinance plays the role of anti-money laundering legislation. The said law in Hong Kong prescribes a transaction reporting system, where the banks are duty bound to report transactions. Such a system would alert the authorities and thereby cause an immediate response.

However, this legislation would not be of much assistance without mutual assistance from other countries. In practice, a criminal organization would operate its criminal activities in one country and transfer the proceeds thereof to another country, or even in some cases, acquire property in a third country. In such cases it involves the question of jurisdictional and national sovereignty of the individual country. Therefore, countries should enact legislation for mutual legal assistance such as in Hong Kong and Thailand. In Hong Kong, such legislation has been enacted in 1998 to enable authorities in Hong Kong to make and respond to requests to and from other jurisdictions in relation to criminal matters. However, such provisions have been enacted in Malaysian law only as regards drug-related offences. The mutual legal assistance ranges from the taking of evidence, search and seizure, confiscation of the proceeds of crime and transfer of suspects.

The time is ripe for all countries to negotiate and enact provisions such as anti-money laundering legislation and for the provision of mutual legal assistance, bearing in mind the primary goal of the prevention of crime.

F. Confiscation of Illicit Proceeds

Provision for confiscation of illicit proceeds would be applicable for offences related to organized and economic crime. Many jurisdictions such as Japan, Malaysia, Pakistan, the Seychelles and Thailand have already enacted provisions within their laws in relation to the confiscation of illicit proceeds connected with drug-related crime. However, such provisions should be extended to a multitude of crimes committed by organized groups.

Laws should make it possible for all ill-gotten proceeds of crime to be confiscated or forfeited. This is to ensure that criminals should not be able to enjoy the fruits of their crime after being punished by way of imprisonment. However, the only problem faced by countries is the difficulty in proving the hidden assets. Another hindrance is the banking secrecy laws in many countries. Participants from Malaysia, Thailand and the Seychelles argued that banking secrecy should not be invoked during forfeiture proceedings by the authorities. These jurisdictions have legislated for the non-applicability of banking secrecy laws for forfeiture proceedings involving ill-gotten proceeds from criminal activities.

G. Presumption Against the Accused: Shift of the Burden of Proof

Offences in relation to organized crime, such as the trafficking of drugs and economic crime such as deception and corruption, are difficult to prove. In many jurisdictions, the relevant laws require the prosecution to prove the mental element or *mens rea*. This causes many problems for the prosecution in proving the mental element. In the commission of crimes such as the trafficking of dangerous drugs, deception and corruption, only the offenders would be able to reveal the mental element. As such, the need arose in certain jurisdictions like Malaysia, Viet Nam and Bangladesh for enacting the

provision of presumption. For instance, for offences such as trafficking in dangerous drugs, in Malaysia the prosecution would have to prove:

(i) it was a dangerous drug; and
(ii) the accused was in custody thereof, as well as the weight of the drug.

Automatically, the law presumes that the accused was trafficking the said drug. It would be incumbent upon the accused to rebut the said presumption on the balance of probabilities. Similarly, provisions for shifting of the burden of proof can be applied to offences relating to organized crime and economic crime. Thus, this would assist the prosecution in obtaining convictions. Provisions like shifting of the burden of proof can also be useful for proceedings involving forfeiture. Such provisions are being applied in the Malaysian Dangerous Drugs (Forfeiture of Property) Act 1988. Participants generally agreed that such provisions be incorporated in existing legislation, as this would enable them to combat this problem.

H. Admissibility of Evidence Gathered by Electronic Surveillance

It is to be noted that in many countries, surveillance is being used by the investigative agencies. However, in some countries it is not being utilized due to constitutional constraints. There are some countries where electronic surveillance is being done in a discreet manner. In such jurisdictions, any evidence obtained through electronic surveillance is not produced in court as evidence in the event that the suspect is indicated or charged. Meanwhile in some countries, electronic surveillance is provided for in certain specific legislation.

Electronic surveillance can take the form of telephone tapping, bugging and also other visual aids. The need for electronic surveillance arises because of the complexity and secrecy in the commission of such crimes. In countries such as Malaysia, Brazil, the Seychelles and Mozambique, electronic surveillance is allowed. However, in the Seychelles and Brazil evidence of electronic surveillance is only allowed with the permission of the judge. Meanwhile in Malaysia, electronic surveillance is only allowed with the approval of the public prosecutor. Nevertheless, the underlying reason for such usage is to fight against crime. In this regard, countries should balance the right of the particular individual as against the right of the society. Even though laws might allow for electronic surveillance, we should also address our mind as to whether such evidence can be admitted by virtue of the relevant evidence laws. For instance, when telephone tapping is done, more often than not such conversations would be tapped. The practical problems for the prosecutor is to ensure that such evidence would be ruled admissible in a trial. As such, question arises as to whether such a tape could be construed as a document. In this aspect, the definition as provided for in the respective evidence laws must be looked into. Therefore, where the need arises, all penal and evidentiary laws must be amended accordingly to keep abreast with the complexity of crime.

I. Admissibility of Evidence Gatherd by Undercover Operations

In dealing with crime committed by organized groups in particular, it is very difficult to obtain inside information or evidence of such movements. As such, the authorities would need to conduct undercover operations or use agent provocateurs. When such operations in apprehending the criminals are successful, the next problem would be for successful prosecution. In the majority of cases, the

prosecution is faced with the task of proving its case beyond reasonable doubt. In dealing with this issue, the courts either:

(i) refuse to admit evidence of agent provocateurs on the grounds that it was illegally obtained evidence; or
(ii) require corroboration or independent evidence to support the evidence of the agent provocateur.

In dealing with the first problem of inadmissibility, the legal position in the United States and the commonwealth jurisdictions were the same until the decision of the Privy Council in *R v Kuruma*. This landmark decision allowed for illegally obtained evidence to be admitted. In recent years, the courts in the United States are moving closer to the Privy Council decision. As regards the second problem, the need for corroboration, some jurisdictions such as Malaysia and Singapore have enacted specific provisions in some legislation, such as corruption laws, doing away with the need for corroborative evidence.

If countries fail to enact specific laws as regards the admissibility of evidence, there would arise a situation of unfairness in the criminal justice system. This is mainly because the authorities might apprehend criminals who would either not be prosecuted or, if prosecuted, they would be acquitted by the courts. As such, laws must be enacted that keep abreast with the nature of the crime being committed.

VII. LOW QUALITY OF PROSECUTORS

In many jurisdictions, prosecutors are either the police or public prosecutors. In such situations where the prosecutors are from the police, they are known as police prosecutors. Police prosecutors in general do not possess legal qualifications. In some cases, even if they possess legal qualification, this is not reflected in their work. This can also be the same with some public prosecutors. In some jurisdictions, public prosecutors are appointed amongst fresh law graduates. The problem of low quality of prosecutor leads to the main problem of low rates of conviction. This problem leads to other consequential problems such as:

(i) insufficient screening before commencement of prosecution;
(ii) not knowing how to draft a proper charge or indictment;
(iii) insufficient preparation for a criminal prosecution ; and
(iv) ultimately not being independent but being controlled by the police.

It is to be noted that the issue of the low quality of prosecutors is serious. If this problem is left unchecked, it would inevitably cause other issues namely :

(i) society would lose faith in prosecutors;
(ii) the dignity of prosecutors would be questioned;
(iii) time, money and hard work of the investigators would be wasted;
(iv) would result in a lot of acquittals;
(v) actual criminals would be out in society; and
(vi) failure to obtain justice for the victim.

Realizing the seriousness of this problem, we propose the following.

A. Recruitment

Countries should formulate a transparent system of recruitment. This is to ensure that fit and proper individuals are appointed as prosecutors. Apart from the system of recruitment, persons of high calibre should be appointed as prosecutors. Further, countries should stop the practice

of recruiting fresh law graduates as prosecutors but require further specific training, as being practiced in Peru.

B. Training

Relevant authorities should establish legal and/or judicial training institutes such as in Japan, the Republic of Korea, Malaysia, Indonesia and Peru for providing courses during the employment of such prosecutors. This would enable the prosecutors to keep abreast of the changes in law, as well as to learn and understand newly emerging crimes.

C. Increase in Salary and Benefits

The most important solution is to increase salaries and to provide other benefits to prosecutors. This would surely motivate qualified people to join the prosecution service. This is important in order to recruit the best people to join the service. It must be realized that most legally qualified persons would rather venture into private legal practice, which brings higher remuneration. Prosecutors should also be provided with benefits such as interest free loans for housing, medical services and so on. This would ensure quality prosecutors for the wellbeing of society.

VIII. CONCLUSION

The main problem at hand, being the low rate of conviction and overloading of the courts and prosecutors, must be addressed immediately. Undivided commitment must be shown by governments and prosecutors to ensure that justice is done, and is seen to be done. Prosecutors should keep themselves abreast of the constant changes in law. They must also be sensitive to the needs of society. Prosecutors should regard themselves as the custodians of the criminal justice system. Prosecutors should initiate changes in outdated laws and not merely leave it in the hands of legislators and policy makers.