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and

RESOURCE MATERIAL SERIES No. 60

UNAFEI

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the Treatment of Offenders
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Reports of the Course

INTRODUCTORY NOTE

It is with pride that the Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community Resource Material Series No. 60.

This volume contains the Annual Report for 2001 and the work produced in the 120th International Senior Seminar that was conducted from 15 January to 14 February 2002. The main theme of this Seminar was, "Effective Administration of the Police and the Prosecution in Criminal Justice."

The 120th International Senior Seminar considered the systematic and functional reform of the police and the prosecution. The Seminar was opportune as it was held shortly before the Eleventh United Nations Commission on Crime Prevention and Criminal Justice that considered the whole issue of "Criminal Justice Reform." It is evident that the police and the prosecution, by definition, have a symbiotic relationship yet in many countries we see these agencies working, at best, separately and, at worst, at odds with one another. These are situations that must be reformed in order that the criminal justice system not only functions but also succeeds.

In this issue, papers contributed by visiting experts, selected individual presentation papers from among the Course participants, and the reports of the Courses are published. I regret that not all the papers submitted by the Course participants could be published. Also, I must request the understanding of the selected authors for not having sufficient time to refer the manuscripts back to them before publication.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Ministry of Justice, the Japan International Cooperation Agency and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes.

Finally, I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular the editor of Resource Material Series No. 60, Mr. Sean Eratt (Linguistic Adviser) who so tirelessly dedicated himself to this series.

February 2003

Kunihiko Sakai
Director of UNAFEI

PART ONE

ANNUAL REPORT
FOR 2001

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UNAFEI

MAIN ACTIVITIES OF UNAFEI
(1 JANUARY 2001 - 31 DECEMBER 2001)

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 utmost attention to the priority themes identified by the Commission on Crime Prevention and Criminal Justice. 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., transnational organized crime, corruption, economic and computer crime and the re-integration of prisoners into society) 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 from different areas of criminal justice 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 now conducts two international training courses (two months duration) and one international seminar (one month duration). Approximately 75 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 all 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 administrators holding relatively senior positions in criminal justice fields.

During its 40 years of existence, UNAFEI has conducted a total of 119 international training courses and seminars, in which approximately 2875 criminal justice personnel have participated, representing 100 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 117th International Senior Seminar

1. Introduction

From 15 January to 16 February 2001, 23 participants from 18 countries attended the 117th International Senior Seminar to examine the main theme of the "Current Situation and Countermeasures against Money Laundering".

2. Methodology

Firstly, the Seminar participants respectively introduced the current situation regarding the role and function of criminal justice agencies in their country in the fight against money laundering. Secondly, General Discussion Sessions in the conference hall examined the subtopics of the main theme. In sum, the participants diligently and comprehensively examined measures to strengthen and improve international cooperation in the fight against transnational organized crime. This was accomplished primarily through comparative analysis of the current situation and problems of preventing money laundering in the international arena. How modern criminal justice agencies are to respond to this emerging form of crime through the use of mutual legal assistance and extradition was analyzed, in order to seek concrete recommendations. To conduct each session efficiently, the UNAFEI faculty provided the following three topics for participant discussion:

Topic 1: Methods for Obtaining Intelligence for the Investigation of Money Laundering;
Topic 2: Components and Legal Framework for Combating Money Laundering: Current Situation, Problems and Solutions for an Asset Confiscation System

Topic 3: Current Situation of, Problems in and Solutions for the Use of Special Investigative Tools in Combating Money Laundering.

A chairperson, co-chairperson, rapporteur and co-rapporteur were elected for each topic and organized the discussions in relation to the above themes. In the conference hall, the participants and UNAFEI faculty seriously studied the designated subtopics and exchanged views. Final reports were compiled, based on the said discussions, and were ultimately adopted as the reports of the Seminar. These reports have been printed in their entirety in UNAFEI Resource Material Series No. 58.

3. Outcome Summary

Money laundering has become a global phenomenon and in this sense its growth has reflected recent rapid technological advances. Although money laundering techniques have become more sophisticated and widespread a number of countries do not have legislation to criminalize money laundering. Even those countries which do have such legislation often have ineffective legislation or simply do not have the necessary infrastructure to deal with the problems engendered by money laundering.

There are now three primary international instruments that provide countries with a framework within which to combat money laundering. These are the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988, the Forty Recommendations of the Financial Action Task Force and the United Nations Convention against Transnational Organized Crime (UN TOC) 2000. It is imperative to fully implement these instruments.

It is recognized that the main methods of investigation, used in money laundering cases, fall into three categories; controlled delivery, electronic surveillance and undercover operations. Controlled delivery is often the only means of identifying those involved in predicate offences (such as drug trafficking) and money laundering. The use of undercover operations and electronic surveillance requires a balance between the investigation of the criminal activity and the constitutional rights of the individual.

In relation to the actual confiscation of proceedings there is a general lack of awareness and a lack of political will. Specific problems identified were; countries' confiscation laws have a narrow scope of application, the burden of proof upon the state to prove that the assets result from money laundering is too onerous, there are a number of implementation problems (e.g. banking confidentiality, lack of international cooperation, lack of procedural laws, lack of FIUs/STRs).

In consideration of the issues raised above the following are some of the recommendations which have been made:

(i) A greater awareness must be generated about money laundering.
(ii) Introduce Financial Intelligence Units (FIUs) and Suspicious Transaction Reporting Systems (STRs).
(iii) Ensure that, where countries have STRs, these are broadened according to the individual situation of the respective country.
(iv) Sanctions should be created and imposed for non-disclosure of STRs and non-compliance with the guidelines in submitting STRs.
(v) Each country should have a comprehensive proceeds of crime law which includes all serious crime. In particular, a defendant should be required to prove the lawful origin of the alleged proceeds of serious crime or other property liable for confiscation thereby shifting the burden of proof.
(vi) The bank secrecy laws should be amended to allow law enforcement agencies to obtain information concerning the location of the proceeds of crime.
(vii) Financial institutions must be required to report suspicious transactions.
(viii) States must enter into multilateral and bilateral treaties in order that the confiscation of the proceeds of crime can be properly carried out.

It is evident that anti-money laundering laws and systems need to be established on a worldwide level. This must act hand in hand with increased training and a better exchange of information among countries in order to combat money laundering. In addition, each country should work closely with its international partners in bilateral and multilateral assistance agreements to promote action to effectively address money laundering.

B. The 118th International Training Course

1. Introduction

UNAFEI conducted the 118th International Training Course from 21 May to 12 July 2001 with the main theme, "Best Practices in the Institutional and Community-Based Treatment of Juvenile Offenders". This Course consisted of 25 participants from 16 countries. The United Nations has recognized the prevalence of juvenile offending and at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (April 2000, Vienna) it urged for measures to be taken to address the root causes and risk factors related to juvenile delinquency. In particular the international community has accepted that the move towards restorative and community justice is a natural consequence of a decreasing use of formal juvenile justice systems. Resultantly, UNAFEI, as a United Nations regional institute, decided to undertake this course looking specifically at the issue of the treatment of juvenile offenders both institutionally and in the community.

2. Methodology

The participants examined measures to strengthen and improve practices in the institutional and community-based treatment of juvenile offenders. This was accomplished primarily through comparative analysis of the current situation and problems of juvenile delinquency, juvenile correctional practice and the treatment of juvenile delinquents in the community. By learning from the successes and failures of ever-implemented solutions (not only in the Asia-Pacific region but also in other parts of the world), the best practices applicable and feasible in each participating country were explored.

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

Group 1: Best Practices in Delinquency Prevention;
Group 2: Best Practices in the Community-Based Treatment of Juvenile Offenders; and
Group 3: Best Practices in the Institutional Treatment of Juvenile Offenders.

Each group elected chairpersons and rapporteurs 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. Thirteen sessions were allocated for Group Discussion. In the fourth, fifth, sixth and seventh 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 seventh 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 Sessions, where they were endorsed as the reports of the Course. The full texts of the reports will be published in the UNAFEI Resource Material Series No. 59.

3. Outcome Summary

In the latter half of the last century there has been an increase in criminal activity among juveniles. It is recognized, however, that stiffer penalties are not the required response despite public calls for such. Indeed empirical research shows that harsher penalties can even increase re-offending. It is within this context that the institutional and community-based treatment of juvenile delinquents must be expounded.

In considering the preferred model for the community-based treatment of juvenile offenders four guiding principles were considered to be of fundamental importance. These principles were thought to be as follows;

(i) As far as possible, at least for juveniles of a certain age, the preferred option is to divert him or her at the pre-court or court stage.
(ii) There should be a multi-disciplinary team to work on the best treatment option that will address the needs of the juvenile to help him or her remain in the community.
(iii) The multi-disciplinary team should influence the availability of community resources to support the juvenile in conflict with the law.
(iv) The system should be one of through care for continuity of care and supervision of the juvenile.

It is recognized that effective delinquency prevention is based on what is called risk factor prevention whereby the risk factors of offending are identified and prevention methods are designed to counteract them. In particular, the "Communities That Care" (CTC) model developed by a research team at the University of Washington, USA stood out as proving to be both flexible and applicable to various situations because it allows the needs and resources of each particular community to be taken into consideration when selecting appropriate programmes. This model provides a framework in which risk/protective factors are systematically targeted by programmes/policies with known efficacy.

In the arena of juvenile offending, most countries are facing problems related to overcrowded institutions, non-availability of technical and professional staff, non-existent or non-professional parole system and no juvenile/family courts, classification or juvenile training schools.

In response to the issues raised, the following recommendations are among those that were suggested:

(i) Specialized training that a community-based corrections staff needs to address beyond his/her early years in the corrections service should be developed. Thus, staff involved in the delivery of cognitive behavioral programmes, multi-systemic therapy and so on should benefit from such training.
(ii) An offender-based information system should be established which allows for a systematic assessment of the risks and needs of each juvenile, an objective benchmarking of progress made by each offender and an analysis of the impact of treatment programmes and other casework intervention by Probation Officers, volunteers and other agencies working in partnership to achieve successful outcomes for the juvenile.
(iii) Community support is vital to the community-based treatment of juveniles and can only be achieved by enhancing public confidence in the treatment system by means such as using volunteers and developing a clear public relations strategy.
(iv) A National Board should be established with representatives from governmental and non-governmental agencies such as criminal justice, social welfare, health services, education and community services.
(v) The principal actor in delinquency prevention should be the Community Board which should consist of members of the community such as principals of local schools, active parents, programmes managers of local social service agencies, local probation officers, local police chiefs and local public health nurses.
(vi) Delinquency prevention programmes should be implemented by direct service providers (e.g. criminal justice professionals, nurses, teachers, social workers, drug therapists, volunteers, etc.) under the guidance of the Community Board.
(vii) Consideration should be given to establishing Juvenile Classification Homes, Juvenile Training Schools and Juvenile Medical Training Schools on one campus, close to the Juvenile Court in order to avoid operational problems.

The role of the United Nations was appreciated in that it has provided standard practices and international instruments such as the Convention on the Rights of the Child, the Beijing Rules and the Riyadh Guidelines. At the same time newly emerging concepts like "risk management" and "restorative justice" provide platforms upon which all those involved in the treatment of juveniles can invigorate their discussions and so develop a comprehensive, multi-disciplinary approach to juvenile delinquency prevention and treatment.

C. The 119th International Training Course

1. Introduction

From 10 September to 1 November 2001, UNAFEI conducted the 119th International Training Course with the main theme, "Current Situation of and Countermeasures against Transnational Organized Crime". This Course consisted of 27 participants from 15 countries. This training course coincided with a historic change in the attitude of the world to challenging international organized crime. The entire perspective with which countries around the world approach international organized crime changed forever after the atrocities in the USA on 11 September 2001, the second day of this course.

The Course further proved to be significant and timely in that it was held when the United Nations Convention on Transnational Organized Crime (hereinafter the "UN TOC Convention") is soon expected to enter into force by ratification of the many member states. The General Assembly adopted the UN TOC Convention in November 2000 and last December, in Palermo, Italy, the Convention was signed by more than 120 countries. At present 132 countries have already signed and 10 of these countries are represented by the participants' countries.

2. Methodology

The participants examined the current trends and issues in investigating organized crimes, particularly the expansion of investigative techniques in the areas of electronic surveillance, controlled delivery, undercover operations, immunity systems and witness and victim protection programmes. Drug trafficking, money laundering, use of violence and extortion, acts of corruption, trafficking in women and children, illicit manufacturing of and trafficking in firearms, the illegal trafficking and transportation of migrants, computer-related crime, and the illegal trafficking in stolen vehicles, perpetrated under the influence of criminal organizations, have been serious problems throughout the world, including Asia and the Pacific region. It is further recognized that transnational organized crime is increasing in the global community at a rate that demands action from all agencies concerned.

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 their 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, with two focus areas respectively, under the guidance of faculty advisers:

Group 1: (i) Analysis of the current situation of illicit drug trafficking
(ii) Tools facilitating the investigation of transnational organized crime.
Group 2: (i) Analysis of the current situation of illegal firearms trafficking and human (women, children, migrants) trafficking
(ii) Criminalization of participation in an organized criminal group and conspiracy, immunity systems, and witness and victim protection programmes
Group 3: (i) Analysis of the current situation of money laundering.
(ii) Countermeasures against money laundering.

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. Twelve sessions were allocated for Group discussion.

In weeks six and seven Plenary Meetings were held to discuss the interim outline of the Group Workshop reports and to offer suggestions and comments. During the Plenary Meetings, 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 Sessions, where they were endorsed as the reports of the Course. The reports will be published in full in the UNAFEI Resource Material Series No. 59.

3. Outcome Summary

Illicit drug trafficking is accelerating at an unprecedented pace, spreading very rapidly across the globe, as a result of rapid globalization. The information technology revolution has reduced the world to a small village and has made communication exceptionally fast and easy. The drug trafficker has found very useful tools to reach his desired destination with ease and with a high degree of secrecy, speed and specificity (three S's). The recent increase in the scope, intensity and sophistication of crime around the world threatens the safety of citizens everywhere and hampers countries in their social, economic and cultural development.

Illegal firearms' trafficking has recently developed into a serious problem. Many of the firearms are mainly smuggled for internal use of one nation. However, there are certain amounts of firearms that have been smuggled by criminal groups for making profit as well as for fueling the operation of international terrorism. Basically there are three categories of country involved in this type of trafficking as follows; illegal manufacturing countries, transit countries and effected countries.

Human trafficking, especially in women, children and migrants is another area that has increased recently in terms of volume and practice. The International Organization for Migration (IOM) estimated that the global human trafficking industry generates up to US$ 8 billion each year from this "trade on human misery." Nearly 2 million children are abused and trafficked globally every year. Basically, there are 2 categories of country involved in this human trafficking as follows; source countries and destination counties. Further there are two types of human trafficking; those engaged in forced labor (including prostitution) and those persons voluntarily engaged in illegal work, the so-called illegal immigrants.

The International Monetary Fund (IMF) has estimated that the aggregate size of money laundering in the world could be somewhere between two to five percent of the world's gross domestic product (GDP). Money laundering operations basically consist of three phases or stages. The first phase is the "placement" i.e. where cash enters the financial system. The second phase consists of "layering" i.e. where the money is routed through a number of transactions so that any attempt to trace the origin of money is lost. The last or the third phase consists of "integration" i.e. the money is brought back into the economy with the appearance of legitimacy and thus, integrated within the lawful economy leaving no trace of the illegal money for the various law enforcement agencies of the different countries.

Among the suggested countermeasures against transnational organized crime, the following were suggested;

(i) Specialized training should be provided to personnel involved in the investigation of transnational organized crime.
(ii) Optimum finances must be provided to train specialized personnel and suitably equip them.
(iii) Specific legislation must be implemented to define all terms (such as wiretapping, controlled delivery and undercover operations) and lay down general procedures for those investigating transnational organized crime.
(iv) International cooperation must be fostered especially in the area of controlled delivery where it has been seen to be lacking.
(v) All states should have legislation which criminalizes conspiracy and/or participation in an organized criminal group (see Article 5 of the TOC Convention).
(vi) The use of immunity systems must be sensitive to a country's culture, history, national sentiment and domestic laws as there are both benefits and drawbacks in the use of such systems depending on the specific national situation. States should however strive to implement the provisions contained within Article 26 of the TOC Convention.
(vii) Countries should adopt measures that guarantee the protection of witnesses as stipulated in Article 25 of the TOC Convention.
(viii) In order to detect money laundering in the most effective way, it is important to obtain illegal proceeds at an early stage and identification of persons at the time of opening his or her bank account is imperative.
(ix) Asset forfeiture systems should be developed in countries.
(x) Professional "gatekeepers" (e.g. lawyers and accountants) should be required to identify their clients and channel any suspicious transactions to the relevant financial intelligence unit or face sanctions accordingly.

The rapid growth in transnational organized crime and the complexity of the investigation requires a truly global response. At present, the measures adopted to counter organized crime are not only predominantly national, but also different from one country to another. It is, thus, absolutely imperative to increase global cooperation between the world law enforcement agencies and to continue to develop the tools which will help them effectively in countering transnational organized crime, including money laundering.

D. Special Seminars and Courses

1. Sixth Special Seminar for Senior Criminal Justice Officials of the People's Republic of China

The Sixth Special Seminar for Senior Officials of Criminal Justice in the People's Republic of China, entitled "International Cooperation in Criminal Matters", was held from 26 February to 16 March 2001. Ten senior criminal justice officials and the UNAFEI faculty comparatively discussed contemporary problems faced by China and Japan in the realization of criminal justice.

2. Second Special Seminar for Kenya on Juvenile Delinquent Treatment Systems

UNAFEI conducted the Second Special Seminar for Kenyan criminal justice officials who are working for the prevention of delinquency and the treatment of juvenile delinquents in their country. The Seminar, entitled "Juvenile Delinquent Treatment Systems", was held from 5 November to 29 November 2001. The Seminar exposed eighth Kenyan officials to the workings of the Japanese juvenile justice and treatment system through lectures and observation visits to relevant agencies. As a result of this comparative study, the officials successfully developed action plans for the implementation and development of institutional and community-based treatment systems for juvenile delinquents in Kenya.

3. Fourth Special Training Course on Corruption Control in Criminal Justice

UNAFEI conducted the Fourth Special Training Course entitled "Corruption Control in Criminal Justice" from 5 November to 30 November 2001. In this course, twelve foreign officials engaged in corruption control comparatively

analyzed the current situation of corruption, methods of corruption prevention, and measures to enhance international cooperation in this regard.

III. TECHNICAL COOPERATION

A. Joint Seminars

Since 1981, UNAFEI has conducted 23 joint seminars under the auspices of JICA and in collaboration with host governments in Asia and the Pacific. 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.

1. Kenya-UNAFEI Joint Seminar

The Kenya-UNAFEI Joint Seminar was held in Nairobi on the theme of "Effective Administration of Juvenile Justice" from 14 to 17 August 2001. The Government of Kenya, JICA and UNAFEI organized the Joint Seminar. There were about one hundred participants from the police, prosecution, judiciary and the prison, probation and children's departments in Kenya. The Seminar focused on the role of the police, prosecution and the judiciary in juvenile justice and analyzed how coordination between the relevant agencies involved in juvenile justice could be improved. The UNAFEI delegation consisted of 6 members of UNAFEI as well as a member of the Japanese Family Court and the Japanese Police.

2. Philippines-UNAFEI Joint Seminar

The Philippines-UNAFEI Joint Seminar was held in Manila under the theme of "Community Involvement in the Criminal Justice Administration" from 5 to 8 December 2001. The Government of the Republic of the Philippines, JICA and UNAFEI organized the Joint Seminar. Over 200 local participants including lawyers, government officials, non-governmental representatives and members of the judiciary and the police attended the Seminar. The UNAFEI delegation consisted of the Director, the Deputy Director, four professors, the Linguistic Advisor, a member of the Secretariat and an official from the National Police Agency of Japan. The Seminar concluded with the adoption of recommendations on enhancing community involvement in criminal justice administrations.

B. Regional Training Programmes

1. Thailand

In January 2001, UNAFEI dispatched the Deputy Director and a professor to Thailand to assist the Office of the Narcotics Control Board (ONCB) in organizing the Ninth Regional Training Course on "Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration."

2. Costa Rica

In July 2001, UNAFEI dispatched the Deputy Director and a professor to Costa Rica to attend the Third International Training Course on "Effective Treatment Measures to Facilitate Reintegration into Society", organized and hosted by the Government of Costa Rica through the United Nations Latin American Institute for the Prevention of Crime and the Treatment of Offenders (ILANUD).

C. Others

In July and August 2001, two UNAFEI professors were 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.

IV. COMPARATIVE RESEARCH PROJECT

Reflecting its emphasis on the systematic relevance of training activities and priority themes identified by the UN Commission, the research activities of the Institute are designed to meet practical needs, including those for training materials for criminal justice personnel.

V. 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.

VI. 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 courses and seminars. In 2001, the 56th, 57th and 58th editions of the Resource Material Series were published, as was "The Global Challenge of High-Tech Crime", a book presenting the results of the Workshop on Crimes Related to the Computer Network at the Tenth United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Vienna, Austria in April 2000. In December 2001 the results of the Nepal-UNAFEI Joint Seminar on "Effective Countermeasures to Combat Organized Crime in Criminal Justice Processses" (held in Kathmandu, Nepal in December 2000) was also published. Additionally, issues 104 to 106 of the UNAFEI Newsletter were published, including a brief report on each course and seminar (from the 117th to the 119th respectively) and providing other timely information.

VII. OTHER ACTIVITIES

A. Public Lecture Programme

On 2 February 2001, 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 117th 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 increase the public's awareness of criminal justice issues, through comparative international study, by inviting distinguished speakers from abroad. This year, Mr. Peter H. Wilkitzki (Director-General, Criminal Affairs Bureau, Federal Ministry of Justice, Germany) and Ms. Susan L. Smith (Senior Trial Attorney and International Money Laundering Counsel, Asset Forfeiture and Money laundering Section, Criminal Division, US Department of Justice, the United States of America) were invited as speakers to the Programme. They delivered lectures respectively entitled "Criminal Law Sanctions in Germany: Facts and Trends" and "Money Laundering: Trends and Techniques".

B. Assisting UNAFEI Alumni Activities

Various UNAFEI alumni associations in several 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 internationally.

C. Overseas Missions

Mr. Keiichi Aizawa (Deputy Director) and Mr. Chikara Satou (Professor) represented UNAFEI at the "9th Regional Training Course on Effective Countermeasures against Drug Offences and the Advancement of Criminal Justice Administration" convened by the Office of the Narcotics Control Board (ONCB), Thailand. Mr. Keiichi Aizawa and Mr. Chikara Satou presented expert lectures on the role of the confiscation of illicit proceeds and anti-money laundering systems in combating drug trafficking. The Training Course was held in Thailand from 14 January to 27 January 2001.

Mr. Mikinao Kitada (Director) represented UNAFEI and was a member of the Japanese delegation at the Tenth United Nations Commission on the Prevention of Crime and Criminal Justice held in Vienna, Austria from 8 May to 17 May 2001.

Mr. Keiichi Aizawa (Deputy Director) attended the First Asia Cyber Crime Summit which was held in Hong Kong from 24 April to 27 April 2001. Mr. Keiichi Aizawa presented a lecture as a panelist at this Summit.

Mr. Yasuhiro Tanabe (Professor) attended the Seminar on Forfeiting the Proceeds of Crime and presented a lecture. This Seminar was hosted by the Asset Forfeiture and Money Laundering Section of the United States Department of Justice and the Anti-Money Laundering Office of Thailand. It was held from 15 May to 18 May 2001 in Thailand.

Mr. Hiroshi Tsutomi (Professor) attended the Ad Hoc Expert Group Meeting on Criminal Justice Statistics as an expert. This Meeting was held in Buenos Aires, Argentina from 23 April to 25 April 2001.

Mr. Keiichi Aizawa (Deputy Director) and Mr. Kenji Teramura (Professor) visited Costa Rica from 14 July to 28 July 2001 where they presented lectures on behalf of UNAFEI at the Third International Training Course on Effective Treatment Measures to Facilitate Reintegration into Society.

Mr. Mikinao Kitada (Director), Mr. Yuuichirou Tachi (Professor) and Mr. Kunihiko Suzuki (Staff) visited the People's Republic of China from15 July to 22 July 2001 for the purpose of fostering international exchange between the respective criminal justice administrations.

Mr. Hiroshi Tsutomi (Professor) and Mr. Kei Someda visited Kenya as short-term experts, as part of a JICA international assistance scheme providing special support to the Children's Department of Kenya from 24 July to 14 September 2001.

Ms. Sue Takasu (Professor) attended the Inter-Governmental Open-Ended Expert Group Meeting to Prepare Draft Terms of Reference for the Negotiation of an International Legal Instrument against Corruption in her capacity as a representative of the Japanese Government, from 30 July 2001 to 3 August 2001.

Mr. Mikinao Kitada (Director), Mr. Toru Miura (Professor), Mr. Yasuhiro Tanabe (Professor) and Ms. Mikiko Kakihara (Professor) formed the UNAFEI delegation which attended the joint Kenya-UNAFEI Seminar in Nairobi, Kenya from 6 August to 22 August 2001.

Mr. Yasuhiro Tanabe (Professor) attended the International Association of Prosecutors' Annual Conference in Sydney, Australia from 1 September to 8 September 2001 where he made a presentation to the conference.

Mr. Keiichi Aizawa (Deputy Director) participated in the Seminar on Extradition and Mutual Legal Assistance as a visiting lecturer in Laos from 22 September to 1 October 2001.

Mr. Mikinao Kitada (Director) attended the 17th Law-Asia Conference held in Christchurch, New Zealand from 3 October to 8 October 2001 where he was invited to speak at two of the sub-sessions.

Mr. Kenji Teramura (Professor) acted as an observer at the 21st Asian and Pacific Conference of Correctional Administrators which was held in Cheng Mai, Thailand from 20 October to 27 October 2001.

D. Assisting ACPF Activities

UNAFEI cooperates and corroborates with the ACPF to further improve crime prevention and criminal justice administration in the region. Since UNAFEI and the ACPF have many similar goals, and a large part of ACPF's membership consist of UNAFEI alumni, the relationship between the two is very strong.

VIII. 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, the judiciary, corrections and probation. UNAFEI also has approximately 20 administrative staff members, who are appointed from among officials of the Government of Japan, and a linguistic adviser. Moreover, the Ministry of Justice invites visiting experts from abroad to each training course and seminar. The Institute has also received valuable assistance from various experts, volunteers and related agencies in conducting its training programmes.

B. Faculty Changes

Mr. Hiroshi Iitsuka, formerly Professor of UNAFEI and Chief of Training Division, was transferred to the Matsudo Branch of the Chiba District Court on 1 April 2001.

Mr. Akihiro Nosaka, formerly Professor of UNAFEI and Chief of Information and Library Service Division, was transferred to the Chiba Probation Office on 1 April 2001.

Mr. Shinya Watanabe, formerly Professor of UNAFEI and Chief of Research Division, was transferred to Fuchu Prison on 1 April 2001.

Mr. Chikara Satou, formerly Professor of UNAFEI, was transferred to the Hachioji Branch of the Tokyo District Prosecutors Office on 1 April 2001.

Mr. Toru Miura, formerly a Judge at the Kushiro District Court, joined UAFEI as a Professor and the Chief of Training Division 1 April 2001.

Mr. Kenji Teramura, formerly a Senior Researcher with the Takamatsu Regional Headquarters, joined UNAFEI as a Professor and Chief of Research Division 1 April 2001.

Mr. Kei Someda, formerly a Senior Researcher at the First Research Department, joined UNAFEI as a Professor and Chief of Information and Library Service Division on 1 April 2001.

Mr. Yasuhiro Tanabe, formerly a Prosecutor with the Tokyo District Prosecutors Office, joined UNAFEI as a Professor on 1 April 2001.

Ms. Sue Takasu, formerly a Prosecutor with the Yokohama District Prosecutors Office, joined UNAFEI as a Professor on 1 April 2001.

Ms. Rebecca Findlay-Debeck left her position as a linguistic advisor at UNAFEI on 1 April 2001 and was replaced by Mr. Sean Eratt, a Solicitor from England.

IX. FINANCES

The Ministry of Justice primarily provides the Institute's budget. The total amount of the UNAFEI budget is approximately ¥351 million yen per year. Additionally, JICA and the ACPF provides assistance for the Institute's international training courses and seminars.

UNAFEI WORK PROGRAMME FOR 2002

I. TRAINING

A. 120th International Senior Seminar

The 120th International Senior Seminar, "Effective Administration of the Police and the Prosecution in Criminal Justice" is to be held from 15 January to 15 February, 2002. The 120th International Senior Seminar will examine measures to improve police systems and enhance methods of case screening by prosecutors. They will also look at means of facilitating better cooperation between police and prosecutors.

B. 121st International Training Course

The 121st International Training Course, "Enhancement of Community-Based Alternatives to Incarceration at all Stages of the Criminal Justice Process", is scheduled to be held from 20 May to 14 July 2002. This Course will examine current initiatives and the use of non-custodial measures at every stage of the criminal justice process.

C. 122nd International Training Course

The theme of the 122nd International Training Course is, as yet, undecided. It is scheduled to be held from 2 September to 3 November 2002.

D. Seventh Special Seminar for Senior Criminal Justice Officials of the People's Republic of China

The Seventh Special Seminar for Senior Criminal Justice Officials in the People's Republic of China, "Criminal Justice Reform", is scheduled to be held at UNAFEI from 25 February to 15 March 2002. Ten senior criminal justice officials and UNAFEI faculty will discuss contemporary problems faced by China and Japan in relation to the above theme.

E. First and Second Seminars on the Judicial System for Tajikistan

The First and Second Special Seminars for officials involved in criminal justice from Tajikistan will be held from 4 March until 21 March and from 27 May until 14 June at UNAFEI. The objectives of these courses will be to study the Tajikistan and Japanese criminal justice systems and to comparatively study the current situation, problems and countermeasures in respect of transnational crime.

F. Third Special Seminar for Kenya on Juvenile Delinquent Treatment Systems

UNAFEI will hold the Third Special Seminar for Kenyan criminal justice officials who are working for the prevention of delinquency and the treatment of juvenile delinquents in their country. The Seminar, entitled "Juvenile Delinquent Treatment Systems", will be held from October to November 2002. The Seminar will expose Kenyan officials to the workings of the Japanese juvenile justice and treatment systems through lectures and observation visits to relevant agencies.

G. Fifth Special Training Course on Corruption Control in Criminal Justice

UNAFEI will conduct the Fifth Special Training Course entitled "Corruption Control in Criminal Justice" from October to November 2002. In this course, foreign officials engaged in corruption control will comparatively analyze the current situation of corruption, methods of corruption prevention, and measures to enhance international cooperation in this regard. During this course there will be a joint programme between the International Association of Penal Law and UNAFEI.

II. TECHNICAL COOPERATION

A. Joint Seminars

Currently the venue and the theme of UNAFEI's joint seminar for 2002 are undecided. It is likely that the joint seminar will be held in either Indonesia or Pakistan.

B. Regional Training Programmes

1. Costa Rica

In July 2002, two UNAFEI professors will represent the Institute at the Fourth International Training Course on the Improvement of Prison Conditions and Correctional Programmes, San Jose, Costa Rica.

C. Others

From July to September 2002, one or two UNAFEI professors 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.

III. OTHER ACTIVITIES

A. Joint Seminar for the Ratification of the UN TOC Convention

The United Nations Centre for International Crime Prevention (CICP) and UNAFEI will hold a Joint Seminar for the Ratification of the UN TOC Convention from 17 to 19 July 2002 at the Osaka branch of UNAFEI. Between 30 and 35 participants will come from between 15 and 20 developing countries from all over the Asia and Pacific region. The issues to be discussed at the Seminar will be the outstanding achievements made by the TOC Convention, legal/practical information that is necessary for the drafting of national legislation which complies with the TOC Convention and technical assistance that can be provided by the CICP.

B. Fortieth Anniversary Ceremony and Symposium

As UNAFEI will celebrate its 40th anniversary in 2002, the 40th Anniversary Ceremony and Symposium will be held from 2 to 3 October 2002. This celebration will be held together with the ACPF (Asian Crime Prevention Foundation) which celebrates its twentieth anniversary at the same time. The celebrations will be held at the Ministry of Justice in Tokyo. The theme of the Symposium will be "Regional Strategies for Combating Corruption in the Context of Development." UNAFEI alumni from Japan and abroad will be invited to this occasion.

APPENDIX

MAIN STAFF OF UNAFEI

Director	Mr. Mikinao Kitada
Deputy Director	Mr. Keiichi Aizawa

Faculty

Chief of Training Division, Professor	Mr. Toru Miura
Chief of Research Division, Professor	Mr. Kenji Teramura
Chief of Information & Library Service Division, Professor	Mr. Kei Someda
Professor	Mr. Yuichiro Tachi
Professor	Mr. Yasuhiro Tanabe
Professor	Ms. Sue Takasu
Professor	Mr. Hiroshi Tsutomi
Professor	Ms. Mikiko Kakihara
Linguistic Adviser	Mr. Sean Brian Eratt

Secretariat

Chief of Secretariat	Mr. Yoshinori Miyamoto
Deputy Chief of Secretariat	Mr. Kunihiko Suzuki
Chief of General and Financial Affairs Section	Mr. Masuo Tanaka
Chief of Training and Hostel Management Affairs Section	Mr. Takuma Kai
Chief of International Research Affairs Section	Mr. Kouichirou Iida

<AS OF 31 DECEMBER 2001>

APPENDIX

2001 VISITING EXPERTS

THE 117TH INTERNATIONAL SENIOR SEMINAR

Mr. Daniel P. Murphy	Senior Counsel, Strategic Prosecution Policy Section, Criminal Law Branch, Department of Justice, Ontario, Canada
Mr. Peter Wilkitzki	Director General, Criminal Affairs Bureau, Federal Ministry of Justice, Federal Republic of Germany
Dr. Gil Galvao	Director General, International, European and Cooperative Relations, Ministry of Justice, Portugal
Ms. Susan L. Smith	Senior Trial Attorney, International Money Laundering Counsel, Asset Forfeiture & Money Laundering Section, Criminal Division, Department of Justice, Washington D.C, United States of America
Mr. Jung-sug Chae	Senior Prosecutor, Seoul High Prosecutors Office, Seoul, Republic of Korea
Mr. Sin Kam-wah	Senior Superintendent, Organized Crime and Triad Bureau, Police Headquarters, Hong Kong

THE 118TH INTERNATIONAL TRAINING COURSE

Ms. Pamela Phillips	Coordinator, Community Conferencing, Department of Families, Youth Justice Directorate, Brisbane, Queensland, Australia
Dr. Alan W. Leschied	Associate Professor, University of Western Ontario, London, Ontario, Canada
Ms. Chomil Kamal	Deputy Director and Chief Probation Officer, Ministry of Community Development, Singapore
Mr. Rob Allen	Member of the Youth Justice Board and Director of the Esmee Fairbairn Foundation, London, England, United Kingdom

Dr. Tracy Harachi	Research Associate Professor, Social Development Research Group, University of Washington, United States of America

THE 119TH INTERNATIONAL TRAINING COURSE

Dr. Matti Joutsen	Director, International Affairs, Ministry of Justice, Helsinki, Finland
Mr. Severino H. Gaña, Jr.	Assistant Chief State Prosecutor, Department of Justice, Manila, the Republic of the Philippines
Mr. Dimitri Vlassis	Crime Prevention and Criminal Justice Officer, United Nations Centre for International Crime Prevention, Vienna, Austria
Mr. James E. Moynihan	Legal Attaché Federal Bureau of Investigation, United States Embassy, Tokyo, Japan
Mr. Edward C. Shaw	Assistant Legal Attaché, Federal Bureau of Investigation, United States Embassy, Tokyo, Japan

2001 AD HOC LECTURERS

THE 117TH INTERNATIONAL SENIOR SEMINAR

Mr. Yuuki Furuta	Director General of Criminal Affairs Bureau, Ministry of Justice, Japan
Mr. Hideaki Suzuki	Director of Japan Financial Intelligence Office, Japan

THE 118TH INTERNATIONAL TRAINING COURSE

Mr. Kenji Higashikawa	Chief Liaison Officer, International Affairs Department, National Police Agency
Mr. Ei Shimamura	Assistant Director, Juvenile Division, Community Safety Bureau, National Police Agency
Mr. Kazuo Kurashima	Classification Coordinator attached to the Medical Care and Classification Division, Correction Bureau, Ministry of Justice
Mr. Shuji Yoshida	Director, Education Division, Correction Bureau, Ministry of Justice
Mr. Takashi Kubo	Professor, Research and Training Institute of the Ministry of Justice
Mr. Kazuo Suzuki	Director (Superintendent), Training Institute of Correctional Personnel, Ministry of Justice
Mr. Motoyuki Shishido	Vice-Chairman of Secretariat, Kantou Regional Parole Board, Ministry of Justice
Mr. Toshihiko Takagi	Director of the Supervision Division, Rehabilitation Bureau, Ministry of Justice
Mr. Yukio Shirai and Mr. Kenichi Morishita	Professors, the Research and Training Institute for Family Court Probation Officers, Supreme Court of Japan

THE 119TH INTERNATIONAL TRAINING COURSE

Mr. Kenji Higashikawa	Chief Liaison Officer, International Affairs Department, National Police Agency, Japan
Mr. Noriaki Mizuno	Director, Financial Intelligence Office, Financial Services Agency, Japan
Mr. Hiroshi Kawamura	Assistant Vice-Minister of Justice (Deputy Director for Criminal Affairs Bureau), Ministry of Justice, Japan
Mr. Masahiko Okubo	Deputy Director (Superintendent), 2nd Organized Crime Control Division, Criminal Investigation Bureau, National Police Agency, Japan
Mr. Minoru Shikita	Chairman, Board of Directors, Asian Crime Prevention Foundation

2001 UNAFEI PARTICIPANTS

THE 117TH INTERNATIONAL SENIOR SEMINAR

Overseas Participants

Ms. Nadira Tabassum	Senior Assistant Secretary, Ministry of Home Affairs, Dhaka, Bangladesh
Mr. Phoung Sophy	Assistant of Misdemeanours, Department of Criminal Police, Ministry of Interior, Chamkamoun District, Cambodia
Mr. Raymond Porter Aguilar	Drugs Prosecutor, Fiscalia General De La Republica, Republic's General Prosecution, San Jose, Costa Rica
Mr. Kevueli Tunidau	Principal Legal Officer, Office of the Director of Public Prosecutions, Lautoka, Fiji
Mr. Sudhir Kumar Awasthi	Inspector General of Police, Crime Branch, CID, UP Lucknow, Uttar-Pradesh, India
Mr. Soeparno Adi Soeryo	Chief of the Legal Bureau, Attorney-General's Office of the Republic of Indonesia, Jakarta, Indonesia
Mr. Richard Otieno Okore	Fraud Investigator, Criminal Investigation Department (CID) Headquarters, Nairobi, Kenya
Mr. Ahmad Zaidi Bin Ibrahim	Sessions Court Judge, Kuala Trengganu Sessions Court, Trengganu, Malaysia
Mr. Kedar Prasad Poudyal	Joint Attorney, Office of the Appellate Government Advocate, Rajbiraj, Nepal
Mr. Bader Talib AL-Shaqsi	Assistant Director of Assessment Department, Special Branch, Royal Oman Police, Head Office, Qurum, Oman
Mr. Ahmad Nasim	Deputy Inspector General of Police, Gujranwala Division, Lahore, Pakistan
Mr. Camillus Jacob Sambua	Senior State Prosecutor, Office of the Public Prosecutor, Waigani, N.C.D, Papua New Guinea

Mr. Meinrado P. Paredes	Judge, Regional Trail Court, Branch 13, Cebu City, Philippines
Ms. Ronel Van Wyk	National Coordinator, Project Investigations, Commercial Branch Head Office, Detective Service, South African Police Service, Pretoria, South Africa
Mr. Dappula Prasantha Joseph De Livera	Senior State Counsel, Joseph De LiveraAttorney General's Department, Colombo 12, Sri Lanka
Mr. Saidi Ally Mwema	Ast. Commissioner of Police & Regional CID Officer, Dar-Es-Salaam Regional CID Office, Dar-Es-Salaam, Tanzania
Mr. Pisan Mookjang	Superintendent in Economic Crime, Crime Prevention and Suppression Division, Police Cadet Academy, Nakhonpratom, Thailand

Japanese Participants

Mr. Ryoichi Chihara	Deputy Superintendent, Ibaraki Juvenile Training School, Ibaraki, Japan
Mr. Takashi Itoyama	Prosecutor, Tokyo District Public Prosecutors Office, Tokyo, Japan
Mr. Haruo Maruyama	Chief of General Affairs Division, Tokyo Probation Office, Tokyo, Japan
Mr. Wataru Nemoto	Judge, Tokyo District Court, Tokyo, Japan
Mr. Mitsuru Nishikori	Director of Guard and Rescue Department, 7th Regional Coast Guard Headquarters, Kita-Kyushu, Japan
Mr. Tatsuo Ueda	Narcotics Control Officer, Narcotics Control Department, Kanto-Shinetsu Regional Bureau of Health and Welfare, Tokyo, Japan

THE 118TH INTERNATIONAL TRAINING COURSE

Overseas Participants

Mr. Mohammed Azizul Haque	Senior Superintendent, Barisal Central Jail, Barisal, Bangladesh
Ms. Phyllis Yolanda Beckles	Senior Probation Officer, Probation Department, St. Michael, Barbados

Dr. Fernando Rabello Mendes Filho	Presidence Advisor, Para's Child and Adolescent Foundation, Belem Para, Brasil
Mr. Chen Hao	Deputy Director, Household Registration Division, Public Order Bureau, Ministry of Public Security, Beijing, China
Mr. Waliki Naiseruvati Satakala	Assistant Superintendent of Prisons, Fiji Prison Service, Suva, Fiji
Mr. Ambati Siva Narayana	Inspector General of Police, Indian Police Service, Security Intelligence, Andhra Pradesh, Hyderabad, India
Mr. Sambas Somawidjaja	Head of Sub-directorate for Social Rehabilitation For Juvenile Delinquency, National Social Welfare Board, Jakarta, Indonesia
Mr. Teh Guan Bee	Principal, Sekolah Tunas Bakti (Juvenile Boys Home), Taiping, Malaysia
Mr. Binod Mohan Acharya	District Judge, District Court, Kalikat, Nepal
Mr. Zaka-Ur-Rab Rana	Senior Lecturer, Central Jail Staff Training Institute, Lahore, Pakistan
Mr. Amin Ali Ibrahim Inabi	Director, Probation Department, Ministry of Social Affairs, Ramallah, Palestine
Mr. Martin Tongamp	Probation Officer, Division of Probation and Parole Services, Boroko N.C.D, Papua New Guinea
Ms. Matshego Bitsang Joyce	Deputy Director, Youth and Females Department of Correctional Services, Pretoria, South Africa
Ms. Rajapakshage Sunethra Gunawardhana	Provincial Commissioner, Department of Probation and Child Care Services, Badulla, Sri Lanka
Ms. Duangporn Ukris	Acting Superintendent, Sirindhorn Vocational Training School, Nakornprathom Province, Thailand

APPENDIX

Japanese Participants

Mr. Naoyuki Fukushima	Assistant Judge, Tokyo District Court, Tokyo, Japan
Mr. Kazuhito Hosaka	Prosecutor, Mito District Public Prosecutors Office, Ibaragi, Japan
Mr. Yasuhiro Hosoi	Principal Specialist, Fukui Juvenile Classification Home, Fukui, Japan
Ms. Yukiko Kudou	Probation Officer, Hokkaido Regional Parole Board, Sapporo, Japan
Mr. Shousuke Kuwabara	Senior Family Court Probation Officer, Fukuoka Family Court, Fukuoka, Japan
Mr. Masamichi Noda	Family Court Probation Officer, Hiroshima Family Court, Kure Branch, Hiroshima, Japan
Ms. Kae Sakuma	Public Prosecutor, Saitama District Public Prosecutors Office, Kumagaya, Japan
Mr. Takahito Shimada	Researcher,National Research Institute of Police Science, Kashiwa, Japan
Ms. Tomoko Yoshida	Professor, Training Institute for Correctional Personnel, Fuchu, Japan
Mr. Hideo Yoshioka	Probation Officer, Yamaguchi Probation Office, Yamaguchi, Japan

THE 119TH INTERNATIONAL TRAINING COURSE

Overseas Participants

Mr. Oscar Antonio Goyanes	Inspector, Argentine Federal Police, Buenos Aires, Argentina
Mr. Bechem Eyong Eneke	Sub Director for Human Resources, Ministry of Justice, Yaounde, Cameroon
Ms. Gina Antonella Ramos Giron	Public Prosecutor, Attorney General's Office Department of Organized Crime, Tegucigalpa, Honduras

Mr. Shankar Pratap Singh	Deputy Inspector General of Police, Anti-Corruption Cell-III, Central Bureau of Investigation, New Delhi, India
Mr. Jan Samuel Maringka	Head of Section, Deputy Attorney-General's for Special Crimes, Jl. Sultan Hasanundin No. 1, Jakarta Selatan, Indonesia
Mr. Bulatov Timur	Senior Investigator, Invest. Div Head ADM. Section, DIA Chui Region, Department of Internal Affairs, Bishkek, Kyrgyzstan
Mr. Nouphanh Mahaphonh	General Director, Judicial Administration Department, Ministry of Justice, Vientiane, Laos
Mr. Zainal Rashid Bin Hj Abu Bakar	Head of Criminal Investigation Department, Johor Bahru Police District, Royal Malaysia Police, Johor, Malaysia
Mr. Sazali Bin Salbi	Director of Anti-Corruption Agency, Labuan, Malaysia
Mr. Bhola Prasad Kharel	District Judge, Jhapa District Court, Chandragadi, Nepal
Mr. Saad Imtiaz Ali	SSP/Deputy Director, Central Planning and Training Unit, National Police Academy, Islamabad, Pakistan
Mr. Zafarullah Khan	Deputy Inspector of Police, Officer on Special Duty, PSP (PPM Baz) Establishment Division, Islamabad, Pakistan
Mr. Miguel Angel Moran Flores	Major Operative Officer, Chief of Training, Anti-Narcotics Department, Peruvian National Police, Lima, Peru
Mr. Sittipong Tanyapongpruch	Judge, Central Intellectual Property and International Trade Court, Bangkok, Thailand
Mr. Muchwangali Charles	Regional Crime Investigations Officer, Uganda Police, Kampala, Uganda
Mr. Raphael Angel Romero Sibulio	Chief Inspector, Judicial Technical Police, Caracas, Venezuela

APPENDIX

Japanese Participants

Mr. Masakazu Ameku	Narcotics Control Officer, Kyusyu Regional Bureau of Health and Welfare, Regional Narcotic Control Office, Ministry of Health, Labor and Welfare, Okinawa, Japan
Mr. Takao Hamada	Probation Officer, Shikoku Regional Parole Board, Kagawa, Japan
Mr. Yasunari Hataguchi	Assistant Judge, Osaka District Court, Osaka, Japan
Ms. Mayumi Ichikawa	Senior Programme Officer, Kasamatsu Prison, Gifu, Japan
Mr. Tsunekazu Kobashi	Public Prosecutor, Tokyo District Public Prosecutors Office, Tokyo, Japan
Mr. Takashi Maruoka	Senior Immigration Inspector, Tokyo Regional Immigration Bureau, Tokyo, Japan
Ms. Azumi Misawa	Public Prosecutor, Kobe District Public Prosecutors Office, Himeji Branch Office, Japan
Ms. Reiko Ota	Public Prosecutor,Fukuoka District Public Prosecutors Office, Fukuoka, Japan
Mr. Takahiro Satou	Deputy Director of Guard Division, Guard and Rescue Department, 10th Regional Coast Guard Headquarters, Kagoshima, Japan
Mr. Taizo Yokoyama	Assistant Judge, Tokyo District Court, Tokyo, Japan
Mr. Masayuki Takeda	Chief Investigator of 2nd Division, 1st Department, Public Security Investigation Agency, Tokyo, Japan

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

Mr. Li, Chang-Ming	President Tonghua City Intermediate People's Court, Jilin Province
Mr. Chen, San-Hu	Division Chief Science, Technology & Training Division, International Cooperation Department Ministry of Public Security
Mr. Zhang, Ming	Division Director, Division of Judicial Assistance, Department of Judicial Assistance and Foreign Affairs, Ministry of Justice
Mr. Zhao, Hong-Kui	Deputy Director, Research Division, Prison Administration Bureau, Ministry of Justice
Mr.. Zhang, En-You	Deputy Director of Teaching Management, Central Institute of Judicial Police
Mr. Li, Wen-Sheng	Deputy Division Chief , Legal Affairs Department, Ministry of Public Security
Mr. Zhou, Yong-Jie	Public Prosecutor, The People's Procuraturate of Sichuan Province
Mr. Gao, Gui-Jun	Judge, Supreme People's Court
Mr. Li, Zhen-Qi	Chief Judge, Second Chamber of Criminal Justice, Beijing High People's Court

SECOND SPECIAL SEMINAR FOR KENYAN OFFICIALS ON JUVENILE DELINQUENT TREATMENT SYSTEMS

Mr. Charles Mwiti Mbengi	Children's Officer, Wamumu Approved School
Mr. Philip Khisa Wapopa	Children's Officer, Othaya Approved School
Mr. Julius Kemboi Yator	Manager, Thika Approved School
Ms. Margaret Wakasa Buyela	Deputy Director, Children's Department Headquarters, Ministry of Home Affairs
Mr. Francis Aloyce Onyango Obare	Officer in-Charge, Kisumu Juvenile Remand Home
Ms. Rhoda Kanini Muisyo	Officer in-Charge, Nairobi Juvenile Remand Home
Ms. Judy Njoki Ndungu	Chief Children's Officer, Children's Department, Ministry of Home Affairs
Mr. Abdi Sheikh Yusuf	Provincial Children's Officer, North Eastern Provincial Children's Office

FOURTH SPECIAL TRAINING COURSE ON CORRUPTION CONTROL

Overseas Participants

Mr. Sailendra Kumar Adhikary	Chief Metropolitan Magistrate, Metropolitan Magistrate Court, Bangladesh
Mr. Chaudhary Vinay Veerendra	Deputy Commissioner of Police, Anti Corruption Branch, Directorate of Vigilance, Government of National Capital Territory of Delhi, India
Mr. Toton Suprapto Sh.	Justice, Supreme Court of Indonesia, Indonesia
Mr. Kennedy Bosire Masita	Superintendent of Police, Fraud Investigator, Criminal Investigations Department, Headquarters, Nairobi, Kenya
Mr. Asan Kangeldiev	Prosecutor of the Department, General Prosecutor Office of the, Kyrgyz Republic, Kyrgyz
Mr. Thomas Akin Jelimin	Deputy Public Prosecutor / Senior Legal Officer, State Attorney General's Chambers, Sarawak, Malaysia
Mr. Idham Bin Abd. Ghani	Deputy Public Prosecutor/ Head of Research Unit, Anti-Corruption Agency, Anti Corruption Agency Malaysia
Mr. Kumar Bahadur Khadka	Section Officer Commission for the Investigation of Abuse of Authority Nepal
Ms. Christiana Ijeoma Onuogu	Legal Adviser / Head of Prosecution, Independent Corrupt Practices Commission, Nigeria
Ms. Grace Morales Hernaez	Graft Investigation Officer II, Office of the Ombudsman, Mindanao, Republic of the Philippines
Mr. Prasong Kunajiraporn	Judge, The Court of Appeals Region 9, Thailand

Ms. Supinya Berkfah	Senior Officer, The Office of the National Counter Corruption Commission, Thailand

Japanese Participants

Mr. Takushi Noguchi	Assistant Judge, Yamaguchi Family Court (Iwakuni Branch), Japan
Ms. Saori Watanabe	Public Prosecutor, Yokohama District Public Prosecutors Office, Japan
Mr. Tsuyoshi Kishi	Public Prosecutor, Sendai District Public Prosecutors Office, Japan

Distribution of Participants by Professional Backgrounds and Countries

(1st International Training Course - 120th International Senior Seminar, U.N.Human Rights Courses and 1 Special Course)

Professional Background / Country	Judicial and Other Administration	Judeg	Public Prosecutors	Police Officials	Correctional Officials(Adult)	Correctional Officials(Juc enile)	Probation Parole Officers	Family Court Incestigation Officers	Child Welfare Officers	Social Welfare Officers	Training&Research Officers	Others	Total
Afghanistan	7	8	5	3									23
Bangladesh	20	11		11	5		4			5		2	58
Bhutan				3									3
Brunei	4				2								6
Myanmar	3			2									5
China	12	3	5	10							7		37
Hong Kong	14			11	24	3	9		1	3	1		66
India	14	10		50	7	1	1			2	6	3	94
Indonesia	20	20	20	21	14		3			6		1	105
Iran	5	11	8	8	6						2	1	41
Iraq	5	3	3	5	5	5					2		28
Jordan				4									4
Cambodia	1	2	1	5	1								10
Oman				3									3
Korea	12	3	53	6	19	4					3		100
Kyrgyz	1			1									2
Laos	5	5	4	10									24
Malaysia	19	2	4	42	31	8	3		1	5	3		118
Maldives			1										1
Mongolia	1			1									2
Nepal	27	13	9	31								2	82
Pakistan	18	10	2	29	8	1	2				2	1	73
Palestine	1			1			1						3
Philippines	17	9	21	33	8	3	9	3	1	6	3	5	118
Saudi Arabia	4			6	3						1	1	15
Singapore	10	18	5	12	10	3	10			3	1	1	73
Sri Lanka	21	20	12	20	18	1	11		1	2		1	107
Taiwan	12	4	2	2	1								21
Thailand	21	30	37	15	14	8	10	1		8	4	1	149
Turkey	2	1	1	2							1		7
United Arab Emirates	1												1
Uzbekistan												1	1
Viet Nam	10	5	2	7						4	1		29
ASIA	287	188	195	354	176	37	63	4	4	44	37	20	1,409
Algeria		3	2										5
Botswana	1			2									3
Cameroon	3												3
Cote d'Ivoire		1		1									2
Egypt	1			1							2	1	5
Ethiopia	3			1									4
Gambia				2									2
Ghana	1			3	1								5
Guinea			1	2									3
Kenya	6	4	1	12	7		6				2		38
Lesotho				1			2						3
Liberia											1		1
Madagascar				1									1
Mauritius		1											1
Morocco			1	4									5
Mozambique	1			1	1								3
Nigeria	1			5	5							1	12

APPENDIX

Professional Background / Country	Judicial and Other Administration	Judeg	Public Prosecutors	Police Officials	Correctional Officials(Adult)	Correctional Officials(Juc enile)	Probation Parole Officers	Family Court Incestigation Officers	Child Welfare Officers	Social Welfare Officers	Training&Research Officers	Others	Total
South Africa				2	1						1		4
Seychelles				3			1						4
Sudan	2		1	13	1						2		19
Swaziland				2									2
Tanzania	4	3	4	5	1								17
Zambia		1		6									7
Uganda			1	5								1	7
Zimbabwe	1			2									3
AFRICA	24	13	11	74	17	0	9	0	0	0	8	3	159
Australia			1				1			1			3
Vanuatu				1									1
Fiji	6	1	9	20	14					1			51
Kiribati	1												1
Marshall Island	1			3									4
Micronesia							1						1
Nauru				1									1
New Zealand	1			1									2
Papua New Guinea	10	1	4	12	9		3			1		2	42
Solomon Islands	3			2									5
Tonga	2	1		6	2						1		12
Western Samoa	1			1			1					1	4
THE PACIFIC	25	3	14	47	25	0	6	0	0	3	1	3	127
Argentina	2	2		2									6
Barbados				1			1						2
Belize	1			1									2
Bolivia		1										1	2
Brazil	2		3	15					1	1			22
Chile	1			3	2								6
Colombia	3	1	2	3					1			1	11
Costa Rica	3	4	4								1	2	14
Ecuador			1	4		1							6
El Salvador	1			1									2
Grenada				1									1
Guatemala					1								1
Honduras			1	3									4
Jamaica	3				1								4
Mexico	1												1
Nicaragua		1											1
Panama			1	2								1	4
Paraguay				9		1							10
Peru	4	10	4	2	1						1	2	24
Saint Lucia			1										1
Saint Vincent	1				1								2
Trinidad and Tobago				1									1
Venezuela	1				1								2
U.S.A.(Hawaii)	1		1	8							1		11
NORTH & SOUTH AMERICA	24	19	18	56	7	2	1	1	2	1	3	7	141
Bulgaria				1									1
Hungary	1												1
Macedonia	1												1
Poland				1									1
Lithuania				1									1
EUROPE	2	0	0	3	0	0	0	0	0	0	0	0	5
JAPAN	105	139	228	88	81	72	170	57	38	2	48	58	1,086
TOTAL	467	362	466	622	306	111	249	62	44	50	97	91	2,927

PART TWO

RESOURCE MATERIAL SERIES
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"Effective Administration Of The Police And The Prosecution In Criminal Justice"

UNAFEI

VISITING EXPERTS' PAPERS

THE COMPETENCE OF THE POLICE IN INVESTIGATION PROCEEDINGS

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I. INTRODUCTION

Several years ago, a survey was conducted in Germany on the subject of security and protection against crime. The results – not surprisingly – indicated that the majority of the country's citizens want a stronger state. Approximately 70 percent of the people surveyed in Germany's eastern states were even willing to accept a restriction of their basic rights if this would lead to greater success in combating crime. Only roughly one in three persons over the age of 30 were of the opinion that there could be no absolute protection against criminal offences in a free society.

Precisely older citizens have a – usually unfounded – excessive fear of becoming the victim of a criminal offence. This fear and the desire among broad segments of the population for greater security in everyday life are reflected in the call for a strengthening and extension of the powers of the police. The Code of Criminal Procedure is thereby quickly exposed to the reproach that its unnecessary formalities serve solely to protect the perpetrator. Politicians who woo voters by championing an enlargement and strengthening of the police forces as well as an increase in the number and speed of arrests and a concomitant shortening of criminal proceedings can reckon with considerable support. Especially since the events of 11 September 2001 and the launch of the global campaign to combat terrorism, endeavours to strengthen and extend the powers of the police unquestionably have good prospects for success.

This development must be followed all the more closely in view of the fact that the previous expansion of the scope of the duties of the police is problematic from the standpoint of both criminological policy and constitutional law and more than ten years ago already gave German defence attorneys cause to warn against an "annexing of criminal proceedings by the police".

In the following I would like to familiarise you with the current law in Germany and with the broad scope of police activity in criminal investigation proceedings. I would also like to discuss the subject of the extension of police powers and present models for successful co-operation in response to specific kinds of crime. And, finally, permit me to address the question of how constructive co-operation between the police and the judicial authorities could ideally be structured.

II. THE CURRENT LAW IN GERMANY

A. Overall Responsibility of the Public Prosecution Office in Investigation Proceedings

Pursuant to section 160 subsection (1) of the Code of Criminal Procedure (hereinafter also abbreviated as CCP), as soon as the public prosecution office obtains knowledge of a suspected criminal offence it must investigate the facts to decide whether public charges are to be preferred. For this purpose it is authorised to make investigations itself or through the authorities and officials in the police force (section 161 subsection (1), first sentence of the CCP). The officials in the police force are thereby obliged to comply with the request or order of the public prosecution office (section 161 subsection (1), second sentence of the CCP).

The police also have a duty to investigate criminal offences (section 163 subsection (1) of the CCP). To this extent they may – even without an application by the public prosecution office – "take all measures where there should be no delay, in order to prevent concealment of facts". The duty of taking initial action is thus transferred to the police.

The aforementioned provision in section 161 of the CCP is thus the statutory foundation for the authorisation of investigations of all kinds, including investigatory acts involving interference with a basic right that are less intrusive and are therefore not encompassed by a specific authorisation of interference. These include short-term observation and the use of confidential informers or undercover buyers (in the case of drugs), for example, as well as simple search measures such as the procurement of information from authorities.

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With respect to the distribution of tasks between the public prosecution office and the police, account must also be taken of section 158 subsection (1) of the CCP, pursuant to which the information of a criminal offence or an application for criminal prosecution may be filed with the authorities and officials in the police force as well as with the public prosecution office and the Local Courts. This is a provision that for all practical purposes enables the police to take initial action to investigate and thus ascertain the facts of the case in the overwhelming majority of cases (approximately 80 percent).

Moreover, you find a multitude of rights of interference in the Code of Criminal Procedure that can be exercised in exigent circumstances either by all police officers or only by the so-called "officials assisting the public prosecution office", who have greater authority to make orders than the other officials in the police force.

B. All Police Officers have the Following Coercive Powers:

- the right to make provisional arrests (section 127 subsection (1), first sentence; section 127 subsection (2); section 127b subsection (1); section 163b subsection (1), second sentence of the CCP),
- the right to carry out measures for identification purposes (section 81b and section 163b subsection (1), third sentence of the CCP; at checkpoints: section 111 subsection (3) of the CCP),
- the right to establish identity (section 163b of the CCP),
- the right to use technical means within the meaning of section 100c subsection (1), numbers 1a and 1b of the CCP (taking of photographs and making of visual recordings, use of technical means for the purposes of surveillance),
- the right to use an undercover investigator in exigent circumstances (section 110b subsection (1), second sentence of the CCP),
- the right to examine papers with the consent of the holder pursuant to section 110 subsection (2), first sentence of the CCP.

C. The Police Officials Assisting the Public Prosecution Office also have the Authority to Order the Following:

- seizure (section 98 subsection (1), first sentence, and section 111e subsection (1), second sentence of the CCP),
- search (section 105 subsection (1), first sentence of the CCP),
- physical examination of the accused (blood samples and other bodily intrusions; section 81a subsection (2) of the CCP),
- physical examination of persons other than the accused (section 81c subsection (5), first sentence of the CCP),
- establishment of identity through DNA analysis (section 81g subsection (3) of the CCP in conjunction with section 81a subsection (2) of the CCP),
- use of technical means within the meaning of section 100c subsection (1), number 2 of the CCP (listening to and recording of private speech outside private premises),
- establishment of checkpoints (section 111 subsection (2) of the CCP),
- emergency sale of objects that have been seized or attached (section 111l subsection (2), second sentence, and subsection (3), second sentence of the CCP),
- computer-assisted search (section 163d subsection (2), first sentence of the CCP).

D. Statutory Distribution of Tasks Between the Public Prosecution Office and the Police

As I mentioned at the beginning, the police admittedly have the right to take initial action; on the other hand, however, they are obliged to comply with requests and orders of the public prosecution office and – this is crucial – transmit the records of their investigations to the public prosecution office without delay (section 163 subsection 2, first sentence of the CCP).

The public prosecution office is responsible for leading the investigation proceedings; it is in charge of the proceedings at this stage. The police criminal investigation department is thus (only) an investigatory body of the public prosecution office. As a matter of principle, the public prosecution office is hence responsible for substantive direction of the police investigations. It has legal control and bears basic responsibility for the proper procurement and the reliability of the evidence required for the criminal proceedings. Under the law there is thus neither any independent right of investigation on the part of the police nor any area of the investigation proceedings that is not subject to the control of the public prosecution office.

The Federal Administrative Court summarised this finding as follows (Federal Administrative Court decision volume 47, pages 255 et. seq., 262):

> *The measures taken by the police when taking initial action are criminal investigations just the same as the measures taken at the instruction of the public prosecution office and the actions of the public prosecution office itself. The Criminal Procedure Code makes no provision for a special investigation proceeding by the police criminal investigation department. The investigations to prosecute criminal acts form an integrated whole; the investigation proceeding is not split into a police proceeding and a public prosecution office proceeding.*

From the sole responsibility of the public prosecution office for the conduct of the investigation proceedings it follows that the power of decision concerning the conclusion of the investigation – termination or preferment of charges – is likewise solely the responsibility of the public prosecution office.

If the investigations offer sufficient reason for preferring public charges, the public prosecution office prefers them by submitting a bill of indictment to the competent court (section 170 subsection (1) of the CCP). In all other cases it terminates the proceedings (section 170 subsection (2), first sentence of the CCP). The percentage of investigations that are terminated due to negligible guilt of the perpetrator and lack of public interest in criminal prosecution or upon compliance with conditions or instructions is relatively large, however. I already addressed these issues earlier in my lecture on the duties of the public prosecution office.

III. ACTUAL LEADERSHIP OF THE INVESTIGATION PROCEEDINGS

At least from crime thrillers, we are all familiar with the public prosecutor who leads the investigation at the scene of the crime, supervises the taking of evidence, participates in the examination of witnesses or the accused, or conducts such examination himself, and in all other respects co-operates closely in a spirit of mutual confidence and trust with the officials of the homicide squad. The public prosecution office also makes extensive use of its authority to lead the investigations in the prosecution of so-called government crime, politically motivated criminal offences and legally complex environmental or economic crime.

Precisely in the area of economic crime, the investigations are clearly concentrated at the public prosecution office, which thereby often avails itself of the specialist knowledge of experts in the fields of tax or banking law. Command of criminal investigation techniques is of lesser importance in cases involving these offences; for the most part, they turn on questions that can only be authoritatively answered by an expert trained in criminal or commercial law. It is thus especially in this area that the public prosecutor exercises the authority to lead the case that is vested in him for the entire investigation proceeding.

The guidelines for criminal proceedings – these are detailed instructions of the *Land* ministries of justice for the work of the public prosecution office – state the following in this regard:

> *In cases that are of considerable importance or are difficult in terms of fact or law, the public prosecutor should personally clarify the facts of the case from the very beginning, namely inspect the scene of the crime himself and personally examine the accused and the most important witnesses. The consequences ensuing from the offence can also be of importance for the decision as to whether he should personally examine the aggrieved person as a witness.*

In all other cases, however, the authority of the public prosecutor to lead the investigations goes largely unexercised, although this is regulated in the aforementioned guidelines as well:

Even if the public prosecutor does not personally clarify the facts of the case but instead delegates this task to the officials assisting him, to the authorities and officials in the police force or to other agencies, he must lead the investigations or at least determine their direction and their scope. He can thereby also give specific individual instructions as to the way in which individual investigatory acts are to be carried out.

In fact, the legal position of the public prosecutor has been considerably watered down over the years. There are a number of reasons for this:

A. Greater Weight of Police Investigations

In practice, it is police officers who conduct the majority of all investigations and, namely, independently of a request or order of the public prosecution office. In the area of petty and fairly serious crime, they in fact usually investigate without the direction of the public prosecution office up to the point where a decision can be made. There is a relatively simple explanation for this. Criminal offences are largely reported to the police. Moreover, the police often become aware of an initial suspicion in the course of performance of their official duties and take action on the basis of this.

In such cases section 163 of the CCP grants the police the authority to investigate the facts of the case themselves and to take all measures where there should be no delay. As a rule, the public prosecution office initially knows nothing about this and thus cannot exercise its authority to lead the investigation at all.

In other words: For all practical purposes, it is up to the police whether and how the principle of mandatory prosecution (*Legalitätsprinzip*) is translated into action.

I would like to make a few brief remarks concerning the principle of mandatory prosecution:

A criminal proceeding is not a proceeding between parties like a civil proceeding. In contrast to the civil proceeding, which is governed by the parties' freedom of disposition and in which the decision is rendered on the basis of a formal truth dependent on the submissions of the parties, in the criminal proceeding the public prosecution office – and the police – are bound by the principle of mandatory prosecution. This principle ensures uniform and equal application of the law as opposed to arbitrary selection and instils confidence that criminal prosecution will be handled in an objective and just manner.

Exceptions to the principle of mandatory prosecution are usually lumped together under the term "principle of discretionary prosecution" (*Opportunitätsprinzip*). After all, the public does not have an interest in the prosecution of every single criminal offence. In cases involving minor and moderately serious crimes where only private legal interests have been infringed, the law therefore makes prosecution subject to further conditions.

Returning to the subject at hand: For all practical purposes, it is thus up to the police whether and how a matter is investigated, in other words, whether and how the principle of mandatory prosecution is translated into action. For the police by no means limit themselves to taking initial action but instead largely independently undertake investigatory action up to the point where a decision can be made. They thereby strive to deliver conclusive results to the public prosecution office. The public prosecution office and the judges are consequently only able to exercise their control in isolated cases.

Thus it is in fact the principle of discretionary prosecution that reigns in investigation proceedings – at least according to the criticism voiced in legal literature. For empirical studies indicate that the police can determine whether or not investigations will be instituted

- through the way in which the information of the offence is registered,
- through selective clarification work in the course of police squad activity, and
- through the offence-dependent intensity of police investigations.

Let me give you an example:

A few years ago a colleague from the United States stayed at our home. She did not speak German and still had some difficulty keeping the German banknotes apart. When she paid for a purchase one day, the salesperson slipped her a

Czech 100-crown bill that was worth only a fraction of the German 100-mark bill she should have received in change. Our guest failed to notice this fraudulent trick because the 100-crown bill was roughly the same size and colour as the 100-mark bill. My wife and I accompanied her to the police station, where the officers listened to her complaint. They also confronted the salesperson with our guest's accusation but were unable to clarify the facts of the case. The police officer took the 100-crown bill for safekeeping and wrote down our address. When I inquired about the status of the investigations a few days later, I was surprised to learn that the police had neither filed a written report nor investigated the case any further. There was absolutely no documentation whatsoever of the incident; they merely offered to give me back the 100-crown bill.

This is a prime example of how sheer passivity on the part of the police authorities – in this case failure to file a report of a criminal offence – can result in a gross violation of the principle of mandatory prosecution. The fact that in this way it is also possible to control the workload of the police and keep cases that are difficult or impossible to solve out of the statistics is another critical point that one must bear in mind when contemplating an extension of the powers of the police.

As a rule, the question of whether coercive measures under the law of criminal procedure will be used in the further course of the investigation proceeding likewise hinges on a preliminary examination and decision by the police that is not stipulated by law. For except in cases involving financial and economic crime, where the public prosecution office generally takes the lead in the proceedings, it is the police who decide whether the files should be submitted to the public prosecution office in order for the latter to apply for the issue of a warrant of arrest. It is not unproblematic that this allows the police a certain amount of discretion that can unquestionably be exercised after the provisional arrest of a suspect to influence his willingness to make statements, in particular to make a confession, name accomplices or divulge the hiding places of loot or of objects used to commit the crime.

The police also often play a crucial role in determining the course of the proceedings through responsible examination of the accused. It is the police who can decide the question of whether – in cases where the facts are unclear – a certain person should no longer be examined as a witness but rather as an accused. For all practical purposes it is thus up to the police to determine the point at which certain rights of the accused become effective. This is a particularly delicate issue in light of the fact that the police officers often conduct an "informal preliminary talk" or an "informatory questioning" of the suspect in order to first ascertain whether they can reckon with a statement or perhaps even a confession or other information pertaining to the offence. Such conduct by the police has no foundation in law, but it is not expressly prohibited either. From the standpoint of respect for the rights of the accused, however, it is particularly problematic because the defendant is not usually formally advised of his rights beforehand. Hence the term "informal" preliminary talk.

Such kinds of talks or questioning are quite popular with the police because the knowledge acquired in this manner can ultimately find its way into the investigation proceedings. The investigating officer, for instance, can add a note to the file detailing the information he has obtained and later testify to this in court as a witness. It goes without saying that defence attorneys do not favour this practice.

While – at least under German procedural law – the defendant indeed has the right to call in and consult with defence counsel at any time, the defence counsel does not have any statutory right to be present when the defendant is examined. Thus in the final analysis the police examination can be structured at the discretion of the officer conducting the examination, for the public prosecutor is usually not present.

Anyone familiar with the subject matter knows that in most cases, mistakes made during the investigation proceedings cannot be eliminated later on in the main hearing; it is likewise common knowledge that once the defendant has made a comprehensive confession to the police he will hardly ever be able to distance himself from it. This alone makes it clear that in the majority of cases it is not likely to be the public prosecution office but rather the police investigatory authorities that take the steps determining the subsequent course of the investigation proceedings.

B. Head Start of the Police in the Investigations as a Consequence of Preventive Action

The police have an ambiguous position in criminal proceedings, as can clearly be seen from the following example:

A burglar has broken into a bank and taken a hostage. While the public prosecutor who has hurried to the scene of the crime can order the police officers to apprehend the suspect and preserve evidence at the scene of the crime, he cannot order them to free the hostage by firing a shot at the perpetrator. For the latter act would not be a criminal prosecution measure but rather a measure to safeguard public security.

The general clause laid down in the police acts of Germany's *Länder* stipulates that

> *In the context of action to avert danger, the police authorities must also prevent any foreseeable criminal offences (preventive suppression of crime).*

It is thus the task of the police, as the law enforcement authority under the purview of the Minister of the Interior, to take preventive or responsive action to suppress disturbances of the peace. This also includes action taken against perpetrators, such as an assault to free hostages.

Here the police are subject to the instructions of the Minister of the Interior; as soon as investigations of persons suspected of having committed a criminal offence are on the agenda, however, the federal statutory regulations of the Code of Criminal Procedure and the Courts Constitution Act apply, with the result that the public prosecution office is authorised to give instructions to the officials assisting it. To the extent that the police are engaged in the prosecution of a criminal offence, one speaks of repressive action; to the extent that they are acting to prevent criminal offences, one speaks of preventive action. Occasionally, however, this distinction poses problems because the general duty (regulated by *Land* law) of the police to suppress crime overlaps with the duty (regulated by federal law) to clear up criminal offences pursuant to the provisions of the Code of Criminal Procedure.

It must, however, be noted that preventive action to suppress crime is an independent pillar in the area of action to avert danger and thus logically falls within the sole competence of the police. Given the use of computers to collect and process vast quantities of information, prevention as conceived above constitutes a considerable extension of the duties of the police. This can be seen from the example of a confidential informer – a small-time drug dealer, for instance – controlled by the police who regularly supplies the police with a wealth of information that – after evaluation and collation by the police – makes targeted investigatory action possible. Since the public prosecution office does not find out about this flow of information in most cases, it cannot exercise its authority to lead the investigations at all.

You will now ask me who has "supreme authority" at the scene of the crime in the case involving the hostage-taker: the senior public prosecutor or a senior police officer. The guidelines for criminal proceedings contain a wise provision for such a constellation:

> *In the event that criminal prosecution duties and duties to avert danger follow simultaneously and directly from one and the same situation, the public prosecution office and police shall be competent to take the measures necessary to fulfil their duties.*
>
> *In such a case, close co-operation based on mutual trust between the public prosecution office and the police is particularly essential. Co-operation in a spirit of partnership dictates that when fulfilling its duties each agency also take into account the implications this will have for the fulfilment of the other duties following from the situation. If the public prosecution office becomes involved, the public prosecutor and the police shall take mutually agreed action if at all possible. This shall also apply in the event that the situation does not permit simultaneous appropriate fulfilment of both their duties. In this case it shall be decided, by weighing the merits of the duties and the legal interests involved, whether criminal prosecution or action to avert danger is the higher good under the given specific circumstances.*

Up to this point there has only been an appeal to the police and the public prosecutor to agree on a mutually acceptable course of action at the scene of the crime; the question of whether the police may on its own responsibility fell the hostage-taker by firing a shot or must instead wait until the public prosecutor gives his instructions is answered by the following provision:

> *If the situation requires a decision concerning the use of direct force without delay and if agreement cannot be reached – even after consulting the superior agencies – as to which duty has priority under the specific circumstances, the police shall make the decision.*

C. Professionalisation of Criminal Investigation Techniques

Last year, the police investigatory authorities dealt with approximately 6.5 million criminal offences. It goes without saying that not only in view of the multitude of investigation proceedings but also in view of its usual lack of specialisation, the public prosecution office is dependent on the specialist knowledge of the police criminal investigation officers. Furthermore, the police with their technical equipment are much more in the public limelight and hence more the focus

of political attention; they thus enjoy not only greater goodwill but also greater financial support. As a consequence of the wide range of new techniques for establishing proof that have also been upheld in decisions of the highest courts (such as DNA analysis, fibre expertise, chemical analysis) and the frequently convincing command of these techniques by the police, the head start of the police in the investigation proceedings from the standpoint of information has become so pronounced that the public prosecution office must often limit itself to checking the plausibility of the results of the investigations submitted to it.

It is meanwhile often only the police who have specialists capable of accurately selecting, sequencing and assessing the prospects for success of individual investigatory methods. The public prosecution offices are thus only rarely able to control, influence or direct the investigations in substantive terms.

It must be pointed out in this context that the police forces – which are organized at *Land* level and have no central office where information can be accessed by all *Land* police authorities – are hardly in a position to effectively combat criminal offences committed on a national scale. This particularly hinders the prosecution of offenders who operate internationally. Against this background, the decision was taken to establish the Federal Criminal Police Office (BKA) in Wiesbaden. In addition to its information collection and co-ordination functions, the Federal Criminal Police Office maintains the facilities and equipment required for all kinds of criminal investigations and criminological research in order to assist the *Land* police authorities in their investigations.

D. Police Control of Data

Since 1972, the Federal Criminal Police Office has had the electronic information network "INPOL" at its disposal to assist the police in the fulfilment of their duties. INPOL is made available at federal and *Land* level for joint use by police agencies and contains the following data, among other things:

- wanted persons data file,
- wanted property data file,
- Criminal Records Index (CRI),
- prisoner file,
- Identification Service,
- Automated Fingerprint Identification System (AFIS),
- motor vehicle light identification file for hit-and-run accident queries,
- vehicle identification and analysis system,
- unidentified dead and missing persons data file,
- police crime statistics.

Of particular importance in this context is the wanted persons data file. It facilitates determination of the whereabouts of wanted persons, apprehension, detention, taking of fingerprints and photographs, and establishment of identity. Among other things, it contains data concerning persons who are wanted for arrest, whose whereabouts are unknown, whose permission to drive has been withdrawn or who are sought in matters falling within the competence of the border police. Just under one million persons are currently listed in this file.

The wanted property data file serves to conserve evidence and recover property. It contains, for example, the information needed for search measures concerning objects that were used to commit a criminal offence or surfaced in connection with the offence or are otherwise of significance to a criminal proceeding. It also contains information concerning vehicles that are under police surveillance. Among the approximately 6.5 million objects contained in this data file are 350,000 cars, 500,000 motor vehicle license plate numbers, 1.3 million personal identification documents, just under 600,000 blank documents – including personal identification documents, for instance – and more than 100,000 weapons.

Only the police authorities are entitled to use INPOL, Germany's most important collection of data. Only they may enter and access data. Thus far the judicial authorities have no right of their own to access INPOL.

The judicial authorities themselves have only relatively few information systems at their disposal. In addition to the programmes installed at the public prosecution offices, through which they compile and administer their own files, these systems include

- the Federal Central Criminal Register (here is where all criminal sanctions are registered),
- the Central Commercial Register (the purpose of which is to ensure uniform approval or denial of business licenses to weed out unsuitable persons), and
- the Central Register of Traffic Offenders (here is where all traffic infractions are registered).

In practice this means that when the police stop a person to check identification, they can access the INPOL data from the squad car by radio. The police officers on the scene thus have a considerable amount of highly sensitive data concerning the person in front of them at their fingertips, but the person being checked cannot discern or deduce the extent of this information.

If the public prosecution office wanted to comprehensively control the police in investigation proceedings, it would have to be able to access the current database at any time in order to also be able to judge the latter's lawfulness in the context of its control function. In fact, however, the judicial authorities have no access to police data because some of it is obtained on the basis of information acquired in the course of preventive action by the police. While consideration is being given to the possibility of granting the judicial authorities access to police databases in the future, at present the information advantage of the police essentially rules out the possibility of control by the public prosecution office in certain areas of investigation.

E. Information Advantage through EUROPOL

Through EUROPOL, police and other information and data from the European Union Member States and third countries are collected and analysed at a central facility for later use in investigations, control measures and executive operations.

The aim of EUROPOL is to bring to light the activities and structures of organized crime as well as data concerning the members and profits of criminal organizations with the aid of modern analysis techniques and to process this information for the use of the national police authorities. This includes defining focal areas for further technical investigatory measures, identifying connections with other investigation complexes and elaborating new investigatory approaches. Future threatening scenarios are generated and their impact assessed in order to enable decision-makers to carry out medium- and long-term planning and take preventive action. EUROPOL thus functions more or less as a clearinghouse for the collection and exchange of criminally relevant information. In addition to personal data of convicted individuals, suspects, potential witnesses and victims, contacts, companions and possible informants, information from virtually all national and European institutions can be accessed. This data is then processed to compile strategic analyses, among other things.

The judicial authorities do not (yet) have any influence on the activities of EUROPOL within the European area. The German public prosecution offices do not even have a right to obtain information directly from EUROPOL. The Federal Criminal Police Office, as the EUROPOL "national unit" for Germany, is merely obliged under the EUROPOL Convention to notify the criminal prosecution authorities of information concerning them and of any connections identified between criminal offences. It is currently not, however, under any obligation to forward requests for information by the public prosecution offices or the courts to EUROPOL.

One must thus conclude that police clearly have a crucial advantage in the case of EUROPOL as well, and that here, too, the public prosecution office cannot exercise its statutory right to control and lead the investigation proceedings.

F. The *de facto* Control of Matters by the Police in a Large Percentage of Investigation Proceedings is Based on the Following:

- Many investigatory acts are undertaken nearly exclusively by police officers on their sole responsibility (summons, examination, taking of fingerprints and photographs, search, arrest, evaluation of evidence, assessment of the status

of the parties to the proceedings as accused or as witnesses). The police maintain a presence day and night; in many cases they are therefore immediately at the scene of the crime and are thus able to determine the course of the future investigations.

- Since the police are also engaged in preventive activity, i.e. work to prevent criminal offences, they have a wealth of detailed knowledge that often enables them to take swift action without the public prosecution office becoming aware of this.

- Public attention and media coverage focus far more often on the work of the police than on the work of the public prosecution office. Thanks to the benevolence of political leaders, the police are better staffed and have more modern equipment and a more highly developed basic and further training system than the judicial authorities.

- The control of data by the police in the context of increasingly comprehensive computer-assisted investigatory methods gives them a distinct advantage over the public prosecution office.

- The same is true of the professionalisation of criminal investigation and intelligence techniques by the police.

- The police alone have taken organizational measures in response to the internationalisation of crime by establishing INTERPOL and EUROPOL. The public prosecution offices are still denied access to these databases.

IV. REFLECTIONS ON AN EXTENSION OF THE POWERS OF THE POLICE UNDER THE LAW OF CRIMINAL PROCEDURE

Given the increasingly important role of the police in criminal proceedings and their de facto advantage over the public prosecution office, it is not surprising that the police in Germany have begun to explore the possibility of amending provisions of the law of criminal procedure to reflect this growing importance. In the following I would like to examine a number of suggestions in greater detail:

A. Obligation of the Witness to Appear before the Police and Make Statements

Pursuant to section 161a of the CCP, witnesses are obliged to appear before the public prosecution office upon being summoned and to make statements on the subject matter. If witnesses fail or refuse to appear without justification, the public prosecutor may impose a coercive fine on them. The current law of criminal procedure does not, however, provide for an obligation of the witness to appear before the police and make statements. The police merely have the possibility of pointing out to the witness that if he refuses, they will see to it that he is examined by the public prosecutor or the judge, vis-a-vis whom the witness has an obligation to appear and make statements.

Time and again there have been calls by the police for legislation mandating an obligation to appear and make statements in the case of police examination of witnesses as well. A corresponding proposal is now the subject of a bill that has been submitted by the *Länder*.

Law enforcement practitioners believe that investigation proceedings could be conducted more efficiently if witnesses were under an obligation to appear before the police and make statements. In their opinion, an early initial examination by the police takes on particular importance when the public prosecution office leading the investigation does not yet have sufficient knowledge of the facts of the case and it would be useful to be able to draw on specific experience or knowledge of the police or on intelligence they have gathered from preventive work to combat crime that is not immediately available to the public prosecution office. Furthermore, they continue, in no small number of cases the investigatory authorities have to deal with ambivalent and intimidated witnesses whose willingness to testify must also be encouraged by the police. From the standpoint of the police, it is precisely the witnesses occasionally called upon to make statements concerning crime complexes of organized crime who should be examined promptly.

In the case of minor and moderately serious crimes, they continue, witnesses are often unwilling to appear before the police upon being summoned due to the inconvenience, cost or time commitment this entails. An obligation to appear before the police would at any rate be likely to accelerate the proceedings in such cases and reduce the time, cost and effort involved for the simple reason that once such witnesses have put in an appearance, they are generally willing to make statements. The proposed provision is to read as follows:

Witnesses shall be obliged to appear before the police authority upon being summoned and to make statements on the subject matter if the summons is based on an order or request of the public prosecution office.

In the opinion of the Federal Government, which commented on the proposed provision, this would merely lead to a shift of powers to the police. For according to the explanatory memorandum to the bill, an obligation of witnesses to appear before the police and make statements was to then take on particular importance when the public prosecution office did not yet have sufficient knowledge of the facts of the case but an early examination would nevertheless be useful. In the Government's view, however, an order or request by the public prosecution office to the police to summon a witness would – if it were to be more than just a formality – presuppose a prior comprehensive briefing on the status of the proceedings in each individual case. Thus no acceleration or increase in the efficiency of investigation proceedings would be associated with a provision such as the one proposed.

Furthermore, it is admissible under German law for witnesses to be accompanied by legal counsel when they appear at the examination. If witnesses were obliged to appear before the police, they would in any case bring legal counsel with them if they could themselves be subject to criminal prosecution and therefore have a right to refuse to make statements or if they belonged to the group of aggrieved persons or witnesses entitled to private accessory prosecution or, finally, if they were particularly in need of protection. In these cases it is possible under the law for an attorney to be assigned to the witness as counsel prior to examination by the public prosecutor or the judge.

In the event of the introduction of an obligation to appear before the police and make statements, the principle of fair proceedings would demand that legal counsel already be called in – at state cost, if necessary – during the examination by the police. This could not only lead to delays in the proceedings and addition expense for the police but also perhaps exceed their expertise. For it is certainly doubtful whether a police criminal investigation officer, who as a rule has only an intermediate-level school education, would be able to hold his own against an attorney with considerable court experience serving as legal counsel for the witness. In such cases the officer conducting the examination would be dependent on the assistance of the competent public prosecutor, insofar as he did not simply discontinue the examination session and leave the questioning of the witness accompanied by counsel to the public prosecutor.

This example shows that the police authorities should only be given additional powers if there is no doubt that they are fully capable of exercising them.

B. Independent Power of the Police to Terminate the Investigation when the Perpetrators are Unknown

More than 1.5 million cases of ordinary theft and just under 700,000 cases of damage to property – snapping off a car antenna, for example – are committed in Germany each year. In cases involving crimes committed on a mass scale in which the perpetrators are likely to remain unknown, the investigation proceedings have already been simplified to the point where no effort is generally made to procure evidence or examine witnesses.

As a rule, the file consists of just one sheet of paper on which the person harmed describes the criminal offence, a form with which the police notify the person harmed two or three weeks after the crime that they were unable to locate a perpetrator, and another form signed two or three weeks later by the public prosecutor with which he notifies the person harmed that the criminal proceedings had to be terminated because the perpetrator is unknown.

In view of this practice it is not surprising that consideration is being given in police circles to whether – at least in the case of unknown perpetrators – the final termination order could not also be signed by the investigating police officer. For this – according to the argumentation of the proponents of such a solution – would avoid unnecessary circulation of files and spare the public prosecutor a review of the case and the issue of a termination order.

The shifting of competence for termination of proceedings to the police appears very problematic to me not only in light of the statutory authority of the public prosecution office to lead the investigation proceedings but also in view of the following:

- The termination of proceedings against unknown perpetrators by the police on their own responsibility would call for more intense police review of the criminal investigation process especially in regard to the legal assessment of the offence; thus far, given the competence of the public prosecution office for final review, this question has not been a focus of review by the police investigation officials. A competence of the police to terminate proceedings on their own would therefore go hand in hand with an additional commitment of resources to review that cannot be made by the police in every case.

- The termination of proceedings against unknown perpetrators by the police harbours a slew of potential objections by affected insurance companies, etc., who might perhaps demand further investigatory acts and insist on a decision by the public prosecution office.

- Such a shift would essentially result in the emergence of parallel competence of the police and the public prosecution office all the way up to the conclusion of criminal proceedings, which would in turn complicate queries concerning the outcome of criminal proceedings as well as the fulfilment of reporting requirements both for statistical purposes and for the Federal Central Criminal Register.

- The termination of investigations against unknown perpetrators is often only temporary or at least open-ended timewise. Since the police are not as centrally organized as the public prosecution office and the number of police authorities is significantly larger, it is not likely to be all that easy to promptly link subsequent incoming tips concerning perpetrators to the correct proceedings.

- Even investigation proceedings in which no accused persons have been identified or examined can involve interference that could make it appear wise on rule-of-law grounds to provide for review by another body – in this case the public prosecution office.

- And, finally, it is difficult to imagine that authority to lead the investigation could remain vested in the public prosecution office but at the same time be undermined by an independent power of the police to terminate the proceedings.

In short: Independent termination of certain investigation proceedings by the police is unlikely to lead to either a general reduction in public administration costs in the area of criminal prosecution or better co-operation between the public prosecution office and the police. The mere fact that the police largely take the lead in proceedings involving prosecution of minor and moderately serious crimes does not justify any changes to the law. Interests protected under the constitution such as the effectiveness of criminal prosecution and the separation of powers as well as the traditional distribution of functions between the investigatory and judicial bodies, to which the public prosecution office belongs, dare not be infringed. The idea of transferring an independent power of termination to the police in certain investigation proceedings should therefore be abandoned.

V. IDEAS FOR OPTIMISING CO-OPERATION BETWEEN THE PUBLIC PROSECUTION OFFICE AND THE POLICE

My remarks are intended to make it clear that merely shifting competences from the public prosecution office to the police – in other words, increasing the latter's power – will not necessarily lead to simplification and acceleration of the proceedings and save costs and, moreover, that it can be questionable from the rule-of-law perspective.

There are, however, a number of areas in which an intensification of co-operation between the public prosecution office and the police could improve criminal prosecution and relieve the burden on the investigatory authorities as a whole, in other words, on both the public prosecution office and the police:

A. Co-ordination of Investigation Strategies

Insofar as the prosecution concepts and investigation strategies of the police can have an impact on criminal prosecution, involvement of the public prosecution office in the form of mutual consultation and co-ordination appears indispensable. There would otherwise be reason to fear that the measures taken by the police would not be followed up by the public prosecution offices and would thus prove fruitless. If, for instance, the police launch a long-term campaign aimed at busting an openly active drug scene by making a multitude of arrests, the public prosecution office must be involved beforehand so that it can take steps to ensure the availability of the personnel resources required to handle these arrests and their subsequent processing by the judicial authorities.

The arrangement spelled out in item No. 5 of Annex E to the Joint Guidelines of the Ministers of Justice and Ministers of the Interior relating to Co-operation between the Public Prosecution Offices and the Police in the Prosecution of organized Crime is a prime example of how to structure co-operation extending beyond individual cases between the public prosecution office and the police to combat organized crime:

Co-operation, extending beyond individual cases, between the public prosecution office and the police is intended to enable both authorities to obtain, jointly develop and use as the basis for their respective individual measures the same in-depth knowledge of the forms of manifestation of organized crime and of the specific problems relating to the cases involved.

Co-operation extending beyond individual cases is also to enable agreement to be reached on the local and temporal management of the investigation capacities of the public prosecution office and the police criminal investigation department through the creation of focal points corresponding to the actual situation in question.

The public prosecution office and the police criminal investigation department arrange regular official meetings at which there is special discussion of the

•actual situation, anticipated development and measures to combat organized crime within their sphere,

•knowledge and experience gained from the course of investigations and of court proceedings, and also the effects of mistakes made during investigations,

•knowledge and experience acquired from the use of undercover investigation methods and from the protection of witnesses, including ensuring the necessary secrecy,

•knowledge and experience acquired from measures for siphoning off profits,

•local practice with regard to international legal assistance and other forms of co-operation with foreign authorities,

•general questions of co-operation,

•public relations.

Discussions should take place once a year, and where necessary more frequently. The customs investigation department should be given the opportunity of taking part. The departments participating decide on whether to call in other authorities. The respective superior authorities must be informed of the outcome of such discussions.

This "model" could be applied without any problem to other areas of crime (especially fairly serious and serious crime) and facilitate the elaboration of joint strategies to combat crime.

In several of Germany's *Länder*, for instance, working groups consisting of both public prosecutors and police officers have been established at the public prosecution office to take concerted action to combat official corruption.

B. Steps to Combat Domestic Violence

Strategies for combating domestic violence have also been developed by the public prosecution office and the police in collaboration with other authorities in order to effectively protect women and children against violence, impose appropriate sanctions for offences and prevent recidivism.

Violence in the immediate social environment is a phenomenon that was long taboo and played down in importance. This form of crime, however, to which more than 10,000 women fall victim every year, constitutes a gross violation of the physical and emotional integrity of the individuals concerned.

As in the case of efforts to combat organized crime, intensive co-operation between public prosecution offices, police and other agencies leads to a concentration of knowledge and experience and thus not only to higher-quality investigations but also to more effective protection of the affected victims. The investigation work is complemented by measures designed to heighten the awareness of the individuals and agencies concerned. Among other things, these include;

- the elaboration of a handbook for criminal investigation officers to provide guidance for action at the scene, conservation of evidence and handling of cases,

- a broad range of basic and further training courses to teach police strategies for intervention in cases involving domestic violence,

- an informational brochure for women frequently affected by domestic violence explaining how they can effectively protect and defend themselves with the assistance of the police and the judicial authorities.

C. Co-operation Models for Simplification of Proceedings

1. Juvenile Delinquency

In my opinion, there is a need for co-operation between the police and the public prosecution office not only in regard to co-ordination of police investigation measures; consideration should also be given to the question of whether closer co-operation between the public prosecution office and the police in the form of delegation of responsibilities or preliminary examinations could simplify and speed up the conclusive handling of criminal proceedings.

In a number of Germany's *Länder* there are guidelines for combating juvenile delinquency that assign a broad range of responsibilities to the police in order to relieve the burden on the judicial authorities without, however, encroaching on the authority of the public prosecution office to lead the investigation proceedings.

Behind this is the fact that in cases involving more minor criminal offences, the Juvenile Courts Act allows the public prosecutor at the juvenile court or the juvenile court judge to refrain from imposing formal sanctions at an early stage of the proceedings. The term "diversion" used in this context means a deviation in sanction practice from the classic formal procedure involving the judicial authorities in favour of an informal, swift and flexible response. Accordingly, preference of charges and conviction may – following the exercise of socio-educational influence or implementation of socio-educational measures – be replaced by termination of the proceedings.

The aim of these administrative provisions is thus;

- the promotion and improvement of co-operation between the police, the youth welfare authorities, the public prosecution office and the court,
- the guarantee of a real socio-educational response by the state in lieu of a formal court decision,
- the involvement of parents and other persons with the right of care and custody,
- the simplification and acceleration of juvenile criminal proceedings, not only in the interest of the judicial authorities but also in the interest of the young person concerned.

The prerequisite for such flexible handling of proceedings is that it apply only to criminal offences of a minor nature such as;

- theft, misappropriation and receiving stolen property of slight value (up to approximately fifty dollars),
- minor cases of fraud (involving damages of up to fifty dollars),
- unauthorised use of a vehicle,
- obtaining benefits by devious means, or travelling without paying for a ticket,
- minor cases of damage to property, especially damage that is the product of typically juvenile motivation or situations, such as graffiti,
- negligent bodily injury,
- insult,
- minor cases of driving without permission to drive.

In order to submit only really suitable cases to the public prosecutor or the court, the police must determine in their investigations whether the accused has already voluntarily rendered meaningful socio-educational accomplishments or voluntarily suggests or actually renders such accomplishments. These can consist of the following in particular;

- an apology to the person harmed,
- restitution of the harm caused (also partial restitution)
- payment of compensation for pain and suffering
- performance of work for the person harmed,
- community service work,
- participation in police road safety instruction,
- a socio-educational talk by the police with the young person in connection with his examination,
- a socio-educational talk by the public prosecutor with the young person.

Insofar as a socio-educational measure of this kind is suggested or implemented by the police after consulting with the public prosecution office, or by the public prosecution office itself, this presupposes three things;

- no earnest denial of the criminal accusation,
- consent of the young person to the measure,
- no objection by the person with the right of care and custody or by the statutory representative.

Final control of the implementation of a socio-educational measure involving the young person lies in the hands of the public prosecution office. It is responsible for ensuring that due account is taken of the idea of social education. Not until then is the proceeding terminated without leaving a blot on the accused juvenile's record.

The distribution of labour between the police and the public prosecution office is advantageous for all the parties involved, including the young person concerned;

- The proceeding is standardised and simplified in such a manner as to avoid unnecessary effort and expense,
- The waiver of intensive investigations – at the youth and social welfare authorities, for instance – ensures that the young person's private sphere remains largely untouched,
- The socio-educational option afforded the young person confronts him with the consequences of his act just the same way as a formal sanction,
- The regular consultations between the police and the public prosecution office guarantee that the police investigatory authorities remain aware of their limits.

2. Mediation between the Perpetrator and the Victim

Administrative provisions are in place that promote pragmatic and flexible co-operation on a case-by-case basis between the police and the public prosecution office in order to ensure uniform practice in the area of mediation between the perpetrator and the victim. Here, too, the police investigatory authorities are only conceded powers of their own to the extent that this does not dilute the supreme investigatory authority of the public prosecution office.

The statutory basis for mediation between the perpetrator and the victim is section 46a of the Criminal Code. Pursuant to section 46a, the court may mitigate or dispense with punishment if the perpetrator has completely or substantially made restitution for his act or has earnestly strived to make restitution. The same is true if the perpetrator has, in a case in which the restitution for the harm caused required substantial personal accomplishments or personal sacrifice on his part, completely or substantially compensated the victim.

The guidelines issued in most of Germany's *Länder* provide for the following action on the part of the police:

- After clarifying the basic facts of the case, the police limit their investigations to verification of personal particulars and examination of the victim and the accused person,

- In suitable cases the police inform the victim or his attorney at the earliest opportunity of the possibility of mediation between the perpetrator and the victim; this can be done by handing out or sending an information sheet or by giving an oral explanation,

- To the extent that this appears expedient, the police seek to establish contact with the accused or his attorney and inform them of the possibility of mediation between the perpetrator and the victim and of the conceivable consequences under the law of criminal procedure. The standardised information sheet is to be handed out or sent for this purpose,

- The police submit a case they deem suitable for mediation between the perpetrator and the victim to the public prosecution office without delay,

- In cases of doubt, the police consult the public prosecution office either in person or by phone as to the procedure to be followed.

Similar guidelines exist for the procedure to be followed at the public prosecution office:

Insofar as the accused and the person harmed agree to such mediation, the public prosecution office requests a conflict mediation agency to carry it out. There the affected parties receive impartial assistance in regulating the consequences of the act that caused the harm.

Upon conclusion of mediation between the perpetrator and the victim, the files are submitted to the public prosecution office, which then decides – with the involvement of the court, if necessary – whether the proceeding should be terminated or whether the circumstances of the act nevertheless give cause for preferment of charges. In such a case, as I pointed out earlier, the conclusion of mediation between the perpetrator and the victim can lead the court to mitigate or even dispense with punishment.

As you have undoubtedly realised, in such cases it would probably be simpler for a public prosecutor to immediately prefer charges – i.e. without mediation between the perpetrator and the victim – or terminate the proceedings upon payment of a regulatory fine. In my opinion, however, this relatively time-consuming mediation procedure is worthwhile for all the parties concerned;

- Peaceful relations under the law are restored, and conflicts are settled,

- The victim obtains satisfaction from the perpetrator,

- Further disputes between perpetrators and victims under the law of civil procedure are usually unlikely to arise.

3. Models for more Efficient Efforts to Combat Shoplifting

The extent of petty crime in Germany gives cause for reflection on steps to optimise the state's response.

Approximately 700,000 cases of shoplifting are registered by the police every year. In more than half of the cases, the value of the shoplifted items is less than ten dollars; in another thirty percent the value is between ten and fifty dollars; and in only about one percent of the cases is the value more than five hundred dollars.

Even though the fault of the perpetrators in the majority of cases is extremely slight and the proceedings – at least in the case of first offenders – are very often terminated without imposition of any sanctions at all, the processing of such offences nevertheless places a considerable burden on the police and the judicial authorities. Furthermore, law enforcement practitioners are of the opinion that the previous sanctioning practice in this area of petty crime is inadequate.

A working group in the state of Saxony is now developing a model for efficient co-operation between the police and the public prosecution office. This model not only greatly simplifies the handling procedure but also leads to imposition of financial sanctions on the perpetrator in every case of shoplifting, even those involving loot of slight value.

The key features of this co-operation model are the following;

- In the case of loot with a value of less than fifty dollars, the police offer the accused the option of terminating the proceedings upon payment of a regulatory fine – subject, however, to the decision of the public prosecution office,

- Whenever possible, the offer to terminate the proceedings is made in the context of the personal hearing of the accused. In cases where small amounts are involved, a form with a standardised offer can already be enclosed with the summons sent to the accused to appear for examination,

- The form makes it clear that this offer is only applicable if the perpetrator does not already have a theft record. It then points out that the public prosecution office will most likely terminate the proceeding upon payment of the regulatory fine, that no entry will be made in the Federal Central Criminal Register, and that in the event that the public prosecutor decides otherwise any regulatory fine that may have been paid will be reimbursed or credited toward any other fine that may be payable,

- The consent of the accused should be declared on the form,

- The accused is informed that he can suggest a specific non-profit-making institution in the declaration of consent,

- In the interests of equal treatment, the assessment of the suggested sum of money to be paid is made on a standardised basis (a multiple of the value of the shoplifted goods, for instance).

In the city of Nuremberg there is a similar pilot project to effectively combat shoplifting:

If a shoplifter is caught in the act, the police arriving on the scene may offer him the option of immediately and voluntarily paying a specific sum of money to the police officer on the spot or to the public treasury within six days. The prerequisite, however, is that the person in question be a first-time offender and that the value of the stolen goods not exceed fifty dollars. The sum of money collected on the spot should be nine times the value of the goods. After payment has been made, the public prosecution office can usually conclude the proceeding immediately. The sanction thus follows hot on the heels of the act.

These two models clearly show that acceleration and simplification of the investigation proceedings are only possible through co-operation models providing for a distribution of labour that are jointly developed and translated into action by the police and the public prosecution office.

4. The "House of Juvenile Justice" in Stuttgart

This pilot project optimises co-operation between the police and the public prosecution office in a manner that can hardly be surpassed, namely by accommodating the youth welfare office, the police and the competent public prosecutor under one roof. This ensures constant and direct contact between the three most important institutions concerned with child and juvenile delinquency. Moreover, the nearby local court keeps time slots available for hearings so that main hearings can be conducted at short notice if necessary.

The key principles governing the work in the House of Juvenile Justice can be summarised as follows;

- Case conferences: All the institutions involved exchange their knowledge and co-ordinate assistance measures in the event of interventions or sanctions. Close daily co-operation and the personnel continuity marking this co-operation foster mutual trust and confidence in both the individuals involved and their skills. At the same time, they ensure a qualified multidisciplinary diagnosis as the prerequisite for an effective response to child or juvenile delinquency,

- Parallelism of case handling: Upon receipt by the police of a notice of a criminal offence, the public prosecution office is also promptly informed so that it can immediately bring its own set of instruments to bear in suitable cases. The officials of the youth welfare office function as intermediaries in this context, involving the necessary co-operation partners,

- Immediacy: There is no longer merely discussion about the young person concerned but discussion with him as well – and, if appropriate, also with his parents. The young person thus experiences the public prosecutor in action as a real person rather than just a faceless name contacting him through a form letter. Many young delinquents are impressed by the intensity of the adults' concern for them. Not infrequently, this is the first time that the children and young people concerned sense that someone really cares about what they do and what becomes of them.

This new form of co-operation has thus far shown in an impressive manner how proceedings can be made more effective and, in particular, how they can be handled more expeditiously. More high-quality pilot projects of this kind are to follow in Germany.

VI. SUMMARY

a) For all practical purposes, it is the police who take the lead in the majority of investigation proceedings. Thanks to their constant presence and consequent ability to take initial action to apprehend suspects, their superior personnel and technical resources, their control of data, and their European network, they are in a position to decisively influence the course of the investigation proceedings. In most cases the steps paving the way for conviction or acquittal are thus already taken during the investigation proceedings, not later on in the courtroom.

b) In order to meet rule-of-law standards, promote acceptance of court decisions by the accused, strengthen public confidence in the lawfulness of intervention by the judicial authorities and forestall critical reporting by the media, the investigation work of the police should be critically monitored, controlled and, in individual cases, managed by a competent, fully trained lawyer – the public prosecutor in Germany. This should at least be the case when criminal offences other than petty crimes or crimes committed on a mass scale are involved.

c) Against this background, any attempts by the police to obtain even more latitude and even more freedom from the influence and control of the public prosecution office must be greeted with extreme caution. There should also be no further consideration of the idea of shifting powers of the public prosecution office to the police.

d) Strong support should, however, be given to joint endeavours by the public prosecution office and the police to divide up the tasks arising in the course of the investigation proceedings in such a way as to increase the transparency of the investigation proceedings and more swiftly and efficiently bring them to a conclusion while at the same time preserving the competence of the public prosecution office to lead the proceedings. Close co-operation in close quarters between the police and the public prosecution office affords optimal conditions for this, as pilot projects prove.

ANNEX 1

Rates of various offences or offence groups
Population: 82 163 500 (01-01-2000)

Key	Offence or offence groups[1]	Cases recorded	%	Offence rate[2]
___	Total offences	6 264 723	100.0	7 625
	Encompassing:			
4***	Theft under aggravating circumstances	1 519 475	24.3	1 849
3***	Theft without aggravating circumstances	1 463 794	23.4	1782
5100	Fraud	771 367	12.3	939
6740	Criminal damage to property	671 368	10.7	817
2240	Intentional bodily harm in less serious cases	261 894	4.2	319
7300	Drug offences	244 336	3.9	297
6730	Insult, assault and battery	152 282	2.4	185
2300	Crimes against personal freedom	146 198	2.3	178
2220	Dangerous bodily harm and serious bodily harm	116 912	1.9	142
6200	Resisting a public official in the execution of his duties and less serious criminal offences against public order	115 097	1.8	140
5300	Embezzlement	86 284	1.4	105
5400	Forgery of documents	71 796	1.1	87
2100	Robbery; extortion resembling robbery and assault of a motor vehicle driver resembling robbery	59 414	0.9	72
5200	Breach of trust (section 266 Criminal Code) Withholding and embezzlement of wages or salaries (section 266a Criminal Code) Misuse of cheque and credit cards (section 266b Criminal Code)	38 107	0.6	46
6760	Environmental offences	34 415	0.5	42
6300	Accessoryship before and after the fact	29 479	0.5	36
7100	Serious criminal offences and less serious criminal offences in secondary criminal law	28 308	0.5	34
6400	Arson	28 002	0.4	34
7260	Offences in violation of laws concerning weapons	23 607	0.4	29
6710	Non-payment of maintenance allowance	15 761	0.3	19
6500	Crimes in public office (Cases of bribery are included)	8 512	0.1	10
1110	Rape (attempts included) and aggravated sexual assault	7 499	0.1	9
0100	Murder and manslaughter (attempts included)	2 770	0.0	3
+0200				

[1] The list of keys is incomplete.

[2] The offence rate is the number of cases, which have come to the attention of the police, calculated on the basis of 100 000 inhabitants.

ANNEX 2

(Stamp of the authority)

(Crest)

Ms/Mr

Date:
Tel.:
Case officer:
Ref. No.:
(Please quote when replying)

Investigation proceedings in respect of theft

Encls.: Reply letter
Transfer slip

Dear ,

You stand accused of the following:

That on (date) at around (time) you did misappropriate in (place) goods to the value of DM in order to permanently retain these goods for yourself without payment (minor crime of theft in accordance with section 242 subsection 1 of the Criminal Code [StGB]).

In accordance with section 163a of the Code of Criminal Procedure (Strafprozessordnung - StPO) you are herewith afforded the opportunity to make a statement with regard to this accusation. You are furthermore afforded the possibility below of applying for simplified conclusion of proceedings on payment of a sum of money. If within two weeks of your receipt of this letter no notice quoting the above ref. No. and no statement returning the enclosed reply letter is received from you by the abovereferenced authority, it will be presumed that you do not wish to avail yourself of the possibility of simplified conclusion of proceedings or of your right to make a statement.

1. Possibility of simplified conclusion of proceedings

If you are a first offender[3], it is possible in the case at hand in accordance with section 153 a subsection 1 of the Code of Criminal Procedure to refrain from filing a public charge if you

- consent to simplified conclusion of proceedings using the form enclosed by the date of **and**
- effect payment in respect of the amount of DM (in words: Deutsche Mark) by at the latest.

[3] A first offender in this context is whoever has not been previously punished for a property offence and in respect of whom no proceedings relating to such offences have been discontinued in the past five years in accordance with section 153 of the Code of Criminal Procedure (Non-Prosecution of Petty Offences) or section 153a of the Code of Criminal Procedure (Provisional Dispensing with Court Action).

Payment should be effected for the benefit of the Landesjustizkasse Chemnitz, a/c No. 87 001 500 at the Landeszentralbank Chemnitz (branch code [Bankleitzahl]: 870 000 00) expressly stating the ref. No. above.

Please find enclosed a transfer slip.

The public prosecution office will decide as to allocation to the sum of money to state funds or to a charitable establishment. You may propose a charity yourself.

If you agree to this treatment of the case in good time and effect payment in respect of the amount in good time and in full, the proceedings are very likely to be discontinued by the public prosecution office. This is conditional on you not having come to notice previously under criminal law. The final decision is to be taken by the public prosecution office. Documented payment of the sum of money in good time will be considered agreement. If the proceedings are discontinued by the public prosecution office, no entry will be made in the Federal Central Criminal Register ("criminal register"). You will be considered not to have a criminal record, and the event will not be entered in a certificate of good conduct.

If you do not agree to this treatment of the case, the public prosecution office will decide.

Please note in particular that there is no mechanism for the following:

- an extension of the period set for the submission of your agreement;
- a reminder to pay the sum of money;
- examination of the reasons for which you have not paid the sum of money, or have not paid it in good time.

In the event of a different decision being taken on the merits of the case by the public prosecution office, the sum of money paid may be refunded or set off against any criminal fine imposed by the court.

2. Information regarding the case

If you wish to provide information concerning the case, you may also use the enclosed reply letter.

Please note that you are free in accordance with the statutory provisions whether to make a statement on the case, and at any time to consult defence counsel to be chosen by yourself. Furthermore, you may apply for individual items of evidence to be taken to exonerate you.

Yours sincerely,

Signature of case officer

ANNEX 3

(First name, last name of the accused, postcode, city, street, house No.)

To (Stamp of the police authority)

Reply

Investigation proceedings concerning myself in respect of theft
Re your letter of
Ref. No. I would like to inform you of the following:

1. Application for simplified conclusion of proceedings (Please do not forget to sign!)

❑ I am a first offender.[4] I consent to the treatment of the case as proposed and intended by the police and suggest discontinuation of the proceedings on payment of a sum of money,

- ❑ I will pay the sum of money in cash to the police.
- ❑ I transferred the sum of money to the Landesjustizkasse Chemnitz on (date).
- ❑ I will pay the money to the benefit of the Landesjustizkasse Chemnitz, a/c No. 87 001 500 at the Landeszentralbank Chemnitz (branch code [BLZ] 870 000 00).

❑ I propose the following charity to receive the sum of money (optional):

❑ In the event of a different decision on the merits being taken by the public prosecution office, I agree to the sum of money being set off.

If the sum of money is not used up by an instruction in accordance with section 153 a of the Code of Criminal Procedure or by setting off in the context of another decision on the merits of the case, I apply for repayment to a/c No.: Branch code (BLZ):
Name and address of the financial institution:

~ I do not consent to simplified conclusion of proceedings.

2. Information on the case (optional, see legal notice in covering letter, continue on another sheet if necessary)

_____ _____ d.o.b._____
place, date signature with first and last names date of birth

[4] A first offender in this context is whoever has not been previously punished for a property offence and in respect of whom no proceedings relating to such offences have been discontinued in the past five years in accordance with section 153 of the Code of Criminal Procedure (Non-Prosecution of Petty Offences) or section 153a of the Code of Criminal Procedure (Provisional Dispensing with Court Action).

THE PUBLIC PROSECUTION OFFICE IN GERMANY : LEGAL STATUS, FUNCTIONS AND ORGANIZATION

*Eberhard Siegismund**

I. INTRODUCTION

Where the media in Germany are concerned with legal matters and problems, it is particularly the criminal law that is the focus of public attention. Serious news magazines regularly report on spectacular criminal offences and on the way in which they are dealt with by the investigating authorities and the courts. Thus, a few years ago, a murder case with a policeman as the victim, moved centre-stage – a trial that went on for months; this was followed by the Mainz child molester case – a case that made legal history because it caused Parliament to change the law and establish video examinations as part of criminal procedure; and now we have a case against three right-wing radicals in an East German town, who set fire to an apartment block several years ago, thereby endangering the lives of a large number of asylum seekers.

Whilst it is occasionally apparent that an effort is being made to report objectively on the course of such trials, one cannot fail to recognise a tendency towards critical reporting, indeed in two respects: on the one hand, public attention is drawn to judicial sanctioning practice, which is sometimes felt to be too lenient – especially with regard to young criminal offenders; on the other hand, the criminal prosecution practice of the police and the public prosecution office is often eyed very critically.

Even though it deserves to be called – actually by dint of statute, and this is something I will be coming back to later – the "most objective authority in the world", the public prosecution office is, however, not infrequently said, as the "cavalry of the law", to demonstrate a certain "dashing spirit" and is thus thought to be blind in its enthusiasm for prosecution. Public prosecutors, although said to investigate swiftly and in a straightforward manner, are said to do so, however, one-sidedly to the accused's disadvantage, without any sure instinct and without the requisite critical distance. Charges of this kind were heard again just recently in petitions addressed to the Federal Ministry of Justice in Berlin, after a young man had been convicted of attempted murder and sentenced to a long term of imprisonment in a trial based on circumstantial evidence. Here the victim was a policewoman; her lover and her father, who were also among the suspects, were also policemen. From the media vantage point, the investigating authorities had erroneously concentrated their inquiries on the person who was subsequently convicted and – as they were professional colleagues – had spared the other two suspects further investigations in line with the principle that birds of a feather flock together. An interesting little detail here: after the Federal Court of Justice had dismissed the appeal on points of law only against the judgment of the lower court, composed of three professional and two lay judges, the convicted person's application for the reopening of the proceedings has now been granted.

Occasionally, but only very seldom, the charge has also been levelled in the press that the public prosecution office is kept on a tight rein by the Government. It is said to be subjected to political influence in its investigations, perhaps with the result that people close to the Government are not being prosecuted with the requisite vigour. In Germany, however, these are matters that do not fall within the competence of the Federation but rather within the competence of the Länder, for in Germany the organization of the justice system is fundamentally a matter for the constituent states of the Federation, i.e. the Bundesländer.

Following a brief introductory historical overview, I would now like to acquaint you with the legal status and functions of the public prosecution office as well as with organizational questions. At this point I will be less concerned with scientific discourse than with a practice-oriented presentation.

II. THE LEGAL STATUS OF THE PUBLIC PROSECUTION OFFICE IN GERMANY

The status and functions of the public prosecution office are laid down by statute, i.e. by the Courts Constitution Act – in its sections 141 to 151 – and by the Code of Criminal Procedure – for instance, in sections 158 to 163 – but not in

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detail and certainly not conclusively. The provisions in the Courts Constitution Act – which I shall refer to as the CCA –on the status of the public prosecution office rather tend to have the character, at least in part, of guiding principles or of organizational principles, whereas the important allocations of function in the Code of Criminal Procedure are mainly drafted in the form of general clauses.

Nevertheless, in Germany we have had largely positive experience with this system of provisions and so, in October 1990 when East and West Germany were reunified, we also transferred this part of the law unchanged to the new *Bundesländer*.

A. Historical Review

In German criminal procedure the public prosecution office is a relatively young institution. The relevant provisions were conceived on the model in French criminal procedure. Until the beginning of the nineteenth century, France had an inquisitorial procedure conducted in secret and in writing.. After Montesquieu had extolled the virtues of English legal institutions as models for the constitution of the courts and for criminal procedure, these institutions were adopted, particularly the principle of *ex officio* prosecution, the parties' duty to furnish proof, the principle of oral proceedings, the principle of proceedings in public, and, above all, trial by jury.

The definitive element of French criminal procedure was a prosecution proceeding where the charges were preferred by a special state criminal prosecuting authority, i.e. a public prosecution office. Compared with the procedure in force in Germany, French procedural law displayed indisputable objective advantages, for in Germany proceedings before the criminal courts up to the mid nineteenth century were conducted in writing and in secret. The criminal courts were equipped with their own investigating staff – the court police. The court police were responsible for clearing up the facts of a case until they were "ripe" for final judgment by the court. There was hardly any control of the police, or none at all. Criminal court judges were reproached for "lack of diligence, bias and overweeningness". Hence the Prussian King was initially concerned only with disciplining the courts and affording the state interest in imposing punishment greater chances of enforcement. It was, however, the more liberal elements in the Berlin Ministry of Justice who succeeded in developing a conception for reform in 1845: according to this conception, the public prosecutor was not only to act in the state's interest but also to show equal concern for the defendant, i.e. for his defence. This was designed to obtain popular support for a novel institution, and to make it clear that the public prosecution office was now to be the custodian of the law, for the benefit of the defendant as well.

The Ministry took an even greater step forward by making the decision to put the police under the control of the public prosecutor, for there was specific cause for concern that reasonable account was not being taken of the accused's rights during police prosecution measures.

The statue that came into force at the beginning of 1847 contained the following core provisions:

- Public prosecutors were made subject to the official supervision of the Minister of Justice and to his instructions.
- Courts were not allowed to intervene *proprio motu*, but only upon application by the public prosecution office.
- Public prosecutors had to watch over compliance with statutory provisions in criminal proceedings. A public prosecutor had to take care that no guilty person escaped punishment and that the guiltless were not prosecuted.

B. What is the Situation Like in Germany Today with Regard to the Public Prosecution Office, when Seen against the Backdrop of its Early Beginnings in Berlin?

The modern view is that public prosecution offices are hierarchically structured, independent organs of the administration of criminal justice. They are on an equal level with the courts. What this means in detail is easier to understand when one knows how public prosecution offices are structured in Germany. The Federal Republic of Germany is a federal state. And because Judicial Power lies with the individual *Bundesländer* – 16 in all – we have independent *Land* public prosecution offices in each *Bundesland*.

The public prosecution office is organized parallel to the courts, which means that the territorial competence of public prosecutors is governed by the territorial jurisdiction of the court where the public prosecution office has been established: section 143(1) of the CCA.

Section 141 of the CCA states that there should be a public prosecution office at every court. Hence, there is a public prosecution office at every Regional Court in the *Länder* that make up the Federal Republic of Germany, meaning a total of 116 public prosecution offices at the Regional Courts. As a rule, these public prosecution offices also carry out public prosecution functions at the Local Courts. They are subordinate to a regional public prosecution office established at every Higher Regional Court (sections 142 and 147 of the CCA), so there are a total of 25 regional public prosecution offices. The regional public prosecution offices are, in turn, subordinate to the respective ministers of justice of the *Bundesländer*: section 147 of the CCA.

Example: There is one public prosecution office each at the Regional Courts in Bonn, Cologne and Aachen. These public prosecution offices are subordinate to the regional public prosecution office in Cologne. The regional public prosecutor there is subordinate to the Minister of Justice of the *Land* of North-Rhine/Westphalia in Düsseldorf.

On the federal level, the Federal Public Prosecution Office exists parallel to the Federal Court of Justice. This authority is headed by the Federal Public Prosecutor General: section 142(1), no. 1, of the CCA; there are other federal public prosecutors assigned to him. On the one hand, the Federal Public Prosecution Office performs the classical functions of a "public prosecution office at the Federal Court of Justice", i.e. it represents the prosecution in all cases that come before that court: section 135 and section 121(2) of the CCA. Section 142a of the CCA otherwise provides for special competence of the Federal Public Prosecution Office to act in cases of first-instance jurisdiction of the Higher Regional Courts (section 122[1] and [2] of the CAA), i.e. particularly in cases of crimes against the state and of terrorist crimes as well as in other cases involving serious crime that goes beyond individual *Länder* borders. This means, for instance, that the intervention of the Federal Public Prosecutor General was called for on an exceptional scale after the events of 11 September 2001 in New York.

I still need to mention that in cases of "normal" delinquency there is no national public prosecution office operating throughout the Federation, since criminal prosecution is on principle a matter for the *Länder*. Thus there is no superior/subordinate relationship of any sort between the Federal Public Prosecution Office in Karlsruhe and the *Länder* public prosecution offices at the Higher Regional Courts and the Regional Courts. Nevertheless, in agreements reached by *Länder* ministers of justice, two institutions have been created that are competent in certain criminal prosecution matters, where such competence encompasses all the *Länder*:

- One of these institutions is the Central Agency in Ludwigsburg, concerned with the registration and clearing up of cases of violent action perpetrated by the Nazis, and having the obligation to pass these cases, for the purpose of prosecution, to the public prosecution office at the court with local jurisdiction over the place where the perpetrator is living,

- The other institution takes the form of a central agency for collecting evidence and documentation; this agency was established at the regional public prosecution office in Braunschweig where it is responsible for documenting violent action perpetrated by state organs of the former GDR, and here in particular homicides perpetrated at the border wall in Berlin, as well as on the inner German border; furthermore, physical assaults and deprivation of liberty for political reasons are also included in the agency's documentation functions. However, apart from the homicide crimes, prosecution of the offences concerned is in most cases already barred by lapse of time (statute of limitations).

III. FUNCTIONS OF THE PUBLIC PROSECUTION OFFICE

To illustrate the public prosecution office's status, it would seem expedient to look at its various functions in criminal proceedings.

The public prosecution office has three main functions: It is

- the "leader, so to speak, of the investigation proceedings"

- the authority that conducts the prosecution in the intermediate proceedings and in the main proceedings, and

- it is the authority that is responsible for execution of sentence in criminal proceedings, as well as the authority handling pardons in criminal cases.

A. Leader of the Investigation Proceedings

In investigation proceedings the public prosecution office has the sole power of indictment: section 152(1) of the Code of Criminal Procedure – which I shall now be referring to as the CCP. The principle of official prosecution, which is formulated as a legal norm here, means that criminal prosecution is fundamentally the duty of the state (acting for the community of law-abiding people), and not of the individual.

1. The Principle of Mandatory Prosecution

The public prosecution office shall, unless otherwise provided by law, be obliged to take action in relation to all criminal offences which may be prosecuted, provided there are sufficient factual indications: section 152(2) of the CCP. The principle of mandatory prosecution means a compulsion to prosecute any and every suspect, and, on fulfilment of all preconditions, to prefer public charges.

With the public prosecution office's monopoly over indictment, practical application is given to the principles of equality before the law (Art. 3 of the German Constitution) and of justice within the realm of possibility. The public prosecution office's source of information is from receipt of information about a criminal offence or from an application for criminal prosecution (section 158[1] of the CCP) or from somewhere else – particularly from a police communication – regarding suspicion of commission of a criminal offence; this is the usual way in which the public prosecution office gets its information, for more than 80 % of criminal informations are laid with the police. The public prosecution office has to investigate the facts of a case for the purpose of deciding whether public charges are to be preferred; it either has to do this itself or through the police: sections 160(1) and 163 of the CCP.

In its investigations the public prosecution office is bound to maintain absolute objectivity: hence it is required to ascertain not only incriminating but also exonerating circumstances (section 160[2] of the CCP) and its shall ensure that such evidence is taken the loss of which is to be feared. It is these provisions that gave rise to the familiar saying that the public prosecution office is "the most objective authority in the world".

2. The General Investigation Clause in Section 161CCP

The statutory basis for the public prosecution office's authority to conduct any kind of investigation, that is to say the core provision regulating investigation proceedings, is section 161(1) of the CCP:

> *"For the purpose indicated in section 160(1) to (3), the public prosecution office shall be entitled to request information from all authorities and to make investigations of any kind, either itself or through the authorities and officials in the police force provided there are no other statutory provisions specifically regulating their powers. The authorities and officials in the police force shall be obliged to comply with the request or order of the public prosecution office, and they shall be entitled in this case to request information from all authorities".*

This general investigation provision also forms the legal basis for those cases of interference with basic rights that are less intensive and are therefore not covered by a special statutory authority, such as for instance;

- short-term monitoring,
- the use of undercover investigators (i.e. police informers) or
- the use of purchasers in a bogus sale.

The important thing is that the public prosecution office can obtain information from public authorities, from other agencies or persons at any time. The authorities are obliged to give the public prosecution office the information in question, even where the requested information still has to be put together by collecting material, or where it has to be acquired from observation of official operations. The requested authority may only refuse to provide the information concerned if its provision will cause detriment to the welfare of the Federation or of a German *Land*, or would seriously endanger performance of public functions or would make such performance much more difficult.

So far as the requested authority's duty to provide information extends, the public prosecution office may also question the officials working for that authority or get them to submit the relevant documents . Information may also be requested from other agencies or persons. If such information is refused, a formal examination may be imposed, and in certain circumstances, surrender may be requested, or search and seizure ordered. The public prosecutor will regularly draw attention here to the conceivable types of possibility in order to lend emphasis to his request for information.

Pursuant to section 161a of the CCP the public prosecution office may formally question witnesses and experts for the purpose of the investigation. Upon being summoned, they are obliged to appear before the public prosecution office and to make statements on the subject matter or to render their opinion. If they are summoned only to appear before the police, they will not be under this obligation. Examination under oath is, however, reserved only for the judge.

3. The Jurisdiction of the Investigating Judge

If the public prosecution office considers a judicial investigation to be necessary it will have to make the relevant applications to the Local Court, to be decided by the investigating judge: section 162 of the CCP; what is meant here is particularly coercive measures, like a search (sections 102 et seqq. of the CCP), seizure (sections 94 et seqq. of the CCP) and remand detention (sections 112 et seqq. of the CCP). Under specific conditions certain coercive measures may also be ordered in exigent circumstances by the public prosecution office acting on its own (see e.g. section 105[1], first sentence, of the CCP for the search of private premises).

Until about a year ago both the public prosecution office and the police with responsibility for conducting criminal investigations had become accustomed to relatively uninhibited application of the element of "exigent circumstances", and they therefore made relatively generous use of the possibility, for instance, of searching people's homes without a judicial decision to this effect, on the ground that the element of "exigent circumstances" had been found to pertain. But the Federal Constitutional Court brought this practice to an abrupt end with its decision of 20 February 2001. The principles guiding this decision may be set out as follows:

> *The Constitution guarantees the inviolability of the home. Hence it is ensured that the individual has an elemental living space, having due regard to his human dignity. On his private premises he has the right to be left in peace. A search represents a serious interference with this constitutionally protected sphere of life. It is in line with the weight attached to such interference and with the constitutional importance of protecting private premises that the Constitution should, on principle, reserve the right of ordering a search for members of the judiciary.*
>
> *It is now the responsibility of all state organs to ensure that this judicial prerogative becomes effective in practice as a means of securing a elemental basic right. Both the courts and the criminal prosecuting authorities have to take action to counter any deficits in effectiveness. This means practical and organizational measures to create the conditions needed for judicial control that is actually effective. Only by doing this can there be suppression of the frequently criticised tendency on the part of the criminal prosecuting authorities towards excessive use of powers available in cases of urgency.*
>
> *Conclusion: It must remain absolutely exceptional for the investigating authorities to have competence in regard to searches of private premises.*

This decision of the Federal Constitutional Court is of very considerable importance in practice. It is now no longer sufficient if there is just pure speculation or just presumptions based on everyday criminalistic experience as the basis for assuming exigent circumstances. Exigent circumstances have to be established on concrete facts relating to the individual case. The mere possibility of losing evidence will not be enough. Hence the criminal prosecuting authorities must make a regular attempt to obtain an order from the competent court with jurisdiction before beginning a search. Only in extremely exceptional situations will they themselves be allowed to make the order in exigent circumstances without first trying to obtain a judicial decision. Not only do the investigating authorities have to take account of the Federal Constitution Court decision, so do the courts: they are required to set up an emergency or duty service in order to ensure that an investigating judge can be reached at any time.

4. The Principle of Discretionary Prosecution

The public prosecution office's competence to terminate proceedings on discretionary grounds is such an everyday occurrence that one cannot imagine doing without it (sections 153 et seqq. of the CCP). These possibilities of terminating proceedings are indispensable particularly for the purpose of swift disposal of petty crime (shoplifting, fare dodging, negligent infliction of bodily harm). Here we are essentially looking at the following measures:

- Termination by the public prosecution office, pursuant to section 153(1) of the CCP, where the perpetrator's guilt is considered to be of a minor nature and there is no public interest in the prosecution (e.g. shoplifting by a first offender where the item stolen is worth up to 5 Dollars).

- Termination, pursuant to section 153a of the CCP, where the perpetrator does not bear heavy guilt and where the conditions and instructions imposed on the accused are of such a nature as to eliminate the public interest in criminal prosecution (e.g. where there has been minimal bodily harm and the accused is willing to pay the victim a sum of money for pain and suffering).

- Termination pursuant to section 154 of the CCP, or else limitation of criminal prosecution pursuant to section154a of the CCP in a case where several offences have been committed but where other offences committed by the same perpetrator in addition to the principal offence are no longer significant (on the grounds of procedural economy: the accused first steals a bottle of beer in a department store, and an hour later he commits a bank robbery; here the proceedings may be terminated in respect of the theft because a severe sentence is to be expected for the robbery).

It follows from the plenitude of competence I have just outlined that the public prosecution office is rightly referred to as the "leader of the investigation proceedings".

5. Disposal of Cases by Public Prosecution

If the public prosecution office has not brought the proceedings to a conclusion through application of the provisions I have referred to, or has terminated the proceedings for lack of evidence of commission of an offence, it will have three options at its disposal:

- To start with, the public prosecution office may apply for issuance of a penal order if a main hearing does not seem necessary and a prison sentence is to be expected not exceeding one year (with suspension of sentence on probation).

  Penal order proceedings have developed into an extremely popular instrument for the public prosecution office; sanctioning is swift and economical in procedural terms, and it is less of a burden on the accused because he is spared a main hearing held in public. In 2001 approximately 500 000 penal orders were issued in Germany.

- Secondly, the public prosecution office may make an application for a decision to be taken in an accelerated procedure if, given the simple factual situation or the clarity of the evidence, the case is appropriate for an immediate hearing. (maximum sentence of one year's imprisonment).

  The accelerated procedure, a type of procedure that deserves support in the light of the view that punishment should, as far as possible, follow hot on the heels of the offence, has not yet developed its full potential in Germany. Practitioners are experiencing some difficulty with this procedure; it is mainly a matter of encountering organizational difficulties (at present also including co-ordination problems between the police and the public prosecution office), and this is preventing an increase in the number of cases here. In 2001 there were only 35,000 cases where use was made of the option of following the accelerated procedure.

- Thirdly, the public prosecution office may prefer charges. Whenever the investigations offer sufficient reason for preferring public charges, the public prosecution office must prefer such charges by submitting a bill of indictment to the court that has jurisdiction locally: section 170(1) of the CCP.

Let me give you a few supplementary figures on operations conducted by the public prosecution office and on its work in investigation proceedings:

In the whole of Germany there are about 5,300 public prosecutors – of whom circa 30 % are women – who deal with roughly 6.5 million criminal offences every year. Charges are preferred in only 540,000 cases, and in addition to this, about 500,000 penal orders are issued. Approximately 3 million cases are terminated by the public prosecution office, of which about 1.2 million cases are terminated for lack of evidence of guilt, and the remainder on the ground of negligible guilt or on other grounds. Indictments are mainly preferred before the Local Court, i.e. in 530,000 cases. Only 10,000 indictments go to the Regional Court, and a much smaller number, i.e. only about 150, go to the Higher Regional Court.

B. Main Hearing, Filing of an Appellate Remedy

Pursuant to section 226 of the CCP the presence of a public prosecutor shall remain uninterrupted at the main hearing. In extensive proceedings, for instance where the facts of a case are very complex, or where there are several defendants, the public prosecution office will be represented by two prosecutors.

The main hearing begins with the indictment being read out: section 243(3) of the CCP. While the evidence is being taken the public prosecutor shall have the right to ask questions(section 240[2], first sentence, of the CCP) and the right to apply for evidence to be taken (sections 244 et seqq. of the CCP). In practice the public prosecutor usually exercises restraint here and leaves it to the defence to make applications for evidence to be taken. When the taking of evidence has been completed, the public prosecutor will give his closing speech: section 158(1) of the CCP.

If the public prosecution office considers the decision questionable on factual or legal grounds, it may seek an appellate remedy, also for the defendant's benefit: section 296 of the CCP. When appellate remedies are sought, however, this usually happens to the defendant's detriment in the vast majority of cases (about 95 % of all cases).

C. Execution of Sentence

The public prosecution office is responsible for execution of sentence. In practice this means that it calls upon the convicted person to pay his fine or to present himself at a specified penal institution at a specified time in order to serve the prison sentence imposed on him.

For social reasons or for health reasons relating to the convicted person himself the public prosecution office may grant the convicted person permission to pay his fine in instalments or to begin service of his prison sentence at a later date. The public prosecution office is also the authority responsible for dealing with pardons; hence it can, in a decision granting a pardon, remit execution of a prison sentence in certain extremely rare cases, for instance where the convicted person is seriously ill. In my twelve years of experience in the criminal courts I only encountered this in one or two cases.

IV. THE POSITION OF THE PUBLIC PROSECUTION OFFICE BETWEEN JUDICATURE AND ADMINISTRATION

A. Parallels with Judicial Training and Activity

Every public prosecutor in Germany undergoes the same – excellent – training as judges do. As a rule, he will have spent four or five years training at a university, and then registered for the First State Examination in Law, which takes about six months and which covers the whole syllabus, written examinations and a written assignment to be completed within a period lasting several weeks. Following this relatively demanding examination he will undergo a period of practical training lasting roughly two and a half years, ending with a state examination which also takes about six months and for which there are written requirements (written examinations and a written assignment) and oral requirements (analysis of file material, and an oral examination). A public prosecutor's professional qualification therefore corresponds precisely to that of a judge.

The public prosecutor's investigating activities in preliminary proceedings does not actually differ from the duty incumbent on the judge at the main hearing to clear up the facts of the case comprehensively. Like a public prosecutor, the judge is also required by law to clear up the offence in question in full, taking into account all incriminating and exonerating circumstances. In other words, by law the public prosecutor is not a party, and equally he is not the opponent of the defendant.

If one further considers the various opportunities the public prosecutor has in shaping the investigation, opportunities that are otherwise nowhere to be found in the Code of Criminal Procedure, in particular the possibilities of terminating the proceedings, it could be argued that his activity is attributable to the judicial field. However, the public prosecution offices do not exercise any judicial functions; in their essential functions they move in the border area between the executive and the judicature. Even though the majority of cases are disposed of by means of termination by the public prosecution office, this does not constitute an exercise of judicial power in qualitative terms and, as such, is negated by the fact that public prosecutors are bound by instructions received – a subject we still need to discuss – and that they lack the competence to give decisions with final and binding effect, for it is the final and binding decision that forms the essence of judicial power.

B. The Public Prosecution Office as an Organ of the Administration of Justice on an Equal Level with the Courts

The public prosecution offices are not, however, an administrative authority of the executive. Within the administration of justice they have the task, jointly and equally with the courts, of dispensing justice and, as such, they are integrated in the justice system as an independent organ in the administration of justice, without however becoming part of the Third Power, i.e. the judiciary. In other words, the public prosecution office is an institution *sui generis*. It does not "administer" but works towards adjudication, belongs within the functional realm of the courts and, together

with the judge, fulfils the function of dispensing justice in the criminal law field. The public prosecution office builds a bridge between the executive and judiciary and therefore stands between both Powers. And so the position and the function of the public prosecution office are best described as follows:

> *The public prosecution office is an organ in the administration of justice on an equal level with the court. It is a custodian of the law and therefore serves to implement criminal justice.*

V. OVERVIEW OF STRUCTURES AND ORGANIZATION AT THE PUBLIC PROSECUTION OFFICES

A. Internal Structure of the Public Prosecution Office

The organizational foundations of the public prosecution offices are only dealt with in initial outline by the Courts Constitution Act. Other provisions are to be found in rules on the organization and service operations of the public prosecution office, contained in uniform orders issued by the *Land* ministries of justice. The public prosecuting authorities are hierarchically – monocratically – structured. Pursuant to section 147 no. 3 of the CCA they are headed by a "first official". The heads of the authority at the public prosecution offices at the Higher Regional Courts have the official title of "Public Prosecutor General"; the heads of the authorities at the public prosecution offices established at the Regional Courts have the official title of "Chief Senior Public Prosecutor".

The public prosecution office is divided into divisions that are headed by senior public prosecutors. The number and scope of the divisions within a public prosecution office depend on the area of competence of the authority concerned. As a rule, larger public prosecution offices have general divisions and also special divisions geared to specific areas of crime. The general divisions cover cases of "normal" everyday crime such as, for instance, theft, offences of infliction of bodily harm, criminal damage to property and fraud.

The general division is usually the training ground for new professionals starting their careers; it is in the general division that they become best acquainted with the fundamentals and techniques of public prosecution work. These public prosecutors are often called "alphabet men" because of the fact that they have to process, for example, all cases against accused persons whose family names begin with the letters A to D. Although such cases are rarely spectacular, the large number that have to be processed parallel to one another – sometimes amounting to 1,000 *per annum* – and also the breadth of life situations involved demand a high measure of perception, operative ability and legal knowledge.

That public prosecutors – like the police investigating authorities, too – are required to deal mainly with mass crime or everyday crime is shown by the statistics kept. The statistics indicate that theft, fraud, criminal damage to property and infliction of bodily harm top the list of criminal offences committed in Germany.

In the special divisions cases are processed falling within closely defined fields of crime. Here mention must be made of:

- corruption,
- organized crime,
- capital crimes (i.e. particularly homicide crimes),
- political crimes, criminal offences against press laws,
- economic crimes,
- environmental crimes,
- drug-related offences,
- juvenile crimes and those relating to the protection of juveniles,
- sexual crimes,

- traffic crimes.

Usually through many years of specialisation in certain groups of offences the public prosecutors on the staff of a division will have acquired profound expertise and legal knowledge in their fields. It is true that they are not usually inundated with a multitude of cases; nevertheless, their work is often so complicated that the workload of a special division staff member is no less than that of his colleague from the "alphabetical" division.

B. Core Elements of a Special Division for the Suppression of Economic Crime

It is clear that the structures and sequences organized for the special divisions, which often have to process spectacular cases and are therefore under particularly strong pressure to succeed, need to be especially well structured in order to ensure concentrated and accelerated processing of proceedings. This I would like to illustrate with reference to the area of economic crimes, which, in some of the *Bundesländer*, are concentrated at one single public prosecution office. In the light of what I have just said, the competent public prosecutors can be assumed to have absolutely expert knowledge.

- The preconditions for effective and time-saving work in this field lie in both staff composition and material equipment within this division. Public prosecutors, registry staff and typists need to be a practised team and must not be subject to constant changes of staff.

- As a supporting measure, training and further training must be ensured in the whole division, particularly for the public prosecutors.

- What has long since become indispensable is the reinforcement of economic crimes divisions with business experts, e.g. from banking, EDP experts and auditors, who all have to be integrated into the public prosecution office. Here the expenditure of time and money that would be associated with calling in external expertise can be kept at a reasonable level.

- What is also indispensable is an EDP infrastructure with integrated workplace networking, so as to be able to operate competitively.

- At the same time, we need to abandon the public prosecutor as a "sole combatant": there are new forms of organization involving a combination of small groups with two or three public prosecutors backed up by the relevant service units.

- Here one will regularly have to go a step further and also bring in experienced police staff. Such multi-track co-operation could avert friction and loss of time, especially in large-scale proceedings.

C. How Does the Individual Public Prosecutor organize his Work?

1. <u>As a Division Staff Member</u>

Let us now go back to the work done by divisional staff in the general divisions, in the "alphabetical division" dealing with "normal" crime of an everyday nature. The diversity of his work cannot be encompassed in just a few sentences. Moreover, the way in which a public prosecutor on the staff of a division actually performs his work will also depend on his personality, his temperament and his professional commitment as well as on his area of work.

It is well imaginable that public prosecution office investigations can be conducted almost entirely from one's desk – with more intensive use of the telephone. This way of performing the work to be done is frequently found in practice, because the enormous workload, especially in the "alphabetical" divisions seldom allows time for external investigatory acts – for instance inspection of the scene of the crime or participation in the search of private premises.

Some years ago, the Federal Ministry of Justice commissioned a "Survey of organization at the Public Prosecution Offices and the Regional Public Prosecution Offices". This survey was designed to show ways of effectively shaping internal organization as well as to speed up work sequences by means of new forms of organization, by the intelligent use of EDP and by taking other measures.

In the framework of this survey public prosecutors were asked to make a down-to-the-minute record of their work assignments. The analysis that followed led to interesting results, for the first ten slots were filled by the following assignments:

1. obligatory representation of the public prosecution office at specified court sittings 30.5 %
2. studying files/processing 13 %
3. telephone calls 10.5 %
4. dealing with the public 9.5 %
5. drafting public charges 8.5 %
6. termination orders 8.0 %
7. travelling time 8.0 %
8. deadlines/statistics 5.5 %
9. inquiries and communications 3.75 %
10. training 2.75 %

It is interesting to see *inter alia* that termination orders accounted for more or less the same amount of work as the drafting of public charges did.

2. As a Head of Department

The allocation of functions for a senior public prosecutor, as the departmental head, takes on a very different complexion:

1. responsibilities of a departmental head 29 %
2. dealing with the public 26 %
3. studying files and processing 15 %
4. telephone calls 8 %
5. terminations 7 %
6. legal remedies/appellate remedies 6 %
7. travelling time 4 %
8. own investigating activity 2 %
9. applications to the court 2 %
10. transfer orders 1 %

The responsibilities of a departmental head include, *inter alia*, the assignment of divisional staff to the court sittings where they are required to represent the public prosecution office; giving decisions on whether corpses may be released; the examination of termination orders; the examination of new criminal informations; the checking of reports on sittings; the evaluation of daily newspapers; and the preparation of draft testimonials.

Dealing with the public mainly involves specialist discussions and consultations within the authority. This area naturally takes up much more time than it does in the case of a "normal" public prosecutor.

It is a remarkable fact, however, that the head of a department spends most of his time at his desk; his own investigating activity, amounting to just 2 %, is of hardly any significance.

VI. ARE POLICE ONLY IN THE ROLE OF ASSISTING THE PUBLIC PROSECUTION OFFICE?

A. General Proposals to Improve Co-operation between the Police and the Public Prosecution Office

However, the fact of the public prosecutor being "tied to" his desk – probably a mainly self-imposed practice – does not fit Parliament's picture of the public prosecution office, in its role of leading the investigation proceedings, being required to take charge of all investigations, i.e. particularly those conducted by the officials assisting it, for this is a task that can hardly be performed from one's desk. In the light of such very evident restraint shown by the public prosecution office in investigation proceedings, it is not surprising that in recent years the police, who in fact – compared with the public prosecution office – have more expertise in criminalistics, and more technical equipment, and have therefore attained a higher degree of specialisation, are now intensifying their demands for an expansion of their police powers in criminal proceedings at the expense of functions exercised by the public prosecution office and by judges.

Naturally, it will often be appropriate to limit the public prosecution office's power of heading investigations to the basic issues and central aspects of the investigation proceedings, and to give the police a free hand with regard to the detail. However, in an individual case, the sensitivity of a case, and the legal difficulties involved, may make it necessary

for practically all investigative steps to be planned and implemented in close co-ordination with the police. Generally, as the evaluation of the statistics shows, hardly any use is made of this possibility.

What can be done to block the public prosecution office's retreat from investigation proceedings? Can the theory of the public prosecution office's overall responsibility for investigation proceedings still be upheld in the face of actual control by the police? The experts brought in by the Federal Ministry of Justice have advised against having statutory solutions; they propose organizational changes adapted to regional needs:

- Intensive consultation with the police about matters arising in connection with a particular investigation reduces police frustration about releasing the accused or about subsequent termination of the proceedings, and leads to better results in the investigation, because there can then be precise determination in advance of what is actually needed for the purpose of preparing the main hearing.

- Changes of location (having the police criminal investigation department at the public prosecution office, or else having public prosecutors at the police criminal investigation department) might intensify co-operation and reduce bureaucratic sequences as a result of the closer proximity.

- Regular joint official discussions between the police and the public prosecution office may, in different areas, lead to co-ordinated and simplified investigations. This also includes, for instance, agreements on the use of forms when a criminal information is laid in shoplifting cases.

B. Optimism of Co-operation in the Accelerated Procedure

Let us now look at these recommendations in specific terms, referring to the example presented by the "accelerated procedure": Cases that are clear and simple in terms of their facts – like shoplifting or fare dodging – are regularly disposed of in the accelerated procedure. In such cases the statute envisages punishment following hot on the heels of the offence committed. The public prosecutor does not need to prefer public charges in writing; they will be preferred orally at the beginning of the main hearing and entered in the record made at the court sitting. If the defendant confesses, witnesses can be dispensed with and – under favourable circumstances – judgment pronounced on the day the offence was committed.

As I said at the outset, the investigative work is largely performed by the police acting on their own. Only when they have finished their investigation will the files be sent to the public prosecutor, who will then – so to speak, without getting up from his chair – only have to draft the decision concluding the investigation, i.e. the memorandum of termination or the indictment.

This kind of sequence with processing by the police followed by processing by the public prosecution office ought to come into juxtaposition in the accelerated procedure, whereby the police will bring in their criminalistic and the public prosecution office their court experience. This is what the position is, particularly where an accused person is arrested, for it is at least mandatory for the person apprehended to be questioned immediately, for his committal to be effected at short notice and, if necessary, for him to be brought to court without delay. That requires arrangements to be made on the organizational level between the court, the public prosecution office and the police – something which functions in an exemplary manner in a number of German towns and cities, but which is only in its infancy in other areas .

The motivating energy of efficient collaboration between police investigating officials and the public prosecution office cannot be overestimated in relation to the goal of avoiding, or at least reducing, frustration experienced by the police – as has frequently been the case in the past. It is totally disappointing for investigating officials if an arrested accused is set free by the public prosecution office because the prerequisites have not been fulfilled for issuing an arrest warrant, or where investigatory activity involving great expenditure of time and effort leads to the termination of the proceedings. Since the actual fact of "successful" conclusion of the proceedings, in the sense of obtaining the accused's conviction, is something which the police officials concerned often remain unaware of, it may certainly have an uplifting effect on job satisfaction in the service if police investigation measures can be concluded directly with a judgment.

With this in mind, consideration could be given to the following sequence of police activity in the accelerated procedure: In most cases the police will generally arrest the perpetrator at the scene of the crime. Using police information, the police will then, in addition to taking the accused's personal particulars and ascertaining his personal situation, also ascertain whether he has had any prior brushes with the criminal law. At this stage, they will already be examining whether the facts are appropriate for a hearing using the accelerated procedure, in other words whether the event involving commission of the offence remains within a simple dimension, or whether the evidence is clear.

The competent police official may now face three different situations:

- Firstly, the situation where the facts are so clear, from the police point of view, that the accused can immediately be taken into the custody of the court, the police will then give the documents to the public prosecutor, who will go on processing the case.

- Secondly, the situation where the police can affirm the case's suitability for swift disposal but rule out taking the accused into custody, for instance because he has a permanent domicile. The accused may then and there be summoned to the court hearing. After his personal particulars have been taken, he will be set free again, the police file on the matter will be closed, and the file will be sent to the public prosecution office.

- Thirdly, the situation where there may be doubts as to whether the case is really appropriate for swift disposal. In such a situation the police official processing the case will get in touch directly with the public prosecutor on duty to deal with urgent cases, in order to get a decision from the latter on whether an accelerated procedure is to be followed at all.

This sort of gradation of action by the police should be the subject of consultation with the public prosecution office so as to improve communication between both authorities and thus also their mutual understanding. Here we find relevant models in pilot schemes in Germany. It is obvious that adjacent accommodation for the public prosecution office and the police may also be beneficial. In fact, the police headquarters of some of the large German cities have made an office available on their premises to the public prosecutor who is responsible for cases involving the accelerated procedure.

VII. PILOT SCHEMES FOR SIPHONING OFF THE PROCEEDS OF CRIME

A. Organizational Recommendations

There certainly are successful models of fruitful co-operation not only between the public prosecution office and the police but also involving close co-operation with customs, the tax and other authorities, i.e. in the field of siphoning off illicit funds. In practice, siphoning off assets acquired through criminal offences has proved to be a difficult matter in legal terms and has actually necessitated great effort, which has effectively restricted its application to a few important cases. The expertise needed for taking urgent measures in an individual case and the relevant experience therefore cannot be assumed – in the long run as well – to apply at all times in the case of every divisional public prosecutor. So, in actual fact, it is the following organizational measures that need to be taken as essential elements of an effective, differentiated and "court-tested" siphoning-off practice:

- Through training and further training adequate basic knowledge will have to be imparted to all divisional public prosecutors and judges.

- At every public prosecution office at least one specialist will have to be appointed who has a more profound knowledge of the subject, who constantly updates his knowledge and who, as a multiplier – here assuming the necessary freedom for him to operate in his service unit – imparts his knowledge within that unit.

- Guidelines, collections of forms, and manuals must be made available for use in everyday practice.

- Close co-operation must be organized with the courts, the police, customs, tax authorities and other partners, whereby the power of the public prosecution office to direct the investigations in substantive terms must remain unassailable.

- Regular joint service meetings must lead to constant mutual exchange of up-to-date information and of court decisions.

B. Practical Application and Successes

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

In the police force of the state of Lower Saxony special investigation groups have been set up for the purpose of securing assets. Certain persons have been assigned by the tax offices to act as contacts with the task of responding to these special investigation groups and to the experts at the public prosecution offices.

This pilot scheme has produced very positive results indeed. What was impressive was not only the commitment of all those involved in the project, but also the quality of co-operation and, surprisingly, the considerable extent of the proceeds ensuing from the respective investigations:

About 28 million Marks' worth of assets were siphoned off, i.e. about 14 million Dollars.

This pilot scheme shows that developing communication between the public prosecution office and the police authorities and the close co-operation between them is one of the important requirements for successful investigation work.

VIII. THE FUNCTIONING OF THE PUBLIC PROSECUTION OFFICE

A. Statutory Foundations of the Power to Issue Instructions

After trying to give you an overview of the external contacts of the public prosecution office with the police, I would like to conclude this lecture by giving you a brief statement on the way in which the public prosecution office functions, with special reference to the question of the importance attached to the right to issue instructions – a right that is established by statute – in the everyday business of the public prosecution office.

As I said at the beginning already, the public prosecution office is structured as a hierarchy. According to section 144 of the CCA, public prosecutors act, in their service capacity, as deputies of the head of the authority. So if the public prosecution office at a court is composed – as is usually the case – of several officials, all public prosecutors subordinate to the head of that authority will be acting as his deputy. It follows from this that the acts performed by a public prosecutor at a trial (for instance giving his consent to termination of the proceedings) will also take full effect if they violate a binding instruction given by his superior.

It is explicable, in terms of the monocratic structure of the public prosecution office, that no specific public prosecutor is, in the final analysis, required to have the competence to act in a specific criminal case; on the contrary, changes of competence can be made, as and when desired, within a public prosecution office. The first officials of the public prosecution offices at the Higher Regional Courts, i.e. the Public Prosecutor Generals, and those at the Regional Courts (the Chief Senior Public Prosecutors) are entitled themselves to take over the official duties of the public prosecution office at all courts in their district and, if necessary, to entrust the discharge of those duties to an official who is not the official who would initially be competent, for instance the official duty of representing the public prosecution office at specified court sittings.

The officials of the public prosecution office shall carry out the official instructions of their superior: section146 of the CCA. The right to issue instructions (section 147) is vested in the public prosecutors who hold positions as superiors as well as in the Minister of Justice. Since, however, the Minister of Justice is not a public prosecutor, his power to issue instructions is referred to as being "external". An external instruction issued by the Minister of Justice is initially directed to the Public Prosecutor General, who will then, assuming the instruction is accepted, translate it into an internal instruction for the public prosecution office concerned.

B. The Ministerial Right to Issue Instructions as a General Guidance for Action

The actual significance of the Ministerial right to issue instructions is illustrated by the issuing of general guidelines and circulars that do not relate to a specific individual case but to the proper handling of provisions of criminal procedure and of criminal law. Here reference must be made to

- the Guidelines on Criminal Proceedings, containing in particular detailed instructions on the prosecution of certain criminal offences;

- the Guidelines on the Youth Courts Act, containing requirements relevant to criminal proceedings in cases against young persons;

- the Guidelines on Relations with Foreign Countries in Criminal Matters; and

- the Directive on Communications in Criminal Matters, identifying the service units that are to be informed on the commencement of investigations. Here the particular focus is on communications about persons who are subject to service supervision, to state supervision, to professional supervision or to supervision under the law regulating their profession, such as doctors, clergymen or Public Service staff.

Ultimately, having such guidelines is sensible and indispensable for ensuring that the administration of justice is carried out consistently.

C. The Ministerial Instruction in an Individual Case

By contrast, what is highly problematic is the individual, i.e. specific, Ministerial instruction. Such instructions are, however, a very seldom occurrence. As a rule, it is sufficient for the Ministry to make informal requests, give informal advice or recommendations.

To the extent that there is any public knowledge at all regarding such recommendations – most of which are usually expressed in informal terms – external observers often assume the existence of extraneous political considerations on the part of ministerial bureaucracy.

With this in mind, attention must be drawn to the following fact: the Minister of Justice bears parliamentary responsibility for the Ministry's activities. Hence he, or she, is essentially free to implement his or her legal policies by issuing instructions in an individual case, for in doing so the Minister is also subject to the control of Parliament.

Clearly, when issuing an individual instruction, he can only move within the parameters of what is legally permissible. That the Minister's right to issue instructions is not to collide with the principle of mandatory prosecution and the relevant provisions of criminal law and of criminal procedure law requires no further elaboration.

D. An Instruction Issued Internally within the Authority Concernd

In the final analysis, similar considerations apply to the right to issue instructions internally within the authority itself, pursuant to section 147 no. 3 of the CCA. Internal instructions issued by the head of the authority may relate to general rules – for instance regarding uniformity in the prosecution of shoplifting – and might suggest certain ways of proceeding corresponding to the value of the goods stolen, e.g. that the regulatory fine should be 10 times the value of what was stolen. As a rule, no difficulties will be encountered here, so far as the public prosecutor working on a case has sufficient scope to act.

What is more difficult to assess is those instructions that affect the handling of a specific individual case. There is much controversy about the details of where the limits lie in respect of the public prosecutorial right to issue instructions. Conflicts may certainly arise, for instance when the recipient of an instruction considers that instruction to be unlawful and his superior tries to exert informal pressure. It is particularly these informal instructions, issued orally and politely to the public prosecutor concerned, that may cause difficulties, especially for a young colleague trying to conform to what is required of him, in a situation where that public prosecutor takes the view that the instruction in question is not correct.

E. Problem Solving by an Individual Instruction being Issued in Writing

With this situation in mind, and also to cover the case where an external instruction is issued, a group of criminal law professors have presented a proposal for a legal provision dealing with this problem. Let me just refer to this provision as follows:

> *" ... (2) Instructions by superior authorities in respect of the handling of a case in specific proceedings shall be issued in writing and shall include the reasons. 2Where there are exigent circumstances and an instruction cannot be issued in writing, an oral instruction shall be confirmed in writing without delay.*
>
> *(3) 1A public prosecutor may request that instructions relating to the handling of a case in specific proceedings shall be issued to him in writing including the reasons. 2Where a public prosecutor deems an instruction to be unlawful, he shall indicate this to the head of the authority in writing, stating the reasons. 3The instruction shall be deemed to have been withdrawn to the extent that it is not repeated in writing.*

(4) 1A public prosecutor who deems an instruction already issued to him to be unlawful and who has indicated this to the head of the authority shall, upon his own application, be released from handling the case further. 2 He shall however undertake any action that cannot be postponed. ...”

I am not entirely sure whether this proposed provision will solve the problem, for it is specifically the informal requests, advice and recommendations from the superior authority, or from the service superior, that can lead to conflict. However, I am confident that discussions with experts from other countries will point to ways of getting to grips with these difficulties.

IX. RECAPITULATION

a) On the basis of his professional competence and his statutory functions a public prosecutor is entitled and bound to guarantee the lawfulness of investigation proceedings. Part of this involves, in particular, the protection of the accused’s and other participants’ basic rights anchored in the Constitution. Where investigation measures are taken which are associated with a particular interference with the accused’s elemental basic rights, such as searching his home, the public prosecutor’s power to make such an order shall not, as a rule, suffice. Here it is the judge, with basically the same qualification but independent in terms of his position, who has jurisdiction; only where there are exigent circumstances can the public prosecutor or the officials assisting him intervene. Against the backdrop of the high ranking basic rights established in the Constitution the Federal Constitutional Court has rightly warned that the element of “exigent circumstances” must be resorted to with restraint.

b) In Germany the multitude both of criminal offences committed and of investigatory acts needed in connection therewith make it actually impossible for the public prosecution office to comply with their obligation to take the lead in all investigation proceedings. In the majority of cases, investigations are therefore, in actual fact, led by the police. However, since in all cases competence to terminate proceedings, as well as to prefer public charges, rests solely with the public prosecution office, the final legal and factual control of the investigation proceedings remains the prerogative of the public prosecution office. This has proved its worth in practice. Hence there is no cause for expanding the powers of the police in investigation proceedings.

c) As coercive measures in investigation proceedings may go hand in hand with interference with elemental basic rights – especially those of the accused – there is, on the contrary, reason for strengthening the public prosecution office’s power to take the lead and their competence in investigation proceedings, and to counter the tendency on the part of the police – often complained of – to make more generous use of their competence to act in urgent cases. What is more, effective, preventive judicial control has to be ensured in relation to coercive measures.

d) The fact that in practice it is the police who are leading the investigations draws a veil over the sole responsibility borne by the public prosecution office. For the purpose of strengthening their position and of dismantling possible hurdles obstructing information and communication in the relationship between the defence and the public prosecution office, statutory provisions are being drawn up in the Federal Ministry of Justice in Berlin; they are designed to give the public prosecution office the opportunity of informally discussing the factual and legal position with the participants in the proceedings. This way conflicts can be resolved and the conditions needed for swift conclusion of proceedings created.

e) There are no easy answers in view as regards conflicts arising for the public prosecution office when a public prosecutor is given problematic instructions by a service superior or by his Minister of Justice. Here the only thing that might help would be to appeal to those in positions of authority at least to issue those instructions that are of a politically sensitive nature in writing and therefore to take responsibility – *vis-a-vis* the outside world and the media. Whether, however, this is the ideal route to take will be a matter for careful examination.

ANNEX 1

Options facing the public prosecution office when making their decisions *

	Type of disposal	Overview of prerequisites	Ground for choosing different type of disposal
1.	**termination, section 153 CCP**	- less serious criminal offence - lack of public interest in prosecution - **guilt** considered to be of a minor nature - in the case of subsection (1), second sentence, **approval of the court not necessary**	**-Guilt** would **not** -be considered **of a minor nature**.
2.	**termination, section 153b CCP**	- also applicable in respect of **serious criminal offences** - lack of public interest in prosecution (unwritten element) - presence of conditions where a court may dispense with imposing a penalty (e.g. reparation, perpetrator-victim mediation)	-Public interest in criminal prosecution must be offset in relation to the perpetrator and/or offence.
3.	**termination with conditions and instructions, section 153a CCP**	- less serious criminal offence - interest in criminal prosecution may be offset by sanctions - degree of guilt not an obstacle - court's and accused's consent necessary	-Gravity of guilt presents an obstacle.
4.	**penal order proceedings, sections 407 et seqq. CCP**	- **less serious criminal offence** - further clarification of the facts not necessary - anticipated penalty (for a defended accused) imprisonment not exceeding one year (suspended on probation)	-Main hearing -seems **necessary.**
5.	**accelerated procedure, sections 417 et seqq. CCP**	- appropriate for **immediate hearing** given **simple factual situation** or **clarity of evidence** - **anticipated penalty** imprisonment not exceeding one year	**-Case** is **inappropriate for immediate hearing.**
6.	**normal proceedings, section 170 subsection (1) CCP - public charges -**		

* according to Schlüchter, Beschleunigtes Verfahren, 1999, p. 69

ANNEX 2

Sample Penalty Order (See paragraph 409 for an explanation of the order's contents)

Local Court

Place and date
Münster, 4 February 2001

File Reference: 13 Cs 72/97
(Please indicate in all correspondence with the Local Court - especially when lodging legal remedies)

Address and telephone
Kleine Gasse 7 999876

Mr Klaus Schrader
Am Ring 13

4400 Münster

Defence Counsel: Mr Müller

Penalty Order

You stand accused by the Münster Public Prosecution Service of negligently causing bodily injury to the witness Mr Fechte whilst in charge of a motor car in the Hiltrup district of Münster at 3.30 pm on 5 October 2000.

You stand accused of the following:

While driving along the South Promenade you turned left onto state highway 54. Paying insufficient attention, you failed to observe Mr Fechte's right of way as he approached in his vehicle from the direction of Rinkerrode. You thereby caused both vehicles to collide, resulting in Mr Fechte's motorcar being propelled onto the on-coming carriageway where it collided with the vehicle of Mr Hellmer, who is also a witness and who was travelling in the direction of Rinkerrode. Mr Fechte suffered minor injuries in the collision .

Offence pursuant to section 230 and the second clause of the first sentence of section 232, subsection 1, of the Criminal Code. Prosecution of this instance of bodily injury by negligence is deemed to be in the public interest.

The Public Prosecution Service has brought the following evidence:

1. Information provided by yourself
2. Witnesses:
   (a) Dieter Fechte, 4600 Dortmund, Sachsenring 12
   (b) Rainer Hellmer, 4400 Münster, Gänsestieg 13
3. Extract from the criminal register

Upon application by the Public Prosecution Service you are sentenced to pay a fine of:

20 daily amounts of _ 40 each.

Your are also ordered to pay for the costs of the proceedings. In addition you are held liable for your own expenses.

P.T.O.

The reverse side contains information about appeals and shows how the costs were calculated.

THE EFFECTIVE SYSTEM OF CRIMINAL INVESTIGATION AND PROSECUTION IN KOREA

*Young-Chul, Kim**

I. INTRODUCTION

Since the dawn of history, every civilized country has developed its own investigation system; exercised investigative power, cracked down on criminals and indicted 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 international seminar, I would like to focus my presentation on the status or the power of the Korean prosecution just right after the overview of the recent trend of crimes in Korea, the criminal investigation organizations. And with related to the case screening, I would like to emphasize the prosecutor's control of the police, and the prosecutor's discretionary power in deciding whether to indict a specific person, thereby explaining how168.0 mm investigation is conducted in Korea and human rights are protected.

II. RECENT TRENDS OF CRIME IN KOREA

A. Crime Rates Compared with Other Countries

The extent of the crime problem in Korea is not as serious as in other foreign countries. Table 1 shows the comparison of crime problems among America, England, Germany, France, Korea, and Japan by focusing on murder and robbery crimes. The number of murder crimes in Korea was 705 in the year of 1996. Meanwhile, America experienced 23,305 murder crimes and Germany experienced 3,751 murder crimes in the same year. The crime rate[1] for murder was 1.6 in Korea, which is the second lowest among the six countries. The murder rate in America was 9.0, which is more than 5 times that of Korea. In cases of robbery, Korea experienced 4,469 incidences while the number of robberies was 618,817 in America. When the incidences are converted into robbery rates by taking into account the sizes of total populations in each of the six countries, the robbery rate of Korea is 10.1, the rate of America is 237.7, that of Germany is 71.0, that of France is 126.9, and that of Japan is 2.1.[2] This comparison indicates that Americans are 23 times more likely to experience robberies and citizens in England, Germany, and France are about 10 times more likely to experience such crimes than people in Korea. Therefore, though Japan is the lowest country with a 1.0 murder rate and a 2.1 robbery rate, it is safe to say that the extent of the crime problem in Korea is not as serious as in other industrialized countries.

The current crime problem in Korea is not at such a life-threatening level like other industrialized countries. However, the legal researchers and practitioners of Korea are now paying special attention to the recent trends of crime problems. Both the quantitative and qualitative aspects of crime problems have become worse since Korean society entered the

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1 Crime rate is calculated by estimating crime incidences per 100,000 individuals.

2 It is the same when the crime rates of index crimes (murder, robbery, rape, aggravated assault, burglary, larceny, and auto theft) are compared. The index crime rate of Korea was 2,033 in 1997, while those of America, Germany, and Japan were 4,899, 8,026, and 1,506 respectively (Legal Research and Training Institute, 1999, The White Paper on Crime:39).

expansion of computer and information technologies are causing a great difficulties for the law professions in terms of investigating such new types of crimes and counteracting high-skilled offenders.[3]

B. Overall Trends of Crime in Korea

Table 2 shows the overall trends of crime incidences from 1966 to 1998. Major characteristics of the overall trend can be categorized as follows:

(i) Crime rates tend to gradually increase with the years. For instance, the crime rate in 1966 was 1,358, that of 1976 was 1,408, that of 1986 was 1,966, and the crime rate reached 3,803 in 1998. The current level of crime incidences in Korea is relatively low compared with the 4,899 and 8,026 of America and Germany.
(ii) Crime rates have increased rapidly in recent years. It took about 20 years for crime rates to reach 2,000 crimes per 100,000 persons, but it took only 6 years to reach 3,000 crimes.
(iii) Arrest rates are pretty high compared to those of other countries. The average arrest rate is about 90 percent.[4]

C. Trends of Newly Emerging Crimes

1. Computer Crimes

Various kinds of computer crimes have newly emerged with the development of computer technology and Internet services. Computer crimes[5] have unique characteristics different from other traditional crimes. First, computer crimes are generally repetitious and continuous unless they are detected. Second, they are committed by persons without geographical limitations. Third, they are hard to detect as they are generally sophisticated and usually committed by persons possessing specialized expertise.

The Supreme Public Prosecutor's Office reports that computer crimes tend to increase in recent years. Table 3 shows the trends of computer crimes. As shown in Table 3, there has been a 1,251.4% increase in the numbers of persons arrested for computer crimes from 1996 (37 persons) to 1999 (500 persons). It can be observed that computer fraud such as a fraudulent transactions on on-line markets is the most frequent type of computer crime. It comprises about 49% of the total computer crime. Illegal access such as hacking and theft of other person's IDs and passwords is the next frequent computer crime. From 1996 to 1999, about 171 persons have been arrested for this type of illegal activity.

2. Drug-related Crimes

In Korea, drug-related crimes are controlled by three distinct laws and regulations concerning narcotics, marijuana and psychotropic medicine. Table 4 shows the trends of drug-related crimes from 1989 to 1998. As shown in Table 4,

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[3] Soon-Rae, Lee, Recent Trends of Crime and Countermeasures to Deal with Crime Problems in Korea, The 4th International Training Course on Crime Prevention and Criminal Justice, 2000. 10., p. 127.

[4] Arrest rates are obtained through the number of arrests made over the number of crime incidences occurring multiplied by 100.

[5] Computer crimes can be sorted into two categories: crimes where a computer is an object of criminal activity and crimes where a computer is an instrument for crime.

a. Computer crime where the computer is an object of criminal activity
- crimes against computer hardware
•disruption of physical configuration of computer
•theft of computers
-crimes against computer software
•distributing computer viruses and sending mail bombs
•hacking the operation of computer system
•illegally copying computer software

b. Computer crime where computer is an instrument for crime
-intentional modification of input information, operating software, and output
-unlawful access to computerized data (computer spy)
-business of copied computer software
-computer crimes related to VAN or commercialized network services
•provision of illegally copied software
•dissemination of legally prohibited information (pornographic materials, political ideology threatening national security)
•distribution of malicious information defaming innocent person's integrity
•theft of other person's IDs and passwords
•fraudulent transactions on on-line markets

there were 8,350 drug-related crimes in 1998. They occupied about 0.4% of the 1998 total crimes. The rate of drug-related crime is 17.98. Such a rate is much lower than those of assault (344.29), larceny (166.93), and fraud (214.35).

The total number of drug-related crimes continued to decrease in the early 1990's, but it has increased since 1993. Among drug-related crimes in 1998, those in violation of the Psychotropic Medicine Control Act are the most frequent, following by those violations against the Marijuana Control Act and Narcotics Act. The recent increase since 1995 can be explained in terms of factors such as the growth in the quantity of drugs smuggled into Korea as more Koreans travel around the world.

3. Organized Crimes

The volume of the Korean economy rapidly expanded during the 1980s. As the economic conditions got better, there happened a transformation in people's attitudes. The traditional attitudes emphasizing diligence, abstinence and hard work were no more sincerely accepted in people's minds. Instead, they started to seek a life of more pleasurable and enjoyable ways. It was during the period when so-called 'immoral' businesses started to open to a greater extent. Luxurious facilities such as 'adult disco clubs', 'adult entertaining shops' or 'hotel gambling' were newly opened one after another.

Organized crimes[6] took advantage of such opportunities. The crime organizations, which were scattered around with tiny memberships, became involved in this 'immoral' businesses. With the profits from the businesses, the organized crimes recruited new members and invested enough money in an attempt to shape the loosely connected organizations into tightly controlled forms. The establishment and formation of organized crime firms appeared during the 1980s. The 1990 Presidential Declaration on 'War on Crime' made a significant impact on such newly formed crime organizations. Massive efforts by police squads and prosecutor's offices nationwide were devoted to dissolve organized crimes. Problems caused by organized crimes were diminished by the efforts.[7] But, since the middle of 1990s when the convicted members tended to be released from incarceration, the Task Forces at the level of District Prosecutor's Office have noticed several attempts of ex-members to restore the previous crime organizations.

III. CRIMINAL INVESTIGATION ORGANIZATIONS OF KOREA

A. Overview of the Investigation Organizations

Criminal investigation organizations of Korea are divided into two categories. One is prosecutors and the other is judicial police officers. The public prosecutor has authority to investigate criminal cases and is entrusted to exclusive authority, albeit with a minor exception, to initiate criminal procedures by indicting the offenders.[8] The judicial police officer also has authority to conduct investigations under the supervision of the public prosecutor.[9] Judicial police officers are made up of general judicial police officers that deal with criminal cases in general and special judicial police officers that handle the specific type of cases set out in the relevant laws.

When a crime occurs, the judicial police officer usually initiates the investigation. In reality, a police officer investigates daily crimes such as thefts, violence or traffic related crimes. Upon conclusion, the case is then transferred to the public prosecutor's office where a public prosecutor continues with the investigation by questioning the suspect and related persons, examining documents and other evidence. The public prosecutor may conduct additional investigations as necessary. Due to such investigations by the public prosecutor, those who need not be punished will be released from the process at an early stage. Consequently, the conviction rate at trial is rather high, constantly more than 90 percent. In the case of complex offenses and white-collar crimes, such as large-scale bribery cases involving politicians or high ranking public officials, economic offenses, narcotics offenses, environmental offenses, organized crimes, tax evasions and police misconduct, the public prosecutor can initiate the investigation *ex officio* or without prior investigation by the judicial police officer.

Public Prosecutor's Offices are under the jurisdiction of the Ministry of Justice. They consist of the Supreme Public Prosecutor's Office, the High Public Prosecutor's Office, the District Public Prosecutor's Office and their respective

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6 Organized crimes are often classified into four types: a) social and political organized crime, such as terrorist groups or guerilla groups, b) predatory organized crimes, which specialize in robbery or larceny like slum gangs, c) organized crimes seeking psychological satisfaction, such as biker groups, d) syndicate organized crimes, which are involved in 'immoral' enterprises providing illegal services to demanding clients.

7 It was estimated in 1994 that the organized crimes consist of 364 families and include about 11,117 members. About 10,616 members were once arrested and 3,622 were imprisoned.

8 Article 195 of the Criminal Procedure Act.

9 Article 196 of the Criminal Procedure Act.

Branch Offices, each corresponding to the court within their jurisdiction. Police officers belong to the National Police Agency and are referred to as 'judicial police officers' in the Criminal Procedure Act.[10] The Korean police have almost the same functions and duties as those of other countries. And there is a National Intelligence Service, which investigates national security crimes such as espionage, insurrection, inducement of foreign aggression, rebellion and violation of the National Security Act.[11] It also performs analysis and collection of intelligence concerning national security.[12] And there are special investigative agencies which are described as 'special judicial police officers' in the Criminal Procedure Act.[13] In the case of special offences such as the customs offence of tax evasion, special investigative agencies, such as the Customs Office, the Tax Administration Agency conduct the investigations.

B. Relationship between Prosecutor and Judicial Police Officer

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-obedience.[14] 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.[15] 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.[16] 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/her duty, that prosecutor can, through his/her chief prosecutor, request the officer to stop the investigation or request his/her superior officer to replace him/her.[17] 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:[18]

1. Prosecutors' Authority to Inspect the Place of Arrest or Detention

To deter unlawful arrest or detention, the chief prosecutor of the district public prosecutor's office or its branch offices dispatches prosecutors once a month to the place of the investigation where a suspect is being arrested or detained. The inspecting prosecutor examines relevant documents and questions the arrestee or detainee.[19] 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 transfer the case to the prosecutor's office.[20] 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.

2. Right to Request the Judge to Issue an Arrest Warrant

Under Korean law, the judicial police officer is not entitled to directly request the judge to issue an arrest warrant. A judicial police officer should apply for an arrest warrant with the prosecutor.[21] If such an application is made by a judicial police officer, the prosecutor examines the application documents and decides whether to request the judge to issue the arrest warrant. The same is true of a warrant for search, seizure or inspection.[22]

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[10] Article 196 of the Criminal Procedure Act.

[11] Article 3 of the National Intelligence Service Act.

[12] Functions and duties of the National Intelligence Service are so similar to the CIA in the United States of America that it is commonly called KCIA, which means Korean CIA.

[13] Article 197 of the Criminal Procedure Act

[14] Article 196 of the Criminal Procedure Act

[15] Article 53 of the Public Prosecutor's Office Act.

[16] Article 53 of the Public Prosecutor's Office Act.

[17] Article 54 of the Public Prosecutor's Office Act.

[18] Kwang-Am Kim, The System of Criminal Investigation and Prosecution in Korea, The 5th International Training Course on Crime Prevention and Criminal Justice, 2001. 10., pp. 142-146.

[19] Article 198-2, Section 1 of the Criminal Procedure Act.

[20] Article 198-2, Section 2 of the Criminal Procedure Act.

[21] Article 200-2 of the Criminal Procedure Act.

[22] Article 215 of the Criminal Procedure Act.

3. 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.[23] 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.[24] 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 prosecutor's right to control judicial police officers.

4. 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.[25]

5. 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 prosecutors' office having jurisdiction over the investigation.[26] 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.

IV. INDEPENDENCE OF PUBLIC PROSECUTORS IN KOREA

As quasi-judicial officers, prosecutors must remain truly objective and impartial in carrying out their duties. To achieve these goals, prosecutors must be independent which means being free from any interference. So in the performance of their duties, prosecutors should be subordinated only through laws in order to insulate the criminal justice system from being abused by political opportunism. As the keeper of the rule of law, prosecutors must make sure that all are equal under the law regardless of their status in society. Particularly, in the case that powerful politicians are breaking the law themselves, it is very important that prosecutors be in a position to stand up and demand that justice must prevail. In order to ensure the independence of prosecutors, Korean laws provide the following:

A. Guarantee of Prosecutor's Status

The President has the authority to appoint and assign public prosecutors upon recommendation from the Minister of Justice. The qualifications for the public prosecutor are identical to that of the judge: passing the national judicial examination and completion of a two-year training course at the Judicial Research and Training Institute.[27] In addition to these requirements, some professional experience is needed to be appointed as a high-ranking public prosecutor.[28] The status of the public prosecutor, like that of the judge, is guaranteed by law. The public prosecutor may not be dismissed or suspended from the exercise of his/her powers or be subject to a reduction in salary other than through impeachment, conviction of crimes punishable by imprisonment or more severe penalties or other disciplinary actions based on relevant laws and regulations.[29]

B. Limitation of Justice Minister's Direction

In view of the importance of the public prosecutor's role in criminal proceedings, the Public Prosecutor's Office Act states that the Minister of Justice, as the chief supervisor of prosecutorial functions, may generally direct and supervise public prosecutors but for specific cases can only direct and supervise the Prosecutor General.[30] This is to safeguard the

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[23] Article 200-3, Section 1 of the Criminal Procedure Act.

[24] Article 200-3, Section 2 of the Criminal Procedure Act.

[25] Article 219 of the Criminal Procedure Act.

[26] Article 2 of the Rules on Execution of Duties of Judicial Police.

[27] Article 29 of the Public Prosecutor's Office Act.

[28] Article 27, 28 of the Public Prosecutor's Office Act.

[29] Article 37 of the Public Prosecutor's Office Act.

[30] Article 8 of the Public Prosecutor's Office Act.

public prosecutor's quasi-judicial status by ensuring each public prosecutor's independence from outside influence with regard to the case in hand.

C. Status of Prosecutor General

The Prosecutor General in Korea shall take charge of affairs of the Supreme Public Prosecutor's Office, exercise general controls over the prosecuting affairs, and direct and supervise public officials of public prosecutor's offices. So, the role of the Prosecutor General in Korea is extremely important in the criminal justice system. In order to ensure the independence of the Prosecutor General from political influence, the term of the Prosecutor shall be 2 years, and he shall not be re-appointed. And, he shall not promote or join any political party within a two-year period after he retires from office.[31]

D. Prohibition of Prosecutor's Political Movement

In order to secure the independence of public prosecutors from political influences, the Public Prosecutor's Office Act provides that "No public prosecutor shall commit any of the following acts while in office: (1) To be a member of the National Assembly or a local council, (2) To participate in any political movement, (3) To be engaged in a business the purpose of which is to obtain any monetary profit, (4) To be engaged in any remunerative duties without permission of the Minister of Justice.[32]

V. PUBLIC PROSECUTOR'S AUTHORITY IN CASE SCREENING

A. Criminal Investigation

Korean prosecutors have the authority and duty to investigate all crimes. An 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.[33] But, in reality, prosecutors cannot investigate all the crimes due to the limitation in the number of prosecutors. So, most of the criminal cases are conducted by judicial police officers rather than prosecutors.[34] Instead, prosecutors screen the cases conducted by judicial police officers. Consequently, it is very important for 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.[35] In case 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. Under 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 prosecutor's office monopolizes the authority of prosecution.[36]

In addition, prosecutors have the discretionary power to suspend prosecution even if there is sufficient evidence to maintain prosecution.[37] 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.[38] 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.[39] This system is based

[31] Article 12 of the Public Prosecutor's Office Act.

[32] Article 43 of the Public Prosecutor's Office Act.

[33] Article 195 of the Criminal Procedure Act.

[34] In 1999, the number of suspects in cases transferred to the prosecutors by judicial police officers was 2,327,445, which accounted for 97% of 2,400,485 suspects in all the cases accepted by the prosecutor's offices.

[35] Article 246 of the Criminal Procedure Act.

[36] Article 246 of the Criminal Procedure Act.

[37] Article 247 of the Criminal Procedure Act.

[38] Article 196, Section 1 of the Criminal Procedure Act.

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.[40] 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.[41] 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 participate in the trial because the prosecutors are legal experts and representatives of the public interest.

VI. CASE SCREENING AT SEVERAL STAGES

A. Investigation

There are two kinds of investigation methods in Korea. The one is compulsory investigation which is conducted under a warrant issued by a judge and the other is voluntary investigation which is conducted without a warrant. In Korea, a public prosecutor can investigate the case at his/her own initiative or screen the cases conducted by police officers at each of these stages.

1. Compulsory Investigation

First, I would like to tell you about arrest and detention during compulsory investigation. Before January lst, 1997, we only had a detention warrant system in the Criminal Procedure Law. But, through the revision of the Criminal Procedure Law, we introduced the arrest warrant system additionally from the beginning of 1997. If there is a probable cause to suspect that a person committed a crime and in case he/she refuses to appear in an investigative agencies' offices without any reasonable ground or there is a concern that he/she may disappear, the investigative authorities can arrest a suspect with an arrest warrant issued by a judge.[42] A request for a warrant to a judge may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant. So, at this stage, a public prosecutor can screen the cases applied by police officers. If a public prosecutor who has screened the case, thinks an arrest warrant is necessary, he/she requests an arrest warrant from a judge. But, when a public prosecutor thinks a warrant is not necessary, he/she rejects a warrant request by police officers. If a public prosecutor thinks there is not enough evidence for an arrest warrant, he/she directs police officers to further the investigations. However, the following cases are exceptions to the warrant requirement for arrest:

(i) Any person may arrest, without a warrant an offender who is committing or has just committed an offense(so-called *in flagrante delicto* arrest).
(ii) The police or public prosecutor may arrest a person who is believed to have committed an offense punishable by death, life imprisonment or up to three years imprisonment when there is not sufficient time to obtain a warrant in advance.[43]

If the police officer who arrests a suspect, thinks that detention of a suspect is necessary, a detention warrant must be requested from a judge through the same procedure as in an arrest warrant within 48 hours from arrest.[44] So, investigative

[39] As long as criminal investigation is concerned, judicial police officers are directed and supervised by prosecutors(Article 4, Section 1 of the Public Prosecutor's Office Act). However, the authority of judicial police officers widely ranges over protection of people's life, body and property, prevention, suppression and investigation of crime, gathering information about crime, control of traffic, social stabilization and peace-keeping (Article 3 of the Police Act).

[40] Article 4 of the Public Prosecutor's Office Act.

[41] Article 4 of the Public Prosecutor's Office Act.

[42] Article 200-2 of the Criminal Procedure Act.

[43] Article 200-3 of the Criminal Procedure Act.

[44] Article 200-4 of the Criminal Procedure Act.

authorities can detain a suspect when they have a detention warrant issued by a judge. A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant. The public prosecutor requests a detention warrant from a judge after screening the case if the following conditions are met:

(i) The suspect has no fixed dwelling; or
(ii) There are reasonable grounds to believe the suspect may flee or destroy evidence.[45]

When the police detain a suspect, the suspect must be released if not transferred to the public prosecutor within 10 days.[46] After the completion of the investigation, the police transfers the suspect to the public prosecutor's office. The public prosecutor can detain the suspect for 10 days.[47] The 10 days detention in police custody and a further 10 days detention under the public prosecutor are granted by a detention warrant. If more investigation is necessary, the judge can grant detention of an additional 10 days by the public prosecutor's request.[48] The maximum term of pre-prosecution detention is thus 29 days, since the detainee's transfer day from the police to the prosecutor is calculated in the detention period on both sides.

Before questioning, the police or a public prosecutor must inform a suspect of his/her right to remain silent.[49] A suspect also has the right to consult with a lawyer during pre-trial detention.[50] Suspects in police custody are held in police detention cells, while those who have been transferred to the public prosecutor's office are detained in official pretrial detention houses. The Constitution provides detainees with the right to request the court to review the legality of detention before indictment is instituted.

2. Search and Seizure

Search and seizure is also one of the compulsory investigations, and the procedure of issuing a search and seizure warrant is similar to that of an arrest and detention warrant. The investigative agencies can search and seize places and things when they have a search and seizure warrant issued by a judge.[51] A request for a warrant may be made only by a public prosecutor; police officers must apply to a public prosecutor for a warrant.[52] So, at this stage, a public prosecutor can screen the cases applied for by police officers. But the following cases are exceptions to the warrant requirement for search and seizure:

(i) When the police or a public prosecutor arrests or detains a suspect, they can search and seize without a warrant at the crime scene.[53]
(ii) The police or a public prosecutor can search and seize things, which are owned or possessed by a suspect who can be under urgent arrest[54] within 48 hours from arrest.[55]
(iii) the police or a public prosecutor can seize things which are brought forward by the owner or possessor.[56]

3. Wiretapping

Like other countries, secrecy of communication is protected by the Constitution in Korea.[57] But as you know, in some crime investigations, the police and a public prosecutor need wiretapping in order to apprehend fugitives and investigate criminal activities. At this point, there is a conflict of interest between the constitutional right and the investigative need. We restrict the legal wiretapping strictly by regulating the legal wiretapping by the special law named Communication Secrecy Protection Act. Under this Act, wiretapping can only be permitted under strict conditions and by restricted procedures, and a request for wiretapping permission may be made only by a public prosecutor; police

[45] Article 201 of the Criminal Procedure Act.
[46] Article 202 of the Criminal Procedure Act.
[47] Article 203 of the Criminal Procedure Act.
[48] Article 205 of the Criminal Procedure Act.
[49] Article 12, Section 2 of the Constitution of the Republic of Korea, Article 200, Section 2 of the Criminal Procedure Act.
[50] Article 12, Section 4 of the Constitution of the Republic of Korea.
[51] Article 215, Section 1 of the Criminal Procedure Act.
[52] Article 215, Section 2 of the Criminal Procedure Act.
[53] Article 216 of the Criminal Procedure Act.
[54] It means a case in which the police or public prosecutor can arrest a person who is believed to have committed an offence punishable by death, life imprisonment or up to three years imprisonment without an arrest warrant, when there is not sufficient time to obtain a warrant in advance, as is described above.
[55] Article 217 of the Criminal Procedure Act.
[56] Article 218 of the Criminal Procedure Act.
[57] Article 18 of the Constitution of Republic of Korea.

officers must apply to a public prosecutor for permission.[58] So, at this stage, a public prosecutor can screen the case applied by police officers.

The public prosecutor requests a written permission for wiretapping from a judge under the following conditions:

(i) There is enough ground to suspect that some specific crimes which are enumerated in the Act are planned, performed or were performed.
(ii) It is difficult to hinder commitment of crime, apprehend a criminal, or collect the criminal evidence with methods other than wiretapping.[59]

The maximum period for wiretapping is three months, but an additional three months can be granted by a judge, if necessary.[60]

4. Voluntary Investigation

In Korea, voluntary investigation involves interrogation of a suspect by summons, inspection at the scene, interrogation of a relevant witness and so on. If it is necessary for criminal investigation, a public prosecutor and the police can demand the appearance of a suspect and listen to the suspect's statement.[61] A public prosecutor and the police must notify the suspect that he/she has the right to remain silent in advance before listening to the suspect's statement.[62] But a public prosecutor and the police can't force the suspect to appear without an arrest of detention warrant because interrogation by summons is a voluntary investigation.

Like other countries, interrogation of a suspect is one of the most important investigation methods. When a crime is committed, investigative agencies usually perform inspection on site at the crime scene, if it is necessary. At the inspection on site, they try to recreate the crime situation, analyze the crime and collect the relevant evidence. This is a very important criminal investigation method, especially when serious and violent crimes such as murder, robbery, rape are committed. A public prosecutor and the police can demand appearance of a witness by summons and listen to the witness's statement. But a public prosecutor and the police can't force the witness to appear.

By the way, with just the traditional investigation methods, we can't solve the new kinds of crime which are getting more sophisticated and ingenious. So, public prosecutors and the police utilize various advanced devices, for example, computer systems, VTRs, poly-graphs and other equipment in performing their prosecutorial functions in order to enhance the efficiency of criminal procedure. For forensic criminal investigation there are several laboratories in the Supreme Public Prosecutor's Office, that is, lab for DNA Analysis Section, Drug Analysis Section, Polygraph Section, Document Examination Section, Criminal Photography Section, Phonetic Analysis Section and Psychological Analysis Section. As at the beginning of this year, we have the most state-of-the-art identification equipment such as Automatic DNA Sequencer, Computer Polygraph System. Also, investigation equipment such as Passive Night Vision System, Wireless Video Camera, Cellular Telephone Interceptor are also available for scientific investigation. In addition we set up a plan in which Criminal DNA Data Base will be established and fully operated in the near future. Besides, there is the National Scientific Investigation Laboratory that assists scientific investigation which the police perform. The laboratory is under the direction of the Ministry of Government Administration and Home Affairs and it actually performs a central function and duty in the police's scientific investigation.

When police officers conduct voluntary investigations and report the results of the investigations, the public prosecutor should screen the case thoroughly. If the public prosecutor can not be confident of the case, he should re-investigates the case at his/her own initiative or direct the police officer to make up for the result of the investigation.

B. 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. For the purpose of this disposition, all investigative agencies transfer the cases to the public prosecutor and the public prosecutor completes the investigation and decides his/her disposition. To institute prosecution, the public

[58] Article 6, Section 1 of the Communication Secrecy Protection Act.

[59] Article 5 of the Communication Secrecy Protection Act.

[60] Article 6, Section 7 of the Communication Secrecy Protection Act.

[61] Article 200 of the Criminal Procedure Act.

[62] Article 12, Section 2 of the Constitution of Republic of Korea.

prosecutor should be confident the case can be proven beyond a reasonable doubt in court. When he/she is not confident, he/she should not institute prosecution. He/She should drop the case for insufficiency of evidence. Due to this practice, the conviction rate at trial is constantly very high, more than 99 percent in Korea. But, it's a very hard task for a public prosecutor to complete an investigation.

1. Presentation of Indictment

To prosecute a suspect, the prosecutor should present a written 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 a 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.

2. Principle of Presentation of Indictment Only

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

VII. DISCRETIONARY POWER OF PROSECUTORS IN CASE SCREENING

A. Introduction

Under Korean law, prosecutors have the discretionary power to suspend prosecution even if there is sufficient evidence to convict a suspect.[63] This is called the Principle of Discretionary Prosecution. It is a concept contrary to the Principle of Compulsory Prosecution.[64] The purpose of the Principle of Discretionary Prosecution is to enable the prosecutor to take into consideration criminal policy in deciding whether to prosecute a specific suspect. However, some lawyers are critical of this principle in that: (1) such a principle can not effectively control a prosecutor's 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 247 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, circumstances, relationship to the victim, motive and method for committing 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. So, to ensure whether these factors exist or not is also a very important purpose of the investigation by the public prosecutor and police officier. In Korea, many cases are dropped under the procedure as suspension of prosecution. As for the offences stipulated in the Criminal Code such as theft, violence, suspension of prosecution is exercised in about 60 percent of the cases.

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, we have to admit that the test for non-prosecution differs slightly from one prosecutor to another prosecutor. It is due to the different views on life of individual prosecutors. The test might also vary with the times or change in people's way of thinking. Accordingly, we 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

(i) *Age*

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

(ii) *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.

(iii) *Intelligence*

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

(iv) *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 a colleague in the work place is also one of the factors.

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[63] Article 247, Section 1 of the Criminal Procedure Act.

[64] 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.

3. Factors Related to the Crime

(i) *Motive for committing 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.

(ii) *Method and result of the crime*

The dangerousness of the method of committing the crime, the profits the suspect has gained from the crime, the people's concerns about 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 Committing the Crime

(i) *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.

(ii) *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.

(iii) *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 committing 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 summons, 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 guessed, it is to reduce the prosecutor's work load. When the suspect is a juvenile 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 committing a crime again in the future. The volunteers are nominated by the chief prosecutor of the district public prosecutor's 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 citizens.

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 guiding 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 committing 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 Probation Committee Guidance Condition

This is for offenders who need probation and guidance by experts for a period of six to twelve months depending upon the possibility of the offenders committing another crime in the future. Suspension of prosecution is made on the condition that the offender is subject to the guidance of the 'Probation 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 fatherly guidance condition. However, this system applies to adult offenders as well.

G. Control of the Prosecutor's Discretion

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. So, it is necessary to set some limitation on the prosecutor's discretionary power. The criteria for the exercise of discretionary power or its control should comply with the ends of criminal justice. In this sense, the discretionary power is to be exercised and controlled on a standard of rationality. There are several controlling devices which can be classified into two categories: they are internal controls and external controls.

1. Internal Control

(i) *Control by superior*

All decisions made by a prosecutor are subject to the control of his superior. The superior is required to review all decisions made by prosecutors. He is to check the propriety of the decision. Also, he must review whether or not the decision complies with the criteria of prosecutorial policy. In practice, the Deputy Chief Prosecutor reviews all cases disposed of by prosecutors prior to the review by the Chief Prosecutor who actually checks only selected cases. The Deputy Chief checks not only the propriety of the decision but clerical mistakes in the case files. The prosecutors are required to write the reason for the decision not to prosecute. The reasoning must be succinct and precise. Writing the reason of the decision not to prosecute is regarded to be important in terms of the control of discretion. The prosecutor is psychologically restrained by this requirement of writing reasons. The Chief or the Deputy Chief Prosecutor usually reads the decision document which is written by the prosecutor. If the Chief or the Deputy Chief thinks that the Decision is inappropriate, then he asks the prosecutor for an explanation of the reasoning for the decision. They discuss the matter thoroughly until they reach a common conclusion. This practice is generally based on the theory that the assigned prosecutor knows more than his superior about the case. In this case, they call the prosecutor to explain the case and the reasoning of the decision. In case of a conflict of opinion on legal issues, superiors are likely to yield to prosecutors, because the legal responsibility for the specific decision is charged not to the superior but to the prosecutor. In the matter of policy, however, prosecutors usually concede to superiors. If a prosecutor anticipates conflict on opinion with a superior, he may discuss the case with them prior to making the decision.

(ii) *Control by general guidelines*

Prosecuting discretion is also controlled by general guidelines of instructions issued by the Prosecutor General. Since the Prosecutor General has a duty to carry out unified prosecuting policy, he, from time to time, issues direction or instruction in the form of general guidelines. A prosecutor is bound by these official guidelines. If he willfully disregards these guidelines, he may be subject to disciplinary punishment. And, the Prosecutor General annually dispatches an inspection team which consists of one Supreme Prosecutor and several Senior Prosecutors to all subordinate prosecutor's offices in order to review the propriety of decisions made by prosecutors. Normally, the emphasis of the inspection is given to the decisions not to prosecute. If they find any impropriety, they may issue a mandate in the name of the Prosecutor General to re-investigate or institute prosecution. The outcome of this inspection is utilized as reference material in the formation of prosecuting policy for the next year.

(iii) *Appeal on the prosecutor's decision of non-prosecution*

This process can only be initiated by petition of a complainant who is not satisfied with the decision not to prosecute. 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.[65] If the appeal is dismissed, the complainant may re-appeal to the Supreme Public Prosecutor's Office. This is regarded as a relatively strong control device.

2. External Control

(i) *Quasi-prosecution by the court(Judicial Control)*

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.[66] 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.[67] However, this system applies only to crimes regarding abuse of authority by public officials.

(ii) *Notification of non-prosecution decision and reasons*

A prosecutor is, by statute, required to inform a complainant of the decision to prosecute or not to prosecute within seven days after the date of disposition of the case. Particularly in the case of a decision not to prosecute, the prosecutor has to explain, in writing, the reason why prosecution was not instituted within seven days after he receives a request from a complainant. Although this is not a direct control on the prosecutor's power of non-prosecution, it works as an indirect control device in that it places psychological pressure on the prosecutor.[68]

VIII. CONCLUSION

What should be the role of public prosecutors in criminal investigation is one of the most controversial questions among nations of different legal traditions and practices. The border-line between the jurisdiction of the prosecutors and police officers is quite difficult to be drawn particularly on the role of criminal investigation. The role of prosecutors in criminal investigation ranges from total control as in the case of Korea, France and Germany, or taking a leading role as in Japan and the United States, to separation of investigation and prosecution as in Thailand, England and Wales after 1986, or complete control by police as in some commonwealth countries.

In my experience as a prosecutor, I believe that prosecutors must play an active role in criminal investigation. In order to ascertain the truth of the matter before making the decision to prosecute, the prosecutor must be allowed to conduct investigations on his/her own initiative or direct judicial police officers as far as criminal investigations are concerned. By participating closely in the conduct of investigation, the prosecutors not only will be able to make more effective decisions and conduct more efficient litigation, they will also be able to supervise the legality of the investigation. As a consequence, they will be in a better position to do justice to both the victim of crime and the suspect as well as to fulfill their duty in protecting society at large. And, I would also like to emphasize that prosecutors must be impartial and objective in the performance of their duties. They should play an active role in criminal investigations so as to maintain the highest standard of efficiency in investigations and prosecution, while, at the same time, safeguarding the rights of the accused and crime victims. To be able to discharge their functions effectively, prosecutors, like judges, should be independent and be immune to undue influences, especially political ones. At the same time, prosecutors should be held accountable and be transparent in the performance of their duties.

In concluding, due to the fact that crimes are no longer confined to the boundary of one country, the functions of prosecutors should be expanded to include not only domestic matters but also issues of international cooperation. In the so-called "global villages", international cooperation and legal assistance on criminal matters are very important and urgent to prevent and suppress transnational crimes. Only with the help of foreign countries' law enforcement agencies, we can cope with the international crimes and protect our society. So, I hope that this international seminar can be a cornerstone to promote international criminal cooperation and legal assistance.

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[65] Article 10 of the Public Prosecutor's Office Act.

[66] Article 260 of the Criminal Procedure Act.

[67] Article 262 of the Criminal Procedure Act.

[68] Article 258, Section 1 of the Criminal Procedure Act.

APPENDIX A

Table 1 COMPARISON OF THE EXTENT OF CRIME PROBLEMS

	America	England	Germany	France	Korea	Japan
Murder Incidence	23,305	1,375	3,751	2,696	705	1,279
Crime rate	9.0	2.7	4.6	4.7	1.6	1.0
Robbery Incidence	618,817	60,016	57,752	73,310	4,469	2,684
Crime rate	237.7	116.7	71.0	126.9	10.1	2.1

Data : Japan Ministry of Justice Research Center,1996 : 398

Table 2 CRIME INCIDENCES AND ARREST RATES FROM 1966 TO 1997

	Incidences	Arrests	Arrest rate (%)	Num. of Arrested	Population (unit:1,000)	Crime rate
1966	399,820	286,613	71.7	385,873	29,436	1,358
1967	361,582	264,833	73.2	369,003	30,131	1,200
1968	333,098	259,362	77.9	391,551	30,838	1,080
1969	352,070	332,851	94.5	419,122	31,544	1,116
1970	333,537	289,637	86.8	415,504	32,241	1,035
1971	351,574	293,279	83.4	395,467	32,883	1,069
1972	369,839	330,890	89.5	442,274	33,505	1,104
1973	323,363	289,157	92.2	398,431	34,103	948
1974	337,535	292,839	86.8	400,266	34,692	978
1975	387,207	335,944	86.8	462,908	35,281	1,097
1976	504,630	450,059	89.2	609,177	35,849	1,408
1977	506,545	448,168	88.5	600,197	36,412	1,391
1978	513,165	438,265	85.4	589,008	36,969	1,388
1979	557,793	491,567	88.4	651,998	37,534	1,481
1980	595,277	475,353	79.9	697,629	38,124	1,561
1981	625,934	549,532	87.8	734,981	38,723	1,616
1982	658,371	575,029	87.3	784,564	39,326	1,674
1983	786,553	656,204	83.4	859,097	39,910	1,971
1984	803,792	693,387	86.3	888,105	40,406	1,989
1985	810,416	693,270	86.5	885,765	40,806	1,986
1986	809,660	704,874	87.0	902,895	41,184	1,966
1987	946,390	825,601	87.2	1,054,407	41,575	2,276
1988	968,965	856,517	88.4	1,114,468	42,380	2,308
1989	1,073,997	949,308	88.4	1,179,156	42,380	2,534
1990	1,171,380	1,047,760	89.0	1,326,775	42,793	2,737
1991	1,230,118	1,130,262	91.9	1,418,168	43,268	2,843
1992	1,241,102	1,135,146	91.5	1,451,942	43,663	2,842
1993	1,356,914	1,298,637	95.7	1,656,113	44,056	3,080
1994	1,373,407	1,246,582	90.8	1,582,428	44,453	3,090
1995	1,399,085	1,269,375	90.7	1,599,930	44,850	3,119
1996	1,494,846	1,358,982	90.9	1,681,321	45,248	3,304
1997	1,588,613	1,452,097	91.4	1,802,720	46,991	3,454
1998	1,765,887	1,632,678	92.5	2,010,814	46,430	3,803

Table 3 TRENDS OF COMPUTER CRIMES

	Number	1996	1997	1998	1999
Total	1,125	37	233	355	500
Modification of Electrical Documents	65	3	28	19	15
Disruption of Electrical Transactions	28	-	16	9	7
Intrusion of Secrecy	17	-	4	3	10
Computer Fraud	555	8	88	206	253
Disruption of Electrical Records	11	-	-	5	6
Unlawful Access	171	17	31	27	96
Others	274	9	66	86	113

Table 4 TRENDS OF DRUG-RELATED CRIMES

	Total	Narcotics Act	Marijuana Control Act	Psychotropic Medicine Control Act
1989	3,876 (100)	657 (100)	1,025 (100)	1,994 (100)
1990	4,222 (109)	1,215 (185)	1,450 (141)	1,557 (78)
1991	3,133 (81)	838 (128)	1,138 (111)	1,157 (58)
1992	2,968 (77)	949 (144)	1,054 (103)	965 (48)
1993	6,773 (175)	3,364 (512)	1,509 (147)	1,900 (95)
1994	4,555 (118)	1,314 (200)	1,499 (146)	1,742 (87)
1995	5,418 (140)	1,135 (173)	1,516 (148)	2,767 (139)
1996	6,189 (160)	1,235 (188)	1,272 (124)	3,682 (185)
1997	6,947 (179)	1,201 (183)	1,301 (127)	4,445 (223)
1998	8,350 (215)	892 (136)	1,606 (157)	5,852 (293)

(Unit : Persons)

REFORMING PAKISTAN POLICE: AN OVERVIEW

*Muhammad Shoaib Suddle**

I. INTRODUCTION

Police reform has emerged as a top priority in Pakistan Government's commitment for strengthening the rule of law. Despite many past reform efforts, it is only in about the last two years that Pakistan has viewed police reform as a critical developmental priority. The interest in reform stems from clear and overwhelming evidence that a fair, responsible, ethical and efficient criminal justice system is an important factor in the promotion of economic and social development and of human security. It also stems from the fact that law and order crisis in Pakistan has continued to deepen over time, and in recent years the police has been increasingly unable to cope with its increased responsibilities, particularly with regard to combating serious crime.

A. The Problem

Among the serious constraints undermining the police system of Pakistan are: (1) an outdated legal and institutional framework (devised for nineteenth century India consisting of near static villages with hardly any urbanisation or industrialization, and meant principally for a colonial rule), (2) arbitrary and whimsical (mis)management of police by the executive authority of the state at every level (policemen were increasingly recruited, trained, promoted and posted without regard to merit and mainly for their subservience to people with influence and power), (3) inadequate accountability, (4) poor incentive systems, (5) widespread corruption, and (6) severe under-resourcing of law and order.

B. The Way Forward

To meet the challenges of modernizing an outmoded institutional framework and improving the professional and ethical content of policing, the government has initiated an ambitious reform process. The thrust of these reforms is to organize a police system, which is politically neutral, non-authoritarian, accountable and responsive to the community, professionally efficient, and last but not least, which is an instrument of rule of law.

In a profound revamping of the structure and systems of police at federal, province and local government levels, the government has decided to dismantle the – anachronistic – Police Act of 1861, which was more suited for rule by a colonial power than safeguarding and promoting rule of law. The draft Police Ordinance 2002 aims, *inter alia*, at depolitising police, improving police professionalism through a merit-oriented system of recruitment and career progression, and making police more accountable to citizens. If properly implemented, these radical reforms can bring about a fundamental transformation in the quality of policing, and make police a people-friendly public service, particularly for the poor and disadvantaged.

II. THE HISTORICAL CONTEXT

Pakistan inherited, in 1947, a more-than-eighty-year-old police system from the British. The overriding consideration before those who designed the police organization in 1861 was to create an instrument in the hands of the – colonial – government for *keeping the natives on a tight leash*, not a *politically neutral outfit for fair and just enforcement of law*. Police was *designed* to be a *public-frightening* organization, not a *public-friendly* agency. Service to the people was not an objective of this design. It was designed in response to the social and political realities of the times: The paramount concerns were collection of land revenue and maintenance of law and order (a euphemism for what Justice Cornelius called the rule of *danda* (stick)). Both these – incompatible – functions were vested in a European officer, variously called Collector, District Officer, Deputy Commissioner or District Magistrate. In his latter capacity, the District Officer was head of the magistracy who tried most criminal cases.

It is crucial to understand the basic difference between a colonial police and a police meant for a free country. Whereas the former was geared at raising semi-militarised, semi-literate, underpaid, bodies of men for maintaining order by overawing an often turbulent and hostile – native – population, the latter aimed at creating quality professionals tasked

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to prevent and detect crime in plural, multi-ethnic and socially conscious communities, through just and impartial enforcement of laws. The former knew how to rule, the latter to serve.

Another important reason why tight and effective control over criminal justice administration was felt critical was to protect the interests of European middle class responsible for trade and administration in India. To that end, those who investigated and prosecuted criminal cases were effectively subordinated to the District Officer.

Not only was this union of distinct functions in one government functionary wrong in theory and bad in principle, it was also contrary to the pre-British and ancient Indian practices under which there existed a virtual separation between the judiciary and the executive. This – untenable – position of District Officer was severely criticised even by many Britons, but it was felt to be "absolutely essential" to the maintenance of British rule in India.

As the overriding objective of police organization designed in 1861 was to maintain the stability of the Raj, the purpose was admirably achieved through emulating the Irish Constabulary model – by placing police under direction and control of the executive authority through the office of the District Officer who acted as the agent of the colonial government.

A. The Irish Constabulary Model

As Britain expanded its empire, a policing model deemed ideal for colonial rule came to be identified. The model was based principally on the experience the English had while they tried to enforce order in Ireland (which rejected rule from Westminster) through Irish Constabulary established under the Constabulary Acts of 1822 and 1836.

As pointed out by Mawby (1990), Irish Constabulary sought legitimacy at Westminster rather than among the indigenous population. It was an alternative to an army of occupation with no community mandate whatsoever. On a structural level it was highly centralised with a recognised chain of command from the individual constable, through chief constable to inspector general, who in turn was responsible to chief secretary and lord lieutenant.

Another significant characteristic of the model was that it firmly established the principle that the constable was answerable to the chief constable rather than the law, the chief constable himself being responsible to central government.

Jeffries (1952, 31) also notes that the Irish blueprint was considered as the ideal mechanism for solving a specific set of law-and-order problems:

> *It is clear enough that from the point of view of the Colonies there was much attraction in an arrangement which provided what we should now call a 'para-military' organization or gendarmerie, armed and trained to operate as an agent of the central government in a country where the population was pre-dominantly rural, communications were poor, social conditions were largely primitive, and the recourse to violence by members of the public who were 'agin the government' was not infrequent. It was natural that such a force, rather than one organized on the lines of the purely civilian and localised forces of Great Britain should have been taken as a suitable model for adaptation to colonial conditions.*

B. The London Model

The Metropolitan Police Act 1829 established the principles that shaped modern English policing. First, policing was to be preventive and the primary means of policing was conspicuous patrolling by uniformed police officers. Second, command and control were to be maintained through a centralised, quasi-military organizational structure. Third, police were to be patient, impersonal and professional. Fourth, the authority of the English constable derived from three official sources – the crown (not the political party in power), the law, and the consent and co-operation of the citizenry. Finally, the oversight of the Home Secretary was to operate in such matters as establishment, administration, and disciplinary regulations, leaving the direction of policing as such in the hands of the two Joint Commissioners and now the Commissioner of the Metropolitan Police. In other words, the secretary of state was not explicitly or implicitly given the authority to direct police operations.

Policing in Britain for the past 173 years has continued to rest on these broad principles, and the Police Act guarantees the independence of the office of chief constable. In maintaining responsibility of direction and control of his force, the Act places high value on the principles that the chief constable should be free from the conventional processes of democratic control and influence in relation to decisions in individual cases.

C. The Irish and British Models Compared

Using the three criteria of legitimacy, structure and function, Mawby (1990) demonstrates that the English and Colonial models of policing are quite distinct. In terms of legitimacy, while the English system is founded on the law and on local government accountability, an alien authority using its law to suit its purpose legitimises the colonial model:

> *In the colonial system, the police not infrequently usurped the role of judge, jailer and executor. The 'order' imposed by the police did not automatically square with the 'law' with which it was habitually coupled. (Arnold 1986, 3)*

To a certain extent, the same can be said of the structure. While the police forces of England were decentralised, civilian, and not organized in a military fashion, although senior officers tended to be recruited from the military, the colonial system featured a military structure, with personnel often drawn from the armed forces, usually (and certainly in the case of senior officers) aliens, armed, and living in separate quarters.

The two models are also distinctive in terms of their functions. While the police forces under the English system accepted responsibility for a range of non-crime tasks, their responsibilities for general administration were nowhere as important as in the colonial model. Moreover, the role of the former in maintaining order and protecting the state from political protest, while scarcely ignored, never attained the priority it had in the colonies. As Arnold (1986, 3) argues, within the colonial system:

> *The distinction between political and crime control function is largely a false one. To the colonial regime crime and politics were almost inseparable: serious crime was an implicit defiance of state authority and a possible prelude to rebellion; political resistance was either a 'crime' or the likely occasion for it. The resources and skills developed in combating one were freely employed in defeating the other.*

No wonder, then, that in India, where a small occupying force imposed alien rule combining administrative, judicial and police functions, the police organization that emerged tended to follow Irish pattern, whereas in countries like United States and Australia that remained under colonial rule but where the indigenous population was in a minority and/or policing settlers was a priority, as in the British Indian cities of Calcutta (now Kolkata), Madras (now Chenai) and Bombay (now Mumbai), alternative policing systems similar to the English system emerged.

D. The Napier's Police Organization

In India, Sir Charles Napier created an Irish-type police in the province of Sind (now the south-eastern province of Pakistan) in the 1840s, and a similar system was later adopted in other provinces. The force was armed and organized on a military basis. Its location, in barracks, like Irish Constabulary, illustrated its source of legitimacy, structure and function as an organ of social control.

> *It was not only the single men who lived in barracks; married constables and sub-constables were usually accommodated in the barracks with their wives and children; partly for their protection, partly to make it more difficult for them to form the 'local connection' which their senior officers greatly feared. (Tobias 1977, 246)*

Napier (1851, 7) was a great sceptic of the civil service. He thought that it was 'a system under which the best must misgovern, as founded on false principles.' He, therefore, decided to run his new administration not through civil servants, but military officers or 'soldier civilians,' as he called them, with 'far less expense and more activity.' Following the para-military Irish Constabulary model, he placed the police of the entire province under the command of a captain of police.

The Napier model was based on two main principles: Firstly, that the police must be kept entirely distinct from the military in their support of the government. And secondly, the police must be an entirely independent body there to assist the civilian authorities in discharging their responsibilities for law and order, but under their own officers.

Although the new police was to be employed solely on police work and was to be supervised by officers whose sole duty it was to control and direct them, the system lacked logical finish. Paradoxically, the district heads of police were organizationally under the command of their provincial chief, the captain of police, while operationally each one of them was subject to orders of his respective civilian authority. In essence, the senior officers of the force were merely to be good managers of the men under their command while the District Officers, apart from their revenue and judicial functions, were tasked with the responsibility of maintaining law and order in their respective districts.

E. The Rationale for Napier's Model

Napier's irrational organization was a deliberate departure from the Irish Constabulary model, which the author of the new scheme had purportedly tried to follow. It was a typically bizarre arrangement that shocked the theorists but which made 'sense' in view of the aims and character of the – colonial – administration (Griffith 1971, 72-4).

F. East India Company's Historic Decision on Police Reform

It may look quite inconceivable that the British administrators, with liberal backgrounds, did not believe in the principle of separation of powers. Actually most of them did; but as pragmatists it was their 'considered view' that only by supplementing and not by judicially reviewing or correcting the police actions (often taken at the behest of executive authorities) could the writ of the rulers be established with maximum of vigour and ease.

Some 'liberalisation' in views, however, started with the Bird Committee's report of 1838. The Committee was tasked to look into the 'desirability' of introducing in India police reforms similar to those Peel had introduced in London in 1829. After stressing that the chief cause of police inefficiency was its inadequate supervision, the Committee recommended that control over police be entrusted exclusively to an officer other than the Collector.

An intense debate followed the Bird report. There also came a scathing indictment of the system by the Torture Commission of 1855, which concluded that revenue authorities in Madras were grossly misusing their police powers to extort revenue from the poor peasants. These historic developments led the Directors of East India Company to examine afresh the vexed subject of police reform in India.

In 1856, after examining the available evidence, the Directors issued orders clearly emphasising that further organizational development of police throughout the sub-continent would proceed on the basic premise that the District Magistrate would seize to have any role in the affairs of police. In line with the basic principles of a modern organization, they decided to commit the police exclusively to a – European – superintendent of police responsible only to his departmental hierarchy. In what may be termed as the most important policy directive – of 24 September 1856 – for the reorganization of police throughout British India, the Directors observed that the police in India had lamentably failed in accomplishing the tasks for which it was established. Identifying ineffectual and irrational control by the District Magistrate as one of the major causes of police failure, they directed:

> *The management of the police of each district be taken out of the hands of the Magistrate and be committed to an European officer with no other duties and responsible to a General Superintendent of Police for the whole presidency (see Gupta 1974, 354-5).*

G. The Police Act of 1861

The implementation of the 1856 directive could have rid the police of many of its chronic organizational ills, but the 'Mutiny' of 1857 completely transformed the whole liberal perspective. The clock was turned back and tightening of control over police was felt a more compelling necessity both to rein in the natives and prevent policemen from ever falling into the footsteps of mutineers. The historic decision regarding separating the police from the executive authorities was withdrawn, and it was strongly advocated that with the judicial and police powers concentrated in the same hands, the District Officer would be more effective in keeping the junior police ranks loyal to the rulers.

Under the Police Act 1861, the Inspector General of Police as the chief of provincial police assumed specific responsibilities in the areas of police policy formulation and the line operations involved in the execution thereof. His appointment was firmly controlled by central government although, once appointed, he was to act as an advisor to the provincial government on all matters connected with the police administration of the province.

In carrying out his responsibilities, the Inspector General was to be assisted by several Deputy Inspectors General posted on a territorial basis, usually each to a group of three to five districts called a range. The Deputy Inspector General was to exercise a general supervision over the District Superintendents in his range, and they were to look towards him for advice, guidance, leadership and co-ordination of police work within the range.

As head of the district police, a District Superintendent was made responsible for all matters relating to the internal economy of the force, its management and the maintenance of its discipline and the efficient performance of all its duties connected with the prevention, investigation and detection of crime.

H. The System of Dual Control

Under the Police Act of 1861, in addition to being under the senior police hierarchy, the District Superintendent was simultaneously subjected to the operational – lateral – control of the District Magistrate. Under paragraph 2 of section 4 of the Act:

> *The administration of the police throughout the local jurisdiction of the magistrate of the district shall, under the* general control and direction *of such magistrate, be vested in a district superintendent and such assistant district superintendents as the Provincial Government shall consider necessary.*

The police administration at the district level was thus subjected to a *dual control* – all administrative, technical, financial, professional and organizational control of Inspector General through his deputies; and the lateral general control and direction of the District Magistrate. Also, postings and transfers of Superintendents of Police and officers senior to them were the concern of the provincial government, not of the Inspector General.

Because of its failure to rectify the long-discovered structural defects of the Irish model, an intense criticism of the draft Police Act of 1861started right from the day it was introduced in the Legislative Assembly. It was variously described as 'old wine in new bottle' and 'a new friend with an old face.' Nonetheless the Act was passed with the hope that 'at no distant period' the police in India would be reformed on lines similar to Peel's.

Sir James Stephan, a law member of the Governor General's Council in 1870-71 and a political philosopher of the Indian Civil Service, however, was quick to put the whole debate about police reform in the 'correct' perspective. After accepting that the administration of justice was not in a satisfactory state in any part of the Empire, he enunciated in succinct terms:

> *The first principle to be born in mind is that the maintenance of the position of the district officers is absolutely essential to the maintenance of British rule in India and that any diminution in their influence and authority over the Natives would be dearly purchased even by an improvement in the administration of justice. (Cited in Gupta, 1979, xvii-xviii)*

In practice, at least in some provinces, the ground position was far worse in that the police operations were controlled and directed not merely by the District Magistrate, but at the sub-divisional level by his subordinate, the Assistant Commissioner, and at the divisional level, by his superior, the Commissioner. In fact the police were impressed upon to act as the 'hands' of the civilian authorities, thereby reducing the former to an agency of the latter and practically excluding the Inspector General and his deputies from supervision of police not only in the sphere of law and order but also, to a very large extent, even from its internal administration.

These retrograde steps, including, in particular, constant interference with the authority of senior officers of police over the men under their command, had a crippling effect on the ill-conceived police organization, in addition to exacerbating the bitter complaints of police oppression and extortion (Griffiths 1971, 99), apart from spoiling the discipline of the force.

I. The Police Commission 1902-03

By the beginning of 20th century, the situation became so 'bad' that Lord Curzon, the Governor General, had to declare police reform as one of the most urgent needs of Indian administration. Accordingly, in July 1902, he appointed a commission to be presided over by Sir Andrew Fraser, chief commissioner of the Central Provinces, to report on the state of the police organization.

The commissioners, in their report submitted in 1903, recorded their 'emphatic' view that the 1861 system had completely failed. One of the major causes of its failure, according to them, was undue interference with the police by the civilian authorities. "The purpose of Police Act 1861 was not to create a system of dual control but merely to provide for a reserve of authority outside the police organization, to be exercised by the District Magistrate only sparingly and in very specific situations, while the day to day police work was to be directed and controlled solely by the senior officers of police," they said.

But, oddly enough, the recommendations of the Fraser Commission fell short in addressing adequately the fundamental – and chronic – organizational ills of police, or bringing about any substantial reform.

Why the British did not feel able to reform police, despite overwhelming evidence in support of reform, was largely because they wanted to ensure in-built subservience of police to the executive administration; never mind that corruption, lack of professional excellence, police high-handedness and resultant police-public estrangement were some of the obvious by-products of this policy. It was also due to the fact that they were not prepared to make terms and conditions of police rank and file attractive enough. In other words, the police organization was designed not to attract better talent.

In his note of dissent, the Moharaja of Darbhanga, the only Indian member of the Fraser Commission, maintained that the junction of the thief-catcher with judge was surely more anomalous in theory and more mischievous in practice. "The connection between the district superintendent and the magistrate needed to be severed entirely and completely, because as bed-fellows, they were capable of causing incalculable harm," he emphasised. He further said that his own experience in Bengal had made him believe that it was essential to sever this connection between the police and the magistracy in the high interest of justice and fair play.

Ironically, similar liberal and rational views of vision and professional wisdom were frequently expressed, but were almost always superseded by the overriding considerations of precipitating the Raj.

Functioning under the guiding principles of this colonial philosophy, the police performed remarkably well in its role of an occupying force. Although this role kept it miles apart from the public and often turned it into a target of emotional abuse by those who were pitted against the British.

III. POLITICS OF POLICE REFORM

The first attempt to bring about a perceptible change in the Irish-type colonial police was – vainly – made within six months of Pakistan becoming a free country in 1947. Under the progressive and able leadership of Governor General Muhammad Ali Jinnah, the Sind Assembly passed a Bill (XXV of 1948) in February 1948 for establishing a modern police force for the city of Karachi. In his statement of objects and reasons, Mr. M. A. Khuro, chief minister, who successfully piloted the Bill, had thus to observe:

> *Sir, the Bill is a long one, but most of it is already in operation in Bombay and other cities. Karachi has very much developed and many more people have come in. The population has considerably increased and the police force in the present conditions will not be able to cope up with the situation. Therefore, like Bombay, we are going to appoint Commissioner of Police for the city of Karachi and give him powers which are identical to those which are given to Police Commissioner of Bombay. This is the main idea behind it. The powers that he will enjoy are in respect of curfews, processions, public meetings, permission of these, regulating arms and licences. I think it is high time that Karachi city should have a Bill like this. There should be a regular Police Commissioner for this city.*

The Assembly passed the Bill on 7th February 1948 and an authenticated copy signed by the Speaker and bearing the forwarding note of the Governor of Sind was duly forwarded to the Governor General's office. Surprisingly, the Legal Advisor to the Governor General made certain 'minor corrections' on the authenticated copy of the Bill, and returned it to the office of Governor Sind for resubmission. Why he did so is not clear from the record, but it appears that the politics of police reform did not let the Bill return to the Governor General, who because of his fast deteriorating health was increasingly unable to attend to official matters. (He died on 11 September 1948.)

In 1951, a committee headed by Sir Oliver Gilbert Grace, then Inspector General of police of the North Western Frontier Province (NWFP), recommended that police set-up for the city of Karachi should be fundamentally changed. However, no headway could be made because of strong opposition by the bureaucratic elite.

The Pakistan Police (Constantine) Commission of 1960-61 specifically went to India to study metropolitan police system for Karachi, but the commissioners chose not to make any recommendation in this regard. They 'felt' that since the capital had already shifted from Karachi to Islamabad, the issue was no longer relevant.

The Pay & Services Re-organization Committee (1961-62), headed by Justice Cornelius, recommended in clear terms the introduction of metropolitan system of policing for cities like Karachi and Lahore, but the recommendation was not 'accepted' for implementation by the 'decision-makers.'

In 1985, the Police Committee – which included the present author as member/secretary – was mandated to examine whether the existing police system based on Police Act of 1861 was capable of meeting the growing law and order challenges, especially in Pakistan's major urban centres, and to consider the introduction of metropolitan police system as it existed elsewhere in the world. After an in-depth discussion of the issue, the Committee strongly recommended that the existing – outdated – system needed to be fundamentally restructured, especially for capital cities and major towns with a population of over 500,000. A Ministerial Committee also approved the recommendation. However, the Cabinet in its special meeting held on 6th January 1987 'decided' to send a delegation consisting of Member/Secretary of the Ministerial Committee and the Additional Secretary, Ministry of Interior, to India and Bangladesh to study the reforms proposed by the Police Committee. (It is worth recalling that Bangladesh – which was East Pakistan until 1971 – had already changed the 1861 system of policing in Dhaka (1976), Chittagong (1978) and Khulna (1987).

The two-member delegation after having 'detailed and searching discussions/interviews' with prominent experts on the question of merits/demerits of the 1861 system, returned 'absolutely' convinced that as a pilot project the policing system proposed by the Police Committee should be introduced in the major cities of Karachi, Lahore and Islamabad on priority basis. However, before any headway could be made in this regard, the time and tide once again proved to be on the side of the forces of status quo. In May 1988, the Government of Prime Minister Junejo was dismissed, with the long-debated police organizational reform suffering serious setback yet another time.

After the new elected government was installed, the Prime Minister in her speech before the Police Service of Pakistan Association on 12th April 1989 announced that the old police system would be replaced on experimental basis in selected cities of Pakistan. (A directive No FDS (IMP)/PMDIR/114/89 dated 04.05.1989 followed the announcement.) However, in the meanwhile, it was 'decided' to send another delegation headed by the Interior Secretary to India and Bangladesh. Interestingly, this delegation also returned with 'strong' recommendation in favour of changing the 1861 system.

A four-member British delegation headed by Sir Richard Barrat, Her Majesty's Chief Inspector of Constabulary visited Pakistan from 21 to 26 January 1990. The delegation emphasised that the present police establishment was a continuation of the police appointed during the British days, which was essentially a ruler-appointed police, and that the whole policing philosophy needed to be changed on the lines suggested by the Police Committee of 1985. "The central problem surrounding police ... in Pakistan is that the present system was created many years ago under colonial rule and has not been refined or evaluated to keep pace with the changing face of the country in the last decade of the twentieth century ... Police ... throughout Pakistan has clung to the role envisaged by the Police Act of 1861, in which the main functions were the maintenance of law and order and preservation of the status quo by methods of suppression and control," the delegation observed.

The Police Reforms Implementation Committee, in its final report submitted on 1st March 1990, also reiterated that the Prime Minister's directive for introduction of metropolitan police system in the cities of Karachi, Lahore and Islamabad should be implemented without further dilly-dallying.

A UN Mission led by Vincent M. Del Buono, UN's Interregional Advisor for Crime Prevention and Criminal Justice, visited Pakistan from 26 March to 10 April 1995. The Mission made a number of categorical recommendations and urged that as an essential first step in the process of renewal, the political leadership of the country at all levels should state as a matter of fundamental policy that an effective, viable, independent but publicly accountable police was crucial to the development of stable democratic government institutions. "The present crisis comes as no surprise. Since 1960, there have been eleven separate committees or commissions established by governments in Pakistan and four international missions requested by the Government of Pakistan which have recommended major reforms of policing in Pakistan. These have for the most part been ignored and the remedies suggested have been unimplemented. Had the proposed reforms been undertaken, much of the present crisis could have been avoided... The present police system, which has been allowed to deteriorate so badly by successive governments and been so abused for political patronage, has not yet completely broken down due to the dedication, integrity, initiative and professionalism of a large number of individual officers and constables. In spite of their best efforts, policing will collapse not only in Karachi but also in other parts of the country unless law enforcement institutions are strengthened immediately," the Mission observed.

Next, a Japanese police experts team led by the Director General of the National Police Agency, Mr. Sekine, visited Pakistan in April 1996 on the invitation of the Government of Pakistan. After analysing police reforms of 1947-54 in Japan, the team observed that it was crucial that police reforms in Pakistan should be focussed on building a relationship of trust between the people and the police, and that the police in Pakistan should adopt a public service concept. In order to establish mutual trust between the police and the general public, the team suggested the following steps.

- Creation of institutional structures that ensure political neutrality and democratic control of the police.
- Proper sharing of responsibilities between the federal government and the provincial governments.
- Adoption of unified chain of command of the police.
- Establishment of recruitment and selection system of personnel based on merit.

In March 1998, the Good Governance Group of 2010 Programme, taking support from the Japanese report, recommended that police be depoliticised and their recruitment, postings, transfers, training and career development ensured on merit.

In their February 1999 report on Sustainable Peace in Karachi, the Colombian experts recommended a clean break with the existing situation. "If a professionally competent, politically neutral and democratically controlled Karachi Metropolitan Police Force is not formed, there will probably be no police reform or reconstruction of the public sector, both of which are essential elements for sustainable peace," they concluded.

IV. TOWARD A COMPREHENSIVE POLICE REFORM PROGRAMME

Faced with a deepening crisis both internally within its own organization and externally in its relations with the public, the 1861 police system started running aground under the strain of social change brought about in 1947 by the freedom from colonial rule. It was like expecting a pushchair designed for a toddler to take an adult from one city to another on a steep road. It was not possible, without a fundamental restructuring of the organization that was so broke.

The last decade of the 20th century particularly witnessed an almost complete collapse of the existing law and order apparatus, thanks mainly to growing and reckless interference in vital aspects of police administration by the 'persons of influence.' No surprises, if the machine designed for colonial purposes failed to meet the aspirations of a free people who wanted to enjoy the fruits of liberty, freedom, and rule of law.

Common complaints against the police ranged from routine discourtesy and incidents of neglect, incompetence, inefficiency, arbitrariness, inadequate or no response to citizens' requests for help to institutionalised abuse of power and widespread resort to high-handedness and corruption. Policing by consent was virtually non-existent. Citizens would lend little or no co-operation, at least little voluntary co-operation, to their police. They perceived police not as an instrument of rule of law, but as a corrupt, insensitive and a highly politicised force, operating mainly to look after the interests of the powerful.

This unacceptably high level of police-public estrangement did not come about lightly or suddenly. For most citizens confronting routine police misbehaviour was a bitter fact of every-day life, borne out of experience of successive generations at the hands of a force widely believed to be working beyond the bounds of civilized code of behaviour. It was the behaviour that defied change and was impervious even to the most scathing criticism by leaders of civil society.

Could the ordinary citizen do anything when things went wrong, grievances arose, or complaints about police fell on deaf ears? Not much, because, badly enough, whatever arrangements existed were woefully inadequate, lacked public confidence and were far from user-friendly.

In any case, not many citizens felt able to formally complain against any actual or perceived abuse of authority by the police. It was their widely-held belief that police could get away with any thing and every thing. There existed no credible mechanism of policing the police, notwithstanding the fact that an increasingly expanding range of coercive powers at their command required stricter accountability controls. Public confidence in the police had never been lower. We knew why. We even knew how to fix it. But we were faced with the perpetual failure of both police leadership and the governing elite to reinvent the design for a people-friendly police.

What people urgently required was a "fundamental change" in the way they were policed, as the police organization designed for colonial purposes had since broken down. It had broken down under the strain imposed by a variety of complex factors, including the growth of terrorism, sectarianism, proliferation of weapons, population explosion, and modern conditions of life. Urban terrorism during the past decade claimed tens of hundreds of innocent victims and brought Karachi the infamous title of 'the City of Death.' The economy also lost hundreds of billions of rupees. Indeed

the inability of the law enforcement apparatus, *inter alia*, to tame the sectarian dinosaur and control illegal arms cost the nation dearly, both in terms of dissipating the gains of economic growth and its image internationally.

Poor law enforcement over time also became a serious threat to the emerging democratic order of Pakistan, its economy, and the safety, well-being and integrity of its citizens. Although the country spent tens of billions every year on police, civil armed forces and security agencies, yet the citizen suffered from a creeping sense of insecurity. It was almost as if the law enforcement system was *designed* not to work.

The solution lay in radically changing the way the police operated, in developing a sub-culture of professional policing, trained and equipped to uphold the rule of law, in shifting from more-than-century-old oppressive policing practices to community policing, and in reinventing the police which had miserably failed to win much-needed partnership with citizens and communities. It was time for police to enter into a customer service contract with the people of Pakistan, a new guarantee of more effective, efficient, responsive, accountable policing. It was time to implement ideas that worked and get rid of those that didn't.

Fortunately, the most opportune moment to reinvent police came when the Government of Pakistan in November 1999 decided to set up the Focal Group on Police Reforms and tasked it to suggest fundamental restructuring of police. The Focal Group, of which the present author was a member, submitted its recommendations in February 2000. These were enthusiastically received and intensely debated by members of civil society as well as the media. In the meanwhile, and more significantly, the National Reconstruction Bureau (NRB) of the Government of Pakistan, as part of their good governance and devolution of powers programme, decided to accord high priority to long overdue police reforms.

The NRB's Think Tank on Police Reforms, which included the present author as a consultant, comprised senior police administrators who knew the police best – who knew what worked, what didn't; and how things ought to be changed. The Think Tank spoke with as many policemen as it possibly could. It heard from the stakeholders – the people of Pakistan – all across the country, seeking their ideas, their input and their inspiration. It sought views of the judiciary, and experts of other criminal justice sub-systems. It held useful discussions with top business leaders who have successfully used innovative management practices to turn their organizations around. It consulted public administration experts who knew how best to apply the principles of reinventing public sector organizations to improving police services. In short, it endeavoured to have meaningful dialogue with the best minds from private sector, government, and the civil society.

As the ground conditions that made the 1861 arrangement expedient had long ceased to exist, the Think Tank lost no time in concluding that police needed to be transformed from its colonial mould and organized on the basis of principles governing standard, modern, contemporary police forces meant for policing free societies, not *natives*. In this regard, the key issues debated in the NRB included: (1) What kind of organization will Pakistan Police need to meet the 21st century law and order challenges? (2) Which model would be most suited in bringing about a radical change in the existing intolerably high level of police-public estrangement? (3) How could such an organization be subjected to effective democratic control, yet ensuring its political neutrality?

It took NRB more than a year to deliberate upon various aspects of the Focal Group's blueprint of police reforms. There was complete unanimity that every organization, whether public or private, could only perform well if founded on valid organizational principles. In the case of Pakistan Police, these principles were ruthlessly violated over the years. This resulted in the creation of a corrupt, inefficient and highly politicised police force. Consequently, the task of maintaining law and order suffered serious setback. Increasingly the police was rendered to act as agents of the political executive rather than as instruments of a democratic state. The selective application of law against opponents, whether due to political interference or at the behest of persons of influence, became the norm rather than an exception. Political and personal vendettas were waged and won through manipulation of the instruments of state. Whatever safeguards existed against the floodgates of pressure, inducement or threat from criminals or ethnic, sectarian or other powerful elements virtually became dead. The net result of this all was that people perceived the police as agents of the powerful, not as members of an organization publicly maintained to enforce rule of law.

As a first critical step towards reform, the NRB concluded that responsibility of maintenance of law and order would need to rest unambiguously with the police. The police hierarchy will have to be made responsible not merely for the organization and the internal administration of the force, but also for other matters connected with maintenance of law and order. In short, policing will no longer be subject to dual control. In this regard, the Chief Executive took the historic decision to abolish the office of the District Magistrate effective 14th August 2001.

Secondly, it was agreed that necessary steps for rendering the police professionally competent, operationally neutral, functionally cohesive and organizationally responsible for all its actions would need to be institutionalised in the Police Ordinance 2002 (scheduled to replace the Police Act 1861 on 23rd March 2002). Once implemented, the new Police Ordinance will lead to efficient police operations, better quality decision-making, improved discipline of the force, and revamping of internal accountability mechanisms.

Thirdly, in a bid to insulate police from extraneous interference by the politicians in power, and emulating the Japanese public safety commission system, the NRB decided to establish public safety commissions at national, province and district levels. In actual fact, the commissions at the district level have already been established and it is for the first time in the history of Pakistan that independent bodies having due representation from opposition parties will be performing oversight role over certain critical aspects of police functioning.

Commenting on the improvement in police accountability and behaviour that resulted after the introduction in 1947 of the public safety commission system in Japan, Bayley (1991) has observed:

> *The fact is that a transformation did occur in police behaviour in Japan in a relatively short period of time immediately after World War II. It is associated with democratisation and in one of the most prized developments of the post war period. Japan's contemporary record of excellence with respect to police behaviour is striking not only in relation to the United States but also in relation to its own past.*

Fourthly, the role, duties and responsibilities of police have been re-defined in a manner in which service function gets precedence and the prevention and detection of crime is seen to have a social purpose. Not only does the new Police Ordinance seek to solicit voluntary support and co-operation of the people, it will enable the police to act proactively for ushering in a culture of rule of law in Pakistan.

Fifthly, it is crucial to bring police under a system of external accountability that enjoys public confidence. Once a policeman renders himself accountable to the community he serves, his work ethics undergoes a radical change. By subjecting himself to rule of law, he would be striving to upholding and promoting the cause of public interest. How can a police force hope to perform its functions efficiently and effectively without enjoying a high degree of public confidence in the integrity of their operations? The new Police Ordinance seeks to achieve this objective by establishing an independent statutory institution under the name and style of Police Complaints Authority. Simultaneously, since 14th August 2001 and for the first time in the history of Pakistan, the judiciary stands completely separated from the executive. There is no doubt that this measure alone would have a profound impact in controlling serious police misconduct.

Sixthly, the reform strategy seeks to establish an independent Prosecution Service in each province of Pakistan. The purpose is to improve the quality of both investigation and prosecution, in addition to introducing a system of check and balance. The measure will also be a major step forward towards establishing a standard criminal justice system in Pakistan.

Seventhly, the process of reinvention requires that the political and police leaderships in Pakistan realise that the police have to respond to the expectations of their customers if they are to be effective. Historically, there has been reluctance on the part of senior police hierarchy to recognise the necessity of seeing police forces as organizations that are fundamentally no different from any other enterprise or business. As Butler (1992) points out, arising from this basic error there has been a tendency to hide behind the complexity of policing as a means of excusing poor management and leadership. The police organization of tomorrow will therefore have to evolve a shared vision and understanding of a common mission which will increasingly be focussed on meeting the community expectations. 'Putting the customer first' would certainly improve the confidence of the public and an overt commitment to enhance the standards of both public safety and police accountability will require the police leadership to lead and manage, not simply run, the force to get results consistent with the mission.

In conclusion, law enforcement modernisation is one of the greatest challenges confronting Pakistan, a challenge that can and must be met. There are no short cuts, and no easy answers. Like an old Chinese saying, a journey of a thousand miles begins with the first step. Fortunately, the government has already taken several steps in the right direction, and is determined to complete the journey. There is not a moment to lose.

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THE THAI CONSTITUTION OF 1997 AND ITS IMPLICATION ON CRIMINAL JUSTICE REFORM

*Kittipong Kittayarak**

I. INTRODUCTION

It is indeed a great honor and privilege for me to be invited to share my views on recent trends and developments on criminal justice reform in Thailand with distinguished criminal justice officials at UNAFEI' s 120th International Senior Seminar.

The topic of my talk today concerns the latest developments in the Thai criminal justice system. With the passage of the new Constitution, widely called "the People's Charter," on October 10, 1997, Thailand is now set to embark upon a major reform course which will embrace not only political reform but also the long anticipated overhaul of the criminal justice system. The Constitution have many detailed provisions relating to the court and criminal justice, particularly on the procedural protection of the rights of the accused, so much so that it has been called the constitutional code of criminal procedure by some critics. It also stipulated that the Court of Justice should have its own executive office separated from the Ministry of Justice, which, as a consequence, has paved the way for the promotion of the independence of the judiciary and the opportunity to reorganize the criminal justice agencies into the new Ministry of Justice. (Some selected articles related to criminal justice are listed in Appendix 1 of this paper.)

In my presentation today, after briefly introducing the Constitution and the Thai criminal justice system, I will then focus upon the new procedural reform towards due process as introduced by the Constitution. These new constitutional requirements have made a considerable impact to the practices of the police, prosecutors and judges in the investigation, prosecution and trial processes. After that, I will also discuss about the ongoing organizational reform of the criminal justice as a result of the new Constitution.

II. THE CONSTITUTION OF THAILAND OF 1997 AND ITS ROLES IN CRIMINAL JUSTICE REFORM

The Constitution of 1997 represents another step of evolution of democratic principles in Thailand. Prior to this new Constitution, Thailand has had 15 Constitutions since 1932 when the country's political system was changed from the Absolute to Constitutional monarchy. However, this Constitution is the first one that was draft by members of the Constitutional Drafting Assembly, who come to power by direct election and stringent selection process. In addition, it was drafted from the perspective of the common people, through highly participatory process. This pro-rights, pro-reform Constitution would not have passed the Parliament, had it not been that Thailand was hard hit by economic crisis during that same year. The economic crisis has waken the Thai society and forced them to question the past administration perceived to be corrupt, inefficient, non-transparent and indifferent to the plight of the marginal and the underprivileged sectors. Such dissatisfaction, together with the campaign for political reform supported by the businessmen and the growing middle class, are combining factors which led to the endorsement of the progressive, revolutionary Constitution of 1997.

The new Constitution has created the ground rules for transforming Thailand from a bureaucratic polity prone to abuse of political rights and corruption into more participatory in which citizens will have greater opportunity to charge their own destiny. It has set the frameworks of laws and administrative procedures, which promote citizen participation, protect individual liberties, restricted state's power to infringe upon individual rights, advocate independent judiciary, and create mechanisms for greater transparent and accountable government. Although the smooth implementation of the principles espoused in the Constitution is by no means guaranteed, in my opinion, there are adequate reasons to be optimistic. The rapid growth of civil and society movement, the changing attitudes among the bureaucrats and the military, the vibrant media and academia, the higher rate of education, and the generation shift of professional and society leaders

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from the right wing, reactionary to the progressive, liberal groups of people whose political views were forged during the tumultuous years of the late 1960s and early 1970s, are among the encouraging signs for successful reform.

As the rule of law is one of the most important elements for good governance, the Constitution has put great emphasis on overhauling the criminal justice system. The timing of the drafting of the Constitution was also coincided with the public sentiments for reform, triggered by public dissatisfaction of criminal justice as a result of the wide media coverage on the abuse of powers by criminal justice officials, the infringement of human rights, the long and cumbersome criminal process without adequate check and balance, etc. The public also learned of conflicts in the judiciary and other judicial organs which at times were spread out and, thereby, deteriorated public faith in the justice system. With such background, the members of the Constitutional Drafting Assembly used the occasion to introduce a major overhaul of the Thai criminal justice.

III. IDEOLOGICAL IMPLICATIONS ON DIRECTION OF REFORM

To understand the reform trends and presented in the Constitution, ones should first start with a quick glance at the legal system of Thailand. To become familiar with the legal system of other countries, one of the most frequently asked questions is whether the system is more related to the common law tradition or to that of the civil law, If one can determine which of the two most important legal families such a system belongs to, one will also see a rough picture of the law and procedure, the legal institutions and the roles of agencies in the criminal justice system of that country. However, in the case of Thailand, there is no easy answer to this question. Due to her unique historical development, the Thai legal system is a mixture of elements of both civil and common-law traditions. Of course, there is nothing wrong with a mixed legal system, which is now the trend of every legal system in the age of globalization where countries can learn from the experiences of others. However, in the case of Thailand, the rivalry between the two major colonial powers to insert their influence over Thailand has resulted in an unbalanced system, particularly with regard to the protection of the accused.

Even though Thailand was able to maintain her independence during the colonial era, she was forced to quickly "modernize" or "westernize" her legal system so as to be free from the curse of extraterritoriality. Caught in the rivalry between the English and the French in their colonial interests, Thailand was practically forced to adopt elements from both legal systems. Although structurally modeled after the civil law system, the Thai legal system had been strongly influenced by the common law traditions in many areas of law and procedure. This is especially true regarding the role of agencies involved in the administration of justice.

The adoption of common law-based adversary attitudes in the structure of the civil law system has resulted in much disadvantageous position for the accused. For instance, in the past, many Thai judges who were trained in England brought home to their office the concept of adversary proceedings where judges are supposed to maintain passive impartial role throughout the trial. This was so despite the fact that the Continental model had influenced the structure of the Thai criminal process where judges are supposed to be more active in searching for the truth during trail. Such an attitude has had a considerable adverse impact on the rights of criminal suspects who have been drawn into the process because the concept of a state-sponsored defense counsel, which is an indispensable component of the adversary process, has not yet been fully recognized. A passive attitude on the part of the court can also be observed in a motion for a detention warrant and a preliminary hearing during which the court abandons the opportunity to participate actively in the control of police conduct.

Discrepancies in ideologies can also be seen regarding the roles of prosecutors and police. Since, structurally, the Thai prosecutors have been modeled after the continental system; they should assume a true quasi-judicial role, as do their counterparts in Germany or France. However, because of the influences of the English system, the Thai prosecutors play a substantially less significant role than their counterparts in the civil law traditions. For instance, in Thailand, prosecutors are not allowed to initiate or conduct criminal investigation. The Thai prosecutors can only request the police to conduct additional investigation if they are of the opinion that the files of inquiry submitted to them by the police do not have sufficient evidence for prosecution. They cannot conduct investigation on their own. This has made the Thai prosecutors play less active role in the pretrial process and allows the police to dominate criminal investigation. Moreover, the influence of the adversary model also makes it more difficult for them to maintain an objective and impartial role. Seeing themselves as protagonists, the Thai prosecutors and, to a larger degree, the Thai police have often been too overzealous in convicting the accused.

In my opinion, the criminal process in any society should be a model that can best balance the common goals of every criminal justice system-the efficiency in law enforcement and the protection of the accused. It does not matter

whether it belongs to the civil or common law family as long as it works well in that society, considering its social, economic and political contexts. The practice in Thailand is a good example how partial importation of only certain elements in one legal culture without taking into consideration the whole context where they actually operate has created more harm than good.

With this new Constitution, there have been attempts to balance the scale towards protecting the rights of the accused much more than earlier. Many good elements from the two legal systems have been strengthened. For instance, the Constitution provides more right to counsel to the accused as well as the right not to be witness against himself, which is a trait of the common law, adversary model. In addition, the impeachment process has been introduced for the first time in this Constitution. At the same time, the Constitution also provides for a stricter quorum of the court, which is reminiscent of the civil law tradition.

IV. DIRECTION OF REFORMS AS APPEARED IN THE NEW CONSTITUTION

The Constitution of Thailand of 1997 has put great emphasis on establishing the rule of law in Thailand. As a sound system of justice is a prerequisite for achieving such goal, the Constitution has placed great importance to the issues of due process in the criminal justice process. As a matter of fact, there have long been attempts to overhaul the criminal justice system in Thailand due to various problems it is encountering, namely, the abuse of powers and the lack of adequate check and balance among the authorities involved, the inefficiency in investigation, prosecution and the trial process, the violation of human rights, etc.

The direction of reforms as appeared in the Constitution is also a reflection of the dissatisfaction of the public towards the inefficiency and the lack of due process protection in the current system. Here are some of the major points:

*** The Warrant Requirement:** Article 237 of the new Constitution reduces the police's authority to conduct warrantless search and arrest and the power to issue arrest and search warrant is now handed over to the courts.

*** The Right to Prompt Arraignment:** After the arrest, the police will be required to bring the suspect to the court in due course. Article 237 demands that the police must bring the suspect to the court within 48 hours.

*** The Right to Bail:** Article 239 establishes a more transparent bail procedure where the arrested person shall entitled to reasonable amount of bail in relation to the offence committed, to prompt consideration by the court, to demand the reason if it is denied, and to appeal the denial to the higher court.

*** The Right to Counsel and Right to have Lawyers or Trusted Persons Present During Interrogation:** Article 241 grants the suspect the right to have a lawyer or trusted person present during police interrogation. The right to have assistance from the state for legal counsel is stipulated in Article 242. The state is required to promptly find a lawyer for the suspect if he or she is confined or detained.

*** The Right to Speedy Trial:** To prevent the delay of the criminal process, Article 241 provides that a suspect shall rightfully receive an expeditious, *continual*, and fair investigation or trial. The term "*continual*" was never before appeared in the previous Constitutions but was intentionally added to prevent the current practice in court where there will normally be only one half-day hearing session a month for criminal trial.

*** The Strict Quorum Requirement:** Article 236 requires that judges must be present in full quorum when trying a case. It also stipulates that any judge who is not in charge of trying a certain case shall not make a judgment or ruling on the case.

*** Witness Protection:** Article 244, for the first time, recognizes the rights of a witness in criminal case to be protected and treated properly.

*** Rights of Crime Victims:** Article 245 demands that the state must look after the injured party or his or her relative in case that he or she was killed or physically or mentally assaulted by criminal offence committed by others.

*** Miscarriage of Justice:** Article 246 provides that any person who has become the accused in a criminal case and has been detained during the trial is entitled to appropriate compensation, expenses and the recovery of any right lost on account of that incident, if it is proved that he has not committed the offense or if his conduct does not constitute a crime.

V. THE ORGANIZATIONAL REFORM OF THE CRIMINAL JUSTICE

Another major problem on the administration of criminal justice in Thailand, that is the "non-system" of the criminal justice agencies. Unlike in most countries where major organs in the criminal justice system, such as the police, the prosecutors, the probation and correction officers, are under the purview of the Ministry of Justice, in Thailand, criminal justice agencies are scattered in different places. For instance, the police and prosecutors have long been under the Ministry of Interior before becoming independent entities since 1992 and 1998 respectively. The Correction Department is under the Ministry of Interior, while the Ministry of Justice only looks after administrative affairs of the Court of Justice and part of the probation works related to the Court. As a consequence, instead of being the focal point for setting national criminal justice policy and overseeing the administration of the whole justice system, the Ministry of Justice only involved itself in the administration of the courts of justice.

Such an unorganized structure of the criminal justice system is one of the major causes for the lack of cooperation and coordination among organs within the system. In Thailand, the criminal process is not viewed as a single, coordinated process. Each agency in the criminal justice system – that is, the police, the prosecutors, the defense lawyers, the courts, and the correction officers – often focuses its resources in solving problems or creating works and projects within its own organization without adequate consideration on the impact of such efforts on the criminal justice process as a whole. These have resulted in repetition of works, the building of empires among criminal justice agencies, the lack of national criminal justice policy, the end results of which is inefficiency in the administration of justice.

A. The Restructuring of the Ministry of Justice

The unorganized structure of the justice agencies in Thailand has long been an issue for discussion at the academic and policy levels. The Senate's Committee on the Administrative and Judicial Affairs have conducted studies and published 2 famous reports in 1996 and 1998 supporting the reorganization of the Ministry of Justice. The first report, which came before the Constitution of 1997, has highlighted the necessity of the structural reform and has paved the way for the constitutional-drafting members to introduce provisions for criminal justice reform. As regards organizational reform, the new Constitution has stipulated that the Courts must have their own Offices of Secretary independent from the executives. To implement the idea in the Constitution, the Senate's Committee on Administrative and Judicial Affairs, in its second report of 1998, focused upon the organizational structure of the Ministry of Justice and the Court of Justice. They have studied the structure of the Ministry of Justice and the equivalent organization of many countries including those of Japan, Korea and the United States, etc. The findings and recommendations were well received by both the Prime Minister Chuan Leekpai and Prime Minister Thaksin Governments. The Justice Reform Committee set up by Prime Minister Chuan Leekpai prepared their own Report endorsing the Senate's recommendations which only a slight variation. Although the ideas have been well received by most academics and policy makers, actual implementation has, however, not been easy.

When the Thaksin Government took over in February 2001, it has set up the Committee for the reorganization of the Ministry of Justice, chaired by a Deputy Prime Minister (Mr.Suvit Khunkitti). I was appointed as the Secretary to this Committee. The Committee has submitted its Report to the Cabinet in October 2001. According to the Report, it was recommended that the new Ministry of Justice should consist of the following agencies: (1) The Office of the Permanent Secretary, (2) the Office of the Minister of Justice, (3) Office of Justice Affairs, (4) The Special Bureau of Investigation, (5) the Institute of Forensic Science, (6) the Rights and Liberties Protection Department, (7) the Department of Immigrations, (8) the Department of Correction, (9) the Department of Probation, (10) the Department of Child Observation and Protection, (11) the Department of Legal Execution. After receiving the Report, the Government decided that since the Government was in the process of introducing a major reorganization and reform of the whole Bureaucratic system in which the justice system is a part thereof, the matter should therefore be considered by the Bureaucratic Reform Committee. The Prime Minister himself chaired the Committee.

The Report of the Committee for the Reform of the Ministry of Justice has been fully endorsed by the Bureaucratic Reform Committee. The Committee shared the views represented in the Report that to provide more efficiency and promote better coordination in criminal justice administration, all agencies related to criminal justice administration should be grouped together at the new Ministry of Justice. In addition, the Committee also raised several new issues such as, whether the National Police Agency, the Office of the Attorney General, the Office of the Narcotics Control Board, the Office of the Anti-Money Laundering Board, which are also involved with law enforcement, should also be included in this new structure.

Taking into consideration all aspects of the pros and cons, the government has finally made a decision on January 9, 2002 that the Ministry of Justice shall consist of the following agencies:

1. Office of the Minister of Justice;
2. Office of the Permanent Secretary;
3. Office of Justice Affairs;
4. Department of Rights and Liberties Protection;
5. Special Bureau of Investigation;
6. Office of the Narcotics Control Board;
7. Office of the Anti-Money Laundering Board;
8. Institute of Forensic Science;
9. Department of Correction;
10. Department of Probation;
11. Department of Child Observation and Protection;
12. Department of Legal Execution;

Apart from these 12 agencies, the Office of the Attorney General, which is currently an agency under the supervision of the Prime Minister, will be under the supervision of the Minister of Justice. As a result, while the Office of the Attorney General can still maintain its independence from being under the full control of the Ministry of Justice, it will, through this new structure, have a connection with the new Ministry. Moreover, the Ministry will be responsible for the works of the Office of the Narcotics Control Board and the Office of the Anti-money Laundering which are now under the Office of the Prime Minister. In addition, the Ministry will also supervise the Thai Bar Association and the Law Society. It should be noted that the Immigration Department is the only agency proposed by the Committee for the Reform of the Ministry of Justice that was finally left out of the new structure.

It is expected that the bills affecting these changes will be presented to the Parliament in its next session in February 2002, and the dateline given by the Prime Minister for the new Ministry to begin its operation is on 1st October 2002.

B. Selected Debating Issues during the Restructuring

Although the proposed new structure of the new Ministry of Justice has in general been well received by all parties involved, it has created debates on several issues, namely:

1. Whether the Whole National Police Agency should be Transferred to the Ministry of Justice?

The idea of having all the police forces transferred to be under the Ministry of Justice was first initiated for the first time during the meeting of the Bureaucratic Reform Committee by the Prime Minister who chaired the meeting himself. After a long national debate on the issue, the idea was later turned down because it was afraid that the National Police Agency which currently has more than 200,000 manpower is too big for the new Ministry of Justice and will make it into "Ministry of Police Forces" instead. It was argued, among other things, that there must first be a decentralization of the force to become local police, then we can incorporate only the "National Police Agency," which should not be too large (a model seminar to that in Japan), to the new Ministry. Finally, it was agreed that the National Police Agency would remain as an independent unit under the Prime Minister, while only part of the police, i.e. the economic crime unit, will be transferred to the new Ministry. I was also agreed that process of decentralization and localization of the police should be expedited.

2. Whether the Special Investigation Bureau should be established in the Ministry and What should be the Role of the New Special Investigation Bureau vis-a-vis the Current Investigative Power of the Police?

The proposal by the Committee for Restructuring the Ministry of Justice coincided with the recommendations by the Senate's Report that a Special Investigation Bureau should be established within the Ministry of Justice. The reasons for such initiative are two folds: efficiency and check and balance. The lack of efficiency in the police investigation of sophisticated crimes is quite obvious given the past records of unsuccessful investigation in high profile economic crime cases. There are several reasons for such failure: namely, the lack of "professional investigators" trained and spent career in this field, the lack of cooperation and coordination among agencies during the pretrial periods, the lack of efficient laws to allow the investigators to conduct effective investigation. Due to the large size and its ineffective management, it is difficult for the Police to train special investigators for sophisticated crimes. Moreover, there are cumbersome procedures that do not allow all parties involved during the pretrial periods, such as the injured party, the police and the prosecutors, to work together. With such drawbacks, the time spent during the pretrial process for economic crime cases is often long and as the police and prosecutors do not work together from the start the cases presented to the Courts are often too weak to punish the offenders.

In Thailand, the police are the only agency that can initiate criminal investigation. The prosecutors cannot prosecute any criminal cases unless the police have already conducted the investigation into that case. This requirement has made the police in Thailand dominate the criminal process for a long time. There has long been an attempt to curb police investigative powers by proposing that the prosecutors should be allowed to participate in investigation together with the police in sophisticated and severe crimes. However, such attempt has however not been successful. The setting up of the Special Investigation Bureau is perhaps a new alternative and a solution to this long lasting problem. According to the new proposed bill, the Special Investigation Bureau will have the jurisdiction to investigate "sophisticated crimes" as defined by the Bill. The list of the names of the laws, which are considered sophisticated crimes, will appear in the Annexes of the Bill. A committee consist of senior government officials in the areas of finance and security will also be set up to determine what types of offenses in each particular law to be under jurisdiction of the new Special Investigation Bureau.

Apart from the jurisdiction to investigate sophisticated crimes, the new Bureau, through the endorsement of the Committee, will also be given the power to intervene in any crime it considers necessary to maintain public order. This will allow the new Bureau to provide the long awaiting, necessary check and balance with the police. It will also make the Minister of Justice accountable to the ineffective law enforcement, which has never before been the case due to the fragmented criminal justice agencies and the lack of responsible officer for effective law enforcement in the country. The new draft bill also proposes a scheme for the prosecutors to work closely with the special investigators from the start so as to make more effective investigation and prosecution.

3. Whether the Police have to Transfer its Forensic Division to the Institute of Forensic Science to be Established within the Ministry of Justice?

During recent years, there have been many incidents which have made the public lose faith in the forensic tests conducted mainly by the Police by its Forensic Division, the Police Hospital, an organ attached with the Police. The lack of accountability and the non-transparent procedures are among the major causes for such distrust. Due to the common agreement that there should be improvement of the forensic science in Thailand, the new Ministry of Justice will include the Institute of Forensic Science as a new agency under its purview. The Institute will be responsible for setting standards and guidelines for forensic related works. A national committee shall be set up to supervise and control the professional standards in this area. It will also be responsible for training and building the capacity of personnel in forensic science. It was also proposed that the Forensic Division of the police should be transferred to the Institute. However, after long debate, it was agreed that the new Institute should not become a large operation center but a standard setting and capacity building organization, therefore, it is not necessary to include the Forensic Division of the police in this new Institute. The Institute will promote and set standards to all forensic units including those at universities as well as police labs.

4. Whether the Public Prosecutors which is Currently under the Office of the Attorney General should be Moved to the Ministry of Justice and What should be their Relation vis-a-vis the Ministry of Justice?

The issue of whether or not the Office of the Attorney General should be under the new structure of the Ministry of Justice has been a topic of hot debate during the Chuan Administration. The Committee for the Restructuring of the Ministry of Justice decided to drop this issue at the beginning of their deliberation for fear of putting its feet into a quagmire. It has therefore left this issue to be decided later on by the Bureaucratic Reform Committee chaired by the Prime Minister. The Bureaucratic Reform Committee was of the opinion that the Office of the Attorney General should be attached to the Ministry of Justice. It was realized however that due to the quasi-judicial status of the prosecutors, they should be relatively free from direct control of the Ministry. As a result, the new proposal only changes the supervision authority of the Office of the Attorney General, which is currently directly under the Prime Minister, to the Minister of Justice. In this new structure, the prosecutors' powers under the Public Prosecutors Act and the Criminal Procedure Code are still left intact and the prosecutors are still free to make decision on criminal cases without any other outside interference. The status of the Office of the Attorney General will therefore be different from other agencies in the Ministry in that its line of supervision will not involve with the Ministry but will be supervised by the Minister himself.

VI. CONCLUSION

The past decade has been the busiest time for criminal justice officials in Thailand. After a long campaign, finally the long awaited criminal justice reform has become a reality due to the new Constitution. However, even though the ground works have already been laid down, it is not at all easy to implement the ideas and principles espoused by the Constitution. It may take some times for agencies in the new criminal justice structure to get accustomed to the new roles and responsibilities. Nonetheless, I am quite confident that the Constitution has provided clear guidelines and frameworks towards a fair and efficient criminal justice process.

In my opinion, there is a big different between the first law reform in Thailand which began more than a century ago during the colonial era. At that time, the reform was a product of national political necessity rather than any real attempt to change basic ideology and values in the society. The ongoing reform in Thailand this time is much different than the prior one in that it was demanded and fully endorsed by the public. With such a solid foundation, I am convinced that the Thai criminal justice process and the administration of justice will soon be improved.

APPENDIX A

CONSTITUTION OF THE KINGDOM OF THAILAND OF 1997
(Selected Provisions concerning criminal justice reform)

CHAPTER VIII
the Courts

Part 1
General Provisions

Section 233. The trial and adjudication of cases are the powers of the Courts, which must proceed in accordance with the Constitution and the law and in the name of the King.

Section 234. All Courts may be established only by Acts. A new Court for the trial and adjudication of any particular case or a case of any particular charge in place of an ordinary Court existing under the law and having jurisdiction over such case shall not be established.

Section 235. A law having an effect of changing or amending the law on the organization of Courts or on judicial procedure for the purpose of its application to a particular case shall not be enacted.

Section 236. The hearing of a case requires a full quorum of judges. Any judge not sitting at the hearing of a case shall not give judgement or a decision of such case, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

Section 237. In a criminal case, no arrest and detention of a person may be made except where an order or a warrant of the Court is obtained, or where such person commits a flagrant offence or where there is such other necessity for an arrest without warrant as provided by law. The arrested person shall, without delay, be notified of the charge and details of such arrest and shall be given an opportunity to inform, at the earliest convenience, his or her relative, or the person of his or her confidence, of the arrest. The arrested person being kept in custody shall be sent to the Court within forty eight hours as from the time of his or her arrival at the office of the inquiry official in order for the court to consider whether there is a reasonable ground under the law for the detention of the arrested person or not, except for the case of *force majeure* or any other unavoidable necessity as provided by law.

A warrant of arrest or detention of a person may be issued where:

1. there is reasonable evidence that such person is likely to have committed a serious offence which is punishable as provided by law; or
2. there is reasonable evidence that such person is likely to have committed an offence and there also exists a reasonable cause to believe that such person is likely to abscond, tamper with the evidence or commit any other dangerous act.

Section 238. In a criminal case, a search in a private place shall not be made except where an order or a warrant of the Court is obtained or there is a reasonable ground to search without an order or a warrant of the Court as provided by law.

Section 239. An application for a bail of the suspect or the accused in a criminal case must be accepted for consideration without delay, and an excessive bail shall not be demanded. The refusal of a bail must be based upon the grounds specifically provided by law, and the suspect or the accused must be informed of such grounds without delay.

The right to appeal against the refusal of a bail is protected as provided by law.

A person being kept in custody, detained or imprisoned has the right to see and consult his or her advocate in private and receive a visit as may be appropriate.

Section 240. In the case of the detention of a person in a criminal case or any other case, the detainee, the public prosecutor or other person acting in the interest of the detainee has the right to lodge with the Court having criminal jurisdiction a plaint that the detention is unlawful. Upon receipt of such plaint, the Court shall forthwith proceed with an *ex parte*

examination. If, in the opinion of the Court, the plaint presents a *prima facie* case, the court shall have the power to order the person responsible for the detention to produce the detainee promptly before the Court, and if the person responsible for the detention can not satisfy the Court that the detention is lawful, the Court shall order an immediate release of the detainee.

Section 241. In a criminal case, the suspect or the accused has the right to a speedy, continuous and fair inquiry or trial.

At the inquiry stage, the suspect has the right to have an advocate or a person of his or her confidence attend and listen to interrogations.

An injured person or the accused in a criminal case has the right to inspect or require a copy of his or her statements made during the inquiry or documents pertaining thereto when the public prosecutor has taken prosecution as provided by law.

In a criminal case for which the public prosecutor issues a final non-prosecution order, an injured person, the suspect or an interested person has the right to know a summary of evidence together with the opinion of the inquiry official and the public prosecutor with respect to the making of the order for the case, as provided by law.

Section 242. In a criminal case, the suspect or the accused has the right to receive an aid from the State by providing an advocate as provided by law. In the case where a person being kept in custody or detained cannot find an advocate, the State shall render assistance by providing an advocate without delay.

In a civil case, a person has the right to receive a legal aid from the State, as provided by law.

Section 243. A person has the right not to make a statement incriminating himself or herself which may result in criminal prosecution being taken against him or her.

Any statement of a person obtained from inducement, a promise, threat, deceit, torture, physical force, or any other unlawful act shall be inadmissible in evidence.

Section 244. In a criminal case, a witness has the right to protection, proper treatment, necessary and appropriate remuneration from the State as provided by law.

Section 245. In a criminal case, an injured person has the right to protection, proper treatment and necessary and appropriate remuneration from the State, as provided by law.

In the case where any person suffers an injury to the life, body or mind on account of the commission of a criminal offence by other person without the injured person participating in such commission and the injury cannot be remedied by other means, such person or his or her heir has the right to receive an aid from the State, upon the conditions and in the manner provided by law.

Section 246. Any person who has become the accused in a criminal case and has been detained during the trial shall, if it appears from the final judgement of that case that the accused did not commit the offence or the act of the accused does not constitute an offence, be entitled to appropriate compensation, expenses and the recovery of any right lost on account of that incident, upon the conditions and in the manner provided by law.

Section 247. In the case where any person was inflicted with a criminal punishment by a final judgment, such person, an interested person, or the public prosecutor may submit a motion for a review of the case. If it appears in the judgment of the Court reviewing the case that he or she did not commit the offence, such person or his or her heir shall be entitled to appropriate compensation, expenses and the recovery of any right lost by virtue of the judgment upon the conditions and in the manner provided by law.

Section 248. In the case where there is a dispute on the competent jurisdiction among the Court of Justice, the Administrative Court, the Military Court or any other Court, it shall be decided by a committee consisting of the President of the Supreme Court of Justice as Chairman, the President of the Supreme Administrative Court, the President of such other Court and not more than four qualified persons as provided by law as members.

The rules for the submission of the dispute under paragraph one shall be as provided by law.

Section 249. Judges are independent in the trial and adjudication of cases in accordance with the Constitution and the law.

The trial and adjudication by judges shall not be subject to hierarchical supervision.

The distribution of case files to judges shall be in accordance with the rules prescribed by law.

The recall or transfer of case files shall not be permitted except in the case where justice in the trial and adjudication of the case shall otherwise be affected.

The transfer of a judge without his or her prior consent shall not be permitted except in the case of termly transfer as provided by law, promotion to a higher position, being under a disciplinary action or becoming a defendant in a criminal case.

Section 250. Judges shall not be political officials or hold political positions.

Section 251. The King appoints and removes judges except in the case of removal from office upon death.

The appointment and removal from office of a judge of any Court other than the Constitutional Court, the Court of Justice, the Administrative Court and the Military Court as well as the adjudicative jurisdiction and procedure of such Courts shall be in accordance with the law on the establishment of such Courts.

Section 252. Before taking office, a judge shall make a solemn declaration before the King in the following words:

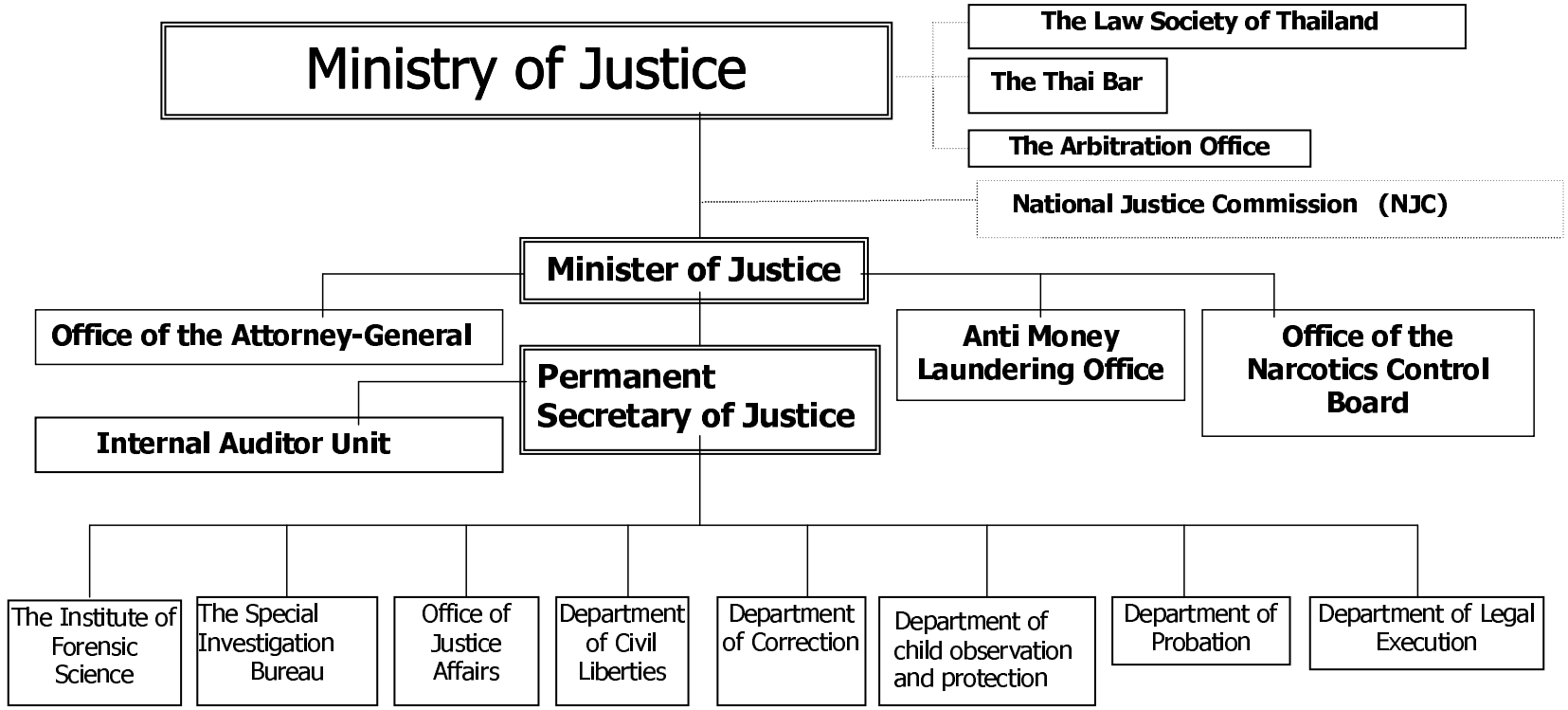
> *"I, (name of the declarer) do solemnly declare that I will be loyal to His Majesty the King and will faithfully perform my duties in the name of the King without any partiality in the interest of justice, of the people and of the public order of the Kingdom. I will also uphold and observe the democratic regime of government with the King as Head of the State, the Constitution of the Kingdom of Thailand and the law in every respect."*

Section 253. Salaries, emoluments and other benefits of judges shall be as provided by law; provided that the system of salary-scale or emoluments applicable to civil servants shall not be applied.

The provisions of paragraph one shall apply to Election Commissioners, Ombudsmen,members of the National Counter Corruption Commission and members of the State Audit Commission *mutatis mutandis*.

Section 254. No person may simultaneously become a member, whether an ex officio member or a qualified member, of the Judicial Commission of the Courts of Justice, the Administrative Court or any other Court as provided by law.

The New Structure of the Ministry of Justice



EFFECTIVE ADMINISTRATION OF THE POLICE AND THE PROSECUTION IN CRIMINAL JUSTICE

*Peter Boeuf**

I. INTRODUCTION

In order to understand the present day relationship between the way in which the Police operate to investigate and detect crime and the way in which criminals are prosecuted in England and Wales it is necessary first to understand the history of what are now two entirely separate organizations. I say England and Wales advisedly since in Scotland different arrangements exist entirely, the Procurators Fiscal (the prosecuting agents) having traditionally a wider responsibility for supervising and investigating crime in accordance with a different legal system and a different law. For no other reason than that I operate in England and Wales the perspective I will give on the themes dominating this seminar will of necessity be an English/Welsh one.

II. HISTORY

From an historical point of view the separation of the responsibilities for investigating crime and for prosecuting arrested defendants has been a relatively recent development, the Crown Prosecution Service for which I work having been created as recently as 1986 and arguably even now still battling to establish a place in the public conscience which recognises its powers and responsibilities and its independent role from that of the Police. The Crown Prosecution Service was the result of Parliamentary intervention in the form of an Act of Parliament, the Prosecution of Offences Act 1985 which resulted from no more than, say, 10 years gestation. The development of the Police service in England and Wales, like so much else, has been a long evolutionary process with little parliamentary intervention to guide its development (until relatively recently) since time immemorium.

Indeed, the origins of British policing lie in early tribal history. They are based on customs for securing order through responsibility being placed on local representatives of the community. It can perhaps best be described as a primitive system of policing of the people by the people. As time went by the system became based on the notion of communities being notionally split up into groups of 10 people. These groups were called "tythings". For each group there was one tything man who was responsible for the orderly behaviour of his tything. A further individual, a "hundred man" was responsible for the tythings and the "hundred man" had to answer to a more senior representative appointed to oversee an administrative area called a County. Those counties, subject to some boundary changes still exist today and they still largely determine the organization of the modern police service in England and Wales. The individual who was in charge of the county was known as the Shire-reeve or in due course the Sheriff. Despite the conquest of England in 1066 by the Normans the system broadly remained the same. Eventually (1346 and thereafter) the role of the Sheriff was gradually replaced in law enforcement terms by the appointment in the counties of Justices of the Peace who assumed a role entailing both the preservation of the King/Queen's Peace by detaining and punishing wrongdoers in the territory for which they were responsible.

Again in an evolutionary fashion and with larger populations springing up and larger local communities, the local Justices of the Peace started to appoint unarmed, able-bodied citizens to act unpaid for 12 months in each parish (a small community whose boundaries reflected the area from which the local Church drew its congregation). The Parish Constable worked in cooperation with the local Justices in securing compliance with the law and maintaining order. Where necessary, the Parish Constable would present before the Justices those who had broken the law and the Justices of the Peace (to become known as Magistrates) imposed some sort of sanction. This system of upholding justice worked comparatively well but began to be tested with a move towards a greater industrialised society in the 17th and 18th centuries and with the development of large urban areas and cities. In those areas it became necessary for the Magistrates or Justices of the Peace to appoint more "Parish Constables". One can readily see how these arrangements gradually led to the creation of the fledgling police forces throughout the country. In 1829 the Metropolitan Police Act was passed establishing in London the Metropolitan Police which until only within the last couple of years was responsible to the Home Secretary rather

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than as elsewhere throughout England and Wales to a Police Authority made up of locally elected members of the local authority and a selection of local Magistrates.

If I have dwelt on the historical background it has been merely to emphasize the strong traditional link which has always existed between the locally appointed Justices of the Peace and those acting as policemen. As upholders of the law the police were expected to present before the Justices those who had broken the law. Once they were presented before the Justices the Magistrates became, initially at any rate, prosecution, judge and jury in their own courts (originally even in their own houses!). Although in due course court procedures were regularised to ensure that the magistracy took a more judicial role, the responsibility for prosecuting the "prisoner before the court" and explaining why he was there remained firmly with the police. As late as 1985 to 1986 in London it was possible for even the most junior of police officers to arrest a defendant in the middle of the night; to produce him at court the following morning and personally to conduct the case before the Magistrate — a system ripe for the development of corrupt practice. Elsewhere had seen the development of police officers of varying degrees of seniority (Sergeant, Inspector, Chief Inspector) who acted as court presentation officers. All the police cases listed in a particular court on a particular day would be presented by him.

As the law became more specialised some of the police authorities in the larger cities started to create small departments manned by professional advocates who would prosecute some (but not necessarily all) of the cases prosecuted by the police force in that area. Thus, for example, the Police Force in Essex had created its own Prosecuting Solicitors office as early as 1947. Further impetus for the development of these offices came from the publication of a Royal Commission Report in 1962 on the Police, which effectively commented that police skills should be used for policing and that of lawyers for prosecuting cases in court. There was, however, no more philosophical analysis of the respective roles at this time.

By the time a further Royal Commission was commissioned in 1978 to consider police powers and the prosecution process approximately 32 of the then 36 police forces had Prosecuting Departments run and manned by qualified lawyers and support staff.

It is, however, important to note the relationship between the police and the prosecutor. The prosecutors had no statutory authority at all either to issue advice or to stop or alter charges brought against defendants. The relationship between the Chief Constable as head of the police force and the prosecutor was the same as that between solicitor and client. The client paid the solicitor to act or to give advice. If the client did not like the advice he was not bound to take it.

Though that was the constitutional position the reality was certainly much different. Although each prosecuting office was entirely independent and separate from other prosecuting offices up and down the country and therefore different systems and practices existed in each office, in general in those cases where they were experiencing difficulty they would:

- occasionally seek advice at an early stage about how to investigate a crime that had been committed or it was suspected was about to be; or

- sometimes present files of evidence for advice on what additional evidence might be obtained to strengthen the case against an individual; or

- regularly present files on complicated investigations for advice on what charge or charges should be brought. (Of course, in those cases the prosecutors might in submitting their advice suggest further enquiries be made in a certain direction).

The vast majority of files submitted however were those where the investigation had been completed and the defendant charged without prosecutorial involvement, the prosecutor being expected merely to present the case at court. Usually this was not a problem but from time-to-time there would be files where the prosecutor would bemoan the failure to consult at an earlier stage when an opportunity existed to improve the strength of the case.

From this it will be seen that no clear rules existed as to when, or if at all, the advice of the prosecutor should be sought. Much depended upon the personalities of individual police officers and the relationship which they had with their local prosecutors. In general terms those relationships were amicable and constructive with prosecuting advocates often working alongside police officers in the same building. Psychologically however there was in the minds of both a clear divide — police officers investigated crimes and prosecutors prosecuted them in court with little or no opportunity or even desire except in extremis for prosecutors to become much more involved in the investigative process.

The Royal Commission on the Police and Criminal Procedure (the Phillips Report) concluded amongst other things that:

- too many cases were being prosecuted with evidential weaknesses which should have been identified at a much earlier stage;
- the existing arrangements with prosecutions being handled on a local basis according to existing Police Force Areas lacked a cohesive influence with the danger of different prosecution policies being applied in different areas; and
- most importantly, it was quite inappropriate for the police to investigate crime and then to decide who should be prosecuted and taking also the responsibility for the prosecution process through the courts.

Phillips therefore recommended that an independent prosecuting authority should be created whose responsibility it would be to:

- advise in those cases where it was felt necessary;
- to receive files from the police where defendants had been charged;
- to decide whether those defendants should be prosecuted because there was sufficient evidence to suggest a realistic prospect of conviction and it was in the public interest to do so; and
- to conduct cases in the criminal courts.

III. THE CROWN PROSECUTION SERVICE

There recommendations were given life by the enactment of the Prosecution of Offences Act 1985 which created a national prosecuting agency — the Crown Prosecution Service — with effect nationally from 1 October 1986. The organization was such that initially 31 local offices were responsible for prosecuting all (save a small number of minor matters) criminal offences initiated by the Police in their 43 areas. There are four important issues which must be considered at this point. The first relates to the retention by the Police of the responsibility to initiate proceedings without the prior approval of the CPS. Of course, by the time files were considered for the first time by CPS, cases had started to develop a life of their own. The public perception of victims remained that if the police had charged there must be sufficient evidence and so a subsequent decision by CPS that the case should not go ahead was unpopular both with the public on occasions and also by charging police officers who hitherto had had an unfettered discretion to charge and who now, in effect, were being told they had made a wrong decision. Psychologically this was not popular particularly after large amounts of effort might have been expended in preparing a case that ultimately proved to be wasted effort. On other occasions it seemed to hard — pressed lawyers that in sometimes difficult situations where the police were under pressure from the public to produce results, it was easier to charge a defendant — sufficient evidence or not — and leave it to CPS to decide. If the CPS decided not to proceed the blame could neatly be shifted to that organization, the police indicating "we did our bit. If the case did not go ahead, it was not out fault". It became easy for those who preferred the power to prosecute to remain with the police to claim that the CPS was, in fact, an acronym for Criminals Protection Society.

The second issue of significance relates to those efforts made on the part of the new Service to secure its independence. In one sense, quite understandably, efforts were made by prosecutors to distance themselves from the Police. Arrangements were rapidly made for prosecutors who had hitherto worked cheek by jowl with police investigators in police accommodation to decant and move to CPS buildings sometimes some distance away from where their work was being generated. Communication, if it took place at all, was in formal letter style or at best over telephone links. Inevitably with much less face-to-face contact problems which might formerly have been sorted out amicably became magnified out of all proportion. Worse than that in some circles, the desire to impose on staff the high degree of independence which was supposed to exist in Crown Prosecutors was such that all contact of a social nature with police officers was discouraged for fear that others might fear that the prosecutor was being unduly influenced in his approach to his work, consciously or unconsciously by the police. Whilst the pursuit of the firmly based impression of true independence was an ideal to be cherished it was often achieved at the expense of a good working relationship with police officers who in simple terms felt insulted at the pariah status they were being accorded. In some areas for example, the notion that a Crown Prosecutor should even set foot in a police station was frowned upon.

Further feelings of growing alienation between the two organizations resulted from the 31 Area Structure adopted by CPS. This meant that some of the 43 police force areas based on county districts which had formally had their own prosecuting office based in, or near, their own Police Force Headquarters now had to liaise with the Chief Crown Prosecutor whose offices might be 65 miles away. If that was something of an irritation in 1986 the position became much worse in 1993 when the CPS reorganized itself into 13 larger areas which meant that a Chief Crown Prosecutor's sphere of responsibility might well encompass several police force areas. On my appointment as Chief Crown Prosecutor for the South West Area I became responsible for the prosecution of cases investigated by the Avon and Somerset Police Force, the Devon and Cornwall Police Force and the Dorset Police Force. Albeit that CPS operated through locally based branch offices manned by lawyers, Chief Constables inevitably felt more divorced from those who bore the ultimate responsibility for prosecuting their cases.

What is most significant about the 1985 Act however is the complete lack of control or power Chief Crown Prosecutors had over the Chief Constables with whom they had to deal. It has already been indicated that theoretically the police were only obliged to deliver the CPS file where a criminal charge had been laid. The Chief Crown Prosecutor had no power to insist on seeing a file, for instance, where the police were not minded to proceed for whatever reason, or where perhaps they were minded to issue a caution as opposed to issuing process. Worse however, was the situation in relation to both the acquisition of further evidence and general file quality. In his review of the file presented the prosecutor may have taken the view that the evidence could be considerably strengthened by further evidence being obtained. As a result a request would be made to the police to follow-up that requirement. It would however be no more than a request. If, for whatever reason — based either on resource problems, disagreements as to the need for further evidence, or even sheer cussedness — there was no power on the part of the prosecutor to insist on the evidence being produced. Again, file presentation standards became an early problem for Chief Crown Prosecutors. Prior to 1986 some police forces had been scrupulous in preparing neatly typed files all in a similar format which immeasurably improved the lot of the busy prosecutor in court. Lively debate ensued with police representatives claiming that the responsibility for typing files for presentation in court was part of the prosecution process and not therefore something which the police should be doing. If this sounds somewhat petty, it does reflect difficulties over funding arrangements. With no minimum standards of file presentation initially capable of agreement the trend moved towards that of the lowest common denominator with local Chief Crown Prosecutors having no power over Chief Constables but much responsibility for the outcomes in court.

IV. PROBLEMS

A further difficulty emerged at this stage — which I am not sure was ever totally resolved — again relating to the notion of independence and requests for advice. If, the argument went, the Crown Prosecutor was to be independent of the Police how could he then respond to a request for advice on how an investigation should be mounted because to do so would cross the line to the point at which the prosecutor was seen to be operating in the guise of a policeman? Thus when a colleague was asked to confer with the local police imminently faced with a public order situation which was likely to lead to mass arrests, he declined to do so on the basis that he could not become embroiled in such a matter — it was an operational issue for the police themselves to determine.

Another factor which over the years has bedevilled the relationship between the police and CPS has been the lack of confluence in the aims and objectives of each of the organizations. In 1829 one of the first Commissioners of the Metropolitan Police wrote to:

- "the primary objective of the Police is the prevention of crime; the next that of detection of and punishment of offenders if crime is committed".

Each police force in England and Wales is required each year to produce a policing plan which identifies its priorities for the coming year. In addition, police forces are required to set a number of targets so that over a period a number improvements can be achieved. Some of the targets are targets upon which the police themselves fall, some are targets arbitrarily fixed by the Home Office, the Government Department bearing some responsibility for police issues. Thus in 2000-2001 numerical targets were required to be set by each police authority for:

- domestic burglaries per 1000 households
- robberies per 1000 population
- vehicles crimes per 1000 of the population.

Although no formal requirement was made as to the setting of the target for the detection of these crimes instructions to police authorities encouraged targets to be set. As far as the detection of crime is concerned the Home Office definition of a "detection" runs to six pages. Bizarrely, however, the successful outcome of a prosecution for the offence is no part of the definition. At one level, the fact that the defendant has been charged (sometimes not even that) will suffice to show that a crime has been detected. We seem to have come a long way from Sir Richard Mayne's definition of the objectives of a police force set out as above in 1829. The impact of this, of course, is that there has been no premium for police forces to prepare good quality files for submission to the Crown Prosecution Service. Strange though it may sound, the response of a Chief Constable to the anguished pleas of one of my colleagues to improve the quality of files submitted in terms both of substance and presentation so better to secure a conviction, that "the conviction of charged defendants is not a priority in the policing plan" was thoroughly understandable.

V. SUCCESS IN SPITE OF DIFFICULTIES

If a picture emerges of relationships between police investigators and CPS prosecutors being irredeemably bad that is misleading and subject to many of the changes which have impacted upon the two organizations and others in recent years.

To redress the balance it might be constructive to give some examples of the sort of results which were being achieved regularly in the years following the creation of CPS which marked the ability of investigators and prosecutors to work closely together (though independently of each other) to achieve just outcomes in spite of, rather than perhaps because of wider political concerns.

In 1990 political agitators reacting to the imposition of a Poll Tax in the United Kingdom organized a demonstration in the centre of London which turned into an ugly riot with immense damage to property and injury to individuals. Much of the activity had been filmed, either by national or local broadcasters or by the police themselves. As a result of requests from the police to tender advice a special ad hoc CPS unit was set up, which with police officers analysed the available material identifying perpetrators of crimes and advising the police which of those identified as being involved should be the focus of attention. (At that stage the vast majority of the perpetrators had neither been arrested nor even identified by name). The prosecutors were not only able to guide the police to those most culpable but also to indicate some sort of framework around which potential interviews could be built. The approach undoubtedly assisted in focusing on what had to be done and eliminated much effort which might otherwise have been wasted.

Less dramatic but just a important as far as the locality was concerned was the investigation of a riot which occurred in my own area at that time when after an end of season football match, a totally mindless riot took place which again was the subject of a great deal of media film footage. By adopting similar tactics to those displayed in London similar economies of effort and improved chances of successful convictions were prompted.

More recently, as London has been subjected to May Day riots aimed at centres of commerce the degree of liaison between police officers in devising strategies to deal with those arrested has been a feature and planning meetings now regularly take place in the weeks preceding the 1 May.

In 1992 a paper was published by UNAFEI prepared by my colleague, Anthony Taylor, from Greater Manchester in which reference was made to Operation Gamma; Operation Omega; and Operation China in which the involvement of senior CPS lawyers at crucial points in the investigation of serious crimes is highlighted.

Again, in another area where I was Chief Crown Prosecutor — and to show that it is not always in cases concerning serious public disorder — immediately after an old sailing ship hand foundered with the death of two passengers in the coast of north Cornwall, police officers once more in possession of excellent television footage immediately liaised with the local Crown Prosecutor who was able to advise them on the course of an intensive and far ranging investigation which led ultimately to the conviction of the owner and master of the Maria Assumpta for manslaughter.

Without doubting for a moment the value and the need arguably for prosecutors to become so involved in work at the early stage of an enquiry, I do have one cautionary tale involving the investigation of a somewhat gruesome murder committed in South Wales. Lawyers became engaged in the enquiry at an early stage advising on what powers the police had and how they might execute those powers. At the trial when cross-examined about a course of action he had taken one of the police officers responded to the effect that he had acted on the advice of the prosecutor. In due course the prosecutor concerned found himself in the unfamiliar position of being in the witness box being examined and cross-

examined vigorously on his role in the investigation. That the subsequently convicted defendants were later to have their convictions quashed had nothing to do with this incident though the experience did cause pause for thought about the proper degree to which the division between the responsibility for investigation can be kept apart from the responsibility for independent conduct of the prosecution. Perhaps the only safe stratagem is for those so intimately involved in advising on the investigation to hand over to another team of lawyers at the point of charge? Do we then create a separate career cadre of investigating lawyers and prosecution process lawyers?

VI. SERIOUS FRAUD OFFICE

Of course, in the jurisdiction of England and Wales the principles of separating strictly the responsibility for investigating and prosecuting established in 1986 on the creation of CPS were swiftly jettisoned in relation to serious fraud offences. In 1986 in reviewing the existing arrangements for the prosecution of serious fraud the Roskill Committee recommended the creation of a unified organization properly resourced with statutory powers of investigation to handled the most serious fraud cases (currently '7 million and above). Thus was born in 1988 the Serious Fraud Office (SFO). The office is staffed by lawyers, accountants and others with relevant experience. It works closely with the police from the Metropolitan Police Service and City of London Police Force Fraud Squads based in the SFO's office. Working cooperatively SFO controls investigation and prosecution. Those wishing to know a little more about SFO might usefully refer to Anthony Taylor's same paper from 1992 in which a fuller description of SFO powers is given. In justifying what he thought some might see as an "opportunist violation of (the) fundamental principle" that investigation and prosecution should remain steadfastly apart, my colleague described it as "an essential response to the special problems which serious frauds produce". Is it too much to argue that the complexities of law and crime in this terrorist world in which we currently live are as such that the greater involvement (albeit in a regularised fashion) of lawyers and police officers should be an equally essential response?

VII. MANUAL OF GUIDANCE

There are other developments too which have taken place over the course of the last 10 years which have assisted in enabling police officers and prosecutors to work more effectively. In terms of the preparation of files the anarchic situation which in earlier times had prevailed and which was described earlier led to senior representatives from the CPS and all police forces putting their heads together to prepare guidance on the format for file production which could be adopted by all police forces when submitting files to CPS. That work produced a volume called the Manual of Guidance for Police Officers. It is a volume which is constantly being updated and edited as changes in the law take place.

VIII. JOINT PERFROMANCE MANAGEMENT

It was, however, one thing to lay down nationally expected standards for the format of files, another to ensure that all investigating officers complied with the Manual. Again, the format of the file was one thing; the quality of that which was in those papers was another. In the course of time these issues were the subject of further debate between senior police officers and CPS which led to the introduction of a management tool known as Joint Performance Management(JPM). On the submission of each file CPS recorded whether the file had been received in the correct format; and qualitatively whether there was any essential evidence missing.

Monthly statistics were to be collated and regular meetings convened between local CPS lawyers and managers and local senior police officers to analyse the results and to agree targets for future improvement. When operated correctly the system worked well. It was possible in some areas for example to discern that local police officers did not fully understand the circumstances in which they were obliged to hold identity parades so that training could then be applied. The statistics also provided a useful tool for Her Majesty's Inspectorate of Constabulary to consider when undertaking their annual inspection of a police force.

Sad to note however that the JPM initiative has not been the success it should have been. There are two reasons for this I suggest:

- from a CPS point of view the bureaucratic burden of completing monitoring forms to be submitted to the police made staff antipathetic to the scheme. It created extra work for them. Moreover, it was claimed that even when the procedure was followed up to the letter, no improvements were secured over time.

- from a police perspective, there was some concern that the scheme was one-sided in that it seemed to measure only police performance. There was little in the scheme about CPS performance and in the prevailing atmosphere at this time paranoia reigned. Moreover, when the police noted that CPS was returning only a fraction of forms confidence fell further because it was claimed that the only reports being made were when failures had occurred.

Whether figures were massaged or not is difficult to say with any certainty. The difficulty has been that ultimately few have had confidence in the system and it is no longer the driving force it ought to be. On a more optimistic note steps have in recent times been taken to re-invigorate the system with a greater emphasis on exception reporting and less beauracracy.

IX. NAREY

A further development which threatened to impact on the quality of file submission by the police in the 1990s was the consistent claim — well publicised in the national press — that police officers were expected to complete so much paperwork that it was becoming difficult to get out of the police station to do any investigation. Hardly a day seemed to go by without some claim or other that as many as sixty different forms had to be completed in even a straightforward case. And, of course, it was CPS which was imposing those requirements. The fact that the claims were incorrect and failed to distinguish between those forms which were required under the Manual of Guidance and other forms required to be completed for police internal purposes hardly seemed to matter. As a result steps were taken by the Home Office (the Government Department which has responsibility for police affairs) to create a review of the administrative burdens placed on the police with a view nationally to reducing them. There was considerable pressure being placed on CPS to accept something much less than that which CPS felt was the minimum it required to ensure that proper decisions were being made in respect of defendants in accordance with its statutory duty. In the nature of things compromises were reached, which by and large have preserved the minimum standards CPS requires.

In a separate but allied development attention focussed on the process by which defendants appeared at court. Historically, defendants who were not being held in custody by the police were bailed to appear at a court sitting at least three weeks in advance. This enabled the police theoretically to have a quality file prepared before the date of first appearance. As a result of changes proposed and adopted, the police would bail the defendant to appear at the next available date on which the relevant court sat, which in many cases would be the next day. The day before what have become known as Early First Hearings (EFH's), a CPS lawyer would attend the local police station — note this development — to review the shortened file and to satisfy himself that sufficient information was available safely to deal with the case the following day where a guilty plea was anticipated. Where a not guilty plea was anticipated the case is scheduled in a separate court for an Early Administrative Hearing (EAH) at which it was hoped issues having a direct bearing on the case would be aired in a way that would enable the case to be managed better. It may be claimed that the now regular attendance of prosecutors in police stations has helped to promote closer working between the two organizations.

X. "JOINED-UP JUSTICE"

There has undoubtedly been a sea change in Government thinking on crime and its impact on society which in turn has started to influence the thinking of all involved in the criminal justice system. The government headed by Tony Blair was elected on a manifesto dedicated to "being tough on crime and the causes of crime". Several initiatives have been taken and all of them seem to emphasize that the responsibility for delivering the manifesto commitments does not rest in isolation with any one organization but that the approach much be an holistic one. No longer can organizations look to their own narrow interests but they are expected to work cooperatively to achieve those ends the Government was voted in to achieve. It is a theme which pervades the whole of government thinking but in the criminal justice system it is expressed as imposing "joined-up justice" with the emphasis on "joined-up working". The clear expectation has been that the police, CPS, the Courts and the Probation Service and the Prison Service and indeed any other organizations having an input should work collaboratively to achieve government aims.

XI. GLIDEWELL

One of the first actions which the newly elected Government took in 1997 was to appoint a former Appeal Court Judge (Lord Justice Glidewell) to review the way in which the Crown Prosecution Service operated. After 12 months or so in which the views of all interested parties both within and without the Service were consulted, the Report (reflecting

not only the conclusions of Sir Iain Glidewell but also of a retired Chief Constable and a Senior Manager from Industry) concluded that:

- in the 12 years of its existence the Service had achieved a reputation for independence about which it no longer had to be quite so precious;
- that it had been traditionally under-funded; and
- that serious fault lines had developed between it and the police which were impacting deleteriously on the delivery of justice in the courts.

Specifically, recommendations were made advocating the re-organization of the Service into Areas reflecting the 43 Police Force Areas so that there was a Chief Crown Prosecutor for each area who could negotiate with the one Chief Constable. That recommendation was implemented with effect from 1999. There are now 42 Chief Crown Prosecutors working alongside 43 Chief Constables. (The anomaly is in the London Area, which covers not only the Metropolitan Police Service Area but also the Police Force for the "Square Mile" comprising the City of London Police.)

More fundamentally however, Glidewell recommended that at the point where defendants entered the Criminal Justice System, police officers together with administrators should work together with CPS lawyers in co-located units dedicated to providing a service to a specific Magistrates' Court or Courts in the locality.

Glidewell prophesied that the introduction of such an organization would reduce delays; reduce duplication of effort and material; create a better level of understanding between CPS lawyers and the police; and ultimately lead to efficiencies in the Criminal Justice System. Since 1999 Chief Crown Prosecutors and their Chief Constables have been working together to achieve those ends. Up and down England and Wales co-located criminal justice units have been opening and operating successfully. At seminars which I have attended and chaired involving both Police and CPS representatives, reports have been uniformly received commenting on the fact that not only have the Glidewell aims been achieved but that the notion of working together has immeasurably improved communications and imbued both organizations with a greater respect for, and understanding, of the other. These are still early days yet and it will take some time before a systematic evaluation of the newly created criminal justice units can be made. By way of example, however, one representative working in a unit was telling me that prior to the creation of the criminal justice unit the average number of occasions on which a case was adjourned was something like 2.8. Since the joint-working initiative that figure has fallen to 1.2. Anecdotal though this evidence is, it augers well for the future.

More than that however, Glidewell has created an impetus which is having an impact far wider than co-located CJU's. The Report recommended that the more serious criminal cases and trials which are heard in the Crown Court rather than the Magistrates' Court should be handled in CPS units called Trial Units. There was never any suggestion that police officers should be routinely housed in Trial Units. Experience is fast showing that the complexities of this serious casework militate in favour of having close links with the police and there is a growing trend to have police personnel based in the Trial Units. Thus for example, at the Central Criminal Court (the Old Bailey) in London I have a small area of the CPS premises dedicated to Metropolitan Police service officers who have installed their own computer equipment. These are not junior officers either. The response of the police, CPS personnel and the judiciary sitting of the Old Bailey proves the value of adopting this approach.

XII. CRIMINAL JUSTICE BUSINESS PLANS

Whilst Glidewell was independently examining the workings of the Crown Prosecution Service the notion of "joined-up justice" was furthered by the publication of a Joint Business Plan for the Criminal Justice System presented by the three Ministers who are responsible for the Criminal Justice System Departments. The Lord Chancellor, the Home Secretary and the Attorney General. This was the first occasion on which this had happened; beforehand the individual Ministers had published Annual Business Plans for their own Department alone. In the introduction to that document, the Ministers state:

> *"It is important to ensure that the Courts and other Agencies remain independent in their decision-making in individual cases; but equally it is essential that the departments, agencies and services that comprise the Criminal Justice System coordinate their activities effectively and efficiently in a joined-up way to achieve Criminal Justice System aims and objectives".*

The current Business Plan sets two principal aims:

- To reduce crime and the fear of crime; and
- To dispense justice fairly and efficiently and to provide confidence in the rule of law.

Those over-arching aims are each underpinned by a number of objectives.

The priorities for the Criminal Justice System in the current planning year were agreed as:

- Crime reduction;
- Attrition;
- Reducing delay;
- Victims and Witnesses
- Information Technology;
- Making the Criminal Justice System work; and
- Implementing Criminal Justice System Reforms

Each of the eight objectives which support the aims of the Criminal Justice System reflect one or more of the priorities set. If I pick on one or two however, it will, I hope give a flavour of the way in which the police and the Crown Prosecution Service will be drawn together (and others) to meet the over-arching aims. A new objective that has a direct impact across the criminal justice system as a whole is that which demands that more offenders are brought to justice. The target is to reduce the high level of attrition, the gap between the number of crimes recorded and the number of crimes for which an offender is properly convicted. There are many ways in which that target can be met but fundamentally it will mean that quality files will have to be produced to prosecutors by the police if there is to be any prospect of a successful prosecution. Again, as part of the aim to reduce delays, statutory time limits have been introduced within which defendants must be dealt with at court. This puts a premium on both the police providing papers to a proper standard as quickly as possible and CPS lawyers responding equally quickly.

Perhaps the biggest challenge for the criminal justice system is to meet the objective of providing a better service for victims and witnesses. Though success is likely to be measured against the crude mechanism of a public opinion poll it will not be one organization which has to answer if the results are poor but all organizations and the heads of these organizations will seek to ensure that the service they provide is up to the mark. It will, for example, be important for CPS to liaise expeditiously with the police to allow them to warn witnesses who have to attend court in a convenient manner and equally for the CPS and the courts to treat the witnesses who arrive at court in a considerate manner. All this will help to promote confidence in the Criminal Justice System which is an additional objective.

XIII. WORKING TOGETHER

In 1999 a Report was published by the National Audit Office (NAO) significantly entitled "Criminal Justice — Working Together". The NAO is a body totally independent of government which certifies the accounts of all Government Departments. In addition, the head of the NAO, the Comptroller and Auditor General has a statutory authority to report to Parliament on the economy, efficiency and effectiveness with which Departments and other bodies have used their resources. The Report containing 63 recommendations gave a clear message to criminal justice agencies that they must work together to solve the identified problems of the criminal justice system. In relation to the Police and CPS the Report recommends that police forces and Chief Crown Prosecutors should:

- Refine their data collection to improve the quality of monitoring under the joint performance management initiative;
- Develop monitoring to identify whether there are particular types of cases or procedures which give rise to disappointing performance on the timeliness and quality of file preparation, including the appropriateness of initial charges prepared by the police;

- Take appropriate management action to address the problems identified by the monitoring.

In due course the fact that a Public Accounts Committee made up of Members of Parliament may wish to return to this subject provides a distinct encouragement for Chief Constables and Chief Crown Prosecutors to take up the responsibility placed upon them.

XIV. PERSISTENT YOUNG OFFENDERS

Perhaps the most influential lever in forcing all Criminal Justice Agencies to work cooperatively together, and in particular, the Police Service and CPS, has been the Government initiative to halve the time in which it takes to process persistent young offenders through the courts from arrest to sentence from 142 days to 71 days. The target was set in October 1997 when a persistent young offender was described as:

> *"A persistent young offender is a young person aged 10 to 17 who has been sentenced by any criminal court in the United Kingdom on three or more separate occasions for one or more recordable offences and within three years of the last sentencing occasion is subsequently arrested or has an information laid against them for a further recordable offence".*

This has proved to be a most challenging target which on a national basis has now been achieved though in certain areas, including London, the target has still not been met albeit that the agencies concerned — and there are several — have been forced to liaise closely with each other. As far as the police and CPS have been concerned these cases have become a priority so that initial file quality standards have been paramount together with the need for CPS to communicate quickly with the police where further work has been required, for example, to strengthen the evidence or to ensure witnesses are warned. The overall success of the initiative has led the Government to commit itself to targeting the prosecution of all persistent offenders (no matter what their age). The details of how they are to be targeted has not yet been finalised but once known they will undoubtedly force the police and CPS much closer together in trying to meet the targets set.

XV. SECTION 51 — CRIME AND DISORDER ACT

I mentioned earlier the initiatives aimed at reducing delays (EFH and EAH's) and statutory time limits. A further development aimed at reducing delays was produced by the Crime and Disorder Act 1998. Section 51 of the Act introduces a procedure whose impact has been to ensure that police and CPS lawyers cooperate if the Act is to be at all effective. In those cases where a defendant is charged with an offence which can only be heard in the Crown Court (an indictable offence) the traditional position has been that he must first appear in the lower Magistrates' Court and once all the evidence sufficient to mount a case has been formally presented to the Magistrates' Court he is committed for trial to the Crown Court. This has sometimes taken several weeks and has meant that often police officers have had to expend considerable effort in preparing full files of evidence before committal proceedings take place and the defendant next appears at the Crown Court — again possibly many weeks later — to enter a plea and if necessary to be tried. The new system operates on the basis that once charged with an indictable offence, the defendant appears at the Magistrates' Court as normal but is immediately sent to the Crown Court without any consideration of the evidence at all. Eight days later (28 if not in custody) the defendant appears at the Crown Court for a preliminary hearing before the Judge. At that preliminary hearing the Judge, amongst other things, estimates the complexity of the case and will set a period of not less than six weeks for the preparation of the full prosecution file which must be served on the defendant. It follows that if the time limits are to be met the CPS lawyers and the investigating police officers must be in close contact with each other. From the outset the CPS lawyers will have been provided with an "expedited file" — a file in short form with a summary which may well cover details of evidence available but not yet formally reduced to statement form. From that short form file the CPS lawyer may be able to indicate exactly what his needs are for a successful prosecution to be mounted, giving the investigator at least six weeks to produce evidence that he may well have not considered obtaining himself or obviating the need to obtain evidence as planned which the lawyer considers otiose. This sort of liaison is bound to be informed by discussions before the Judge involving those representing the defendant who may be able to identify the sole issues to be contested in the trial. Often defendants indicate at this first appearance in the Crown Court that they are intending to plead guilty which will mean that a less comprehensive file needs to be prepared.

The introduction of the procedure has undoubtedly enabled CPS lawyers to take a grip of a case at a much earlier stage than has traditionally been the situation and therefore to influence its development and progress.

XVI. EUROJUST

Crime as we know, no longer (if it ever did) confines itself to national borders. The cry often goes up that we are attempting to fight 21st century criminals with 19th century methods. In the European Union efforts to achieve a greater spirit of cooperation in the detection and prosecution of international crime has seen the development of Europol (drawing together the various police authorities operating in the European Union) and more recently and still very much in a developmental role Eurojust with broadly similar aims for those concerned in the prosecutorial and judicial aspects of the European criminal justice system. In very simple terms lawyers from member states are based in other member states with a brief to obviate the rubbing points which have plagued the investigation and prosecution of those responsible for international crime in the past. Thus, Eurojust lawyers have had minimum activities which have involved providing information on that national law, arranging contacts among investigating national bodies, the transfer of information on the stage of proceedings or on judgements, and the exchange of experience and legal advice. The European Commission however sees a wider role for Eurojust. There are moves afoot for it to become involved in individual criminal investigations. It is felt by the Commissioners that Eurojust collectively should be able to contribute actively to the proper coordination of individual cases, in particular where urgent cross-border advice in needed. In exercising the wider responsibility Eurojust would have powers requiring actions to be taken by member states on pain of having to explain publicly why action had not been taken. Thus far in its fledgling existence the CPS has been able to provide lawyers working on secondment in Belgium and Italy who as time passes will become more involved in the investigation rather than merely the prosecutorial process.

XVII. THE AULD REVIEW

Perhaps the most radical development in criminal litigation thinking in many years came about on the appointment in 1999 of a current Lord Justice of Appeal (Lord Justice Auld) to conduct a review of the way in which the criminal courts operate. The terms of reference were to carry out "a review into the practices and procedures of and the rules of evidence applied by the Criminal Courts at every level with a view to ensuring that they develop justice fairly, by streamlining all their processes, increasing their efficiency and strengthening the effectiveness of their relationships with others across the whole of the criminal justice system, and having regard to the interest of all parties including victims and witnesses, thereby promoting public confidence in the rule of law".

Lord Justice Auld's conclusions and wide-ranging recommendations (328) were published in October 2001. If only half of those recommendations were to be followed it would represent a substantial change to the way in which our criminal courts are administered.

Before I consider one of the most fundamental recommendations made in more detail it is as well to reflect on Lord Justice Auld's view that the key to better preparation for and efficient disposal of criminal cases is early identification of the issues. For this to happen he identifies four essentials:

- strong and independent prosecutors;
- efficient and properly paid defence lawyers;
- ready access by defence lawyers to their clients in custody; and
- a modern communication system.

One of his recommendations states that sufficient resources should be provided to ensure that the Crown Prosecution Service can take full and effective control of cases. But the most radical recommendation from the CPS point of view concerns the decision to charge. As I have already made clear traditionally the position in England and Wales has been that the police retain the responsibility for setting the criminal process in motion by deciding whether to charge a potential defendant. Lord Justice Auld has recommended that in future the CPS should determine the charge in all but minor routine offences, or where because of the circumstances, there is a need for a holding charge seeking the advise of the service. In those cases where the police have preferred a holding charge it is recommended that a prosecutor should review and if necessary reformulate the charge at the earliest opportunity.

Setting aside for the moment the practical difficulties or details which might result from this — for example the attendance of a prosecutor at a police station where defendants are charged on a 24 hour basis, this represents a major

shift in thinking welcomed whole-heartedly in CPS circles. The Auld Review is at present subject to a consultation process with all interested parties responding to the recommendations by the end of January 2002.

What has been just as interesting as the recommendation itself has been the response of the police service in the guise of the Association of Chief Police Officers — an organization made up of all the Chief Constables which although operating in a consultative and advisory capacity is effectively the voice of policing in England and Wales. It is not, I think, being too unfair to comment that the response from ACPO was expected to be negative. In reality, the response has been extremely positive to the extent that a number of pilot sites have been identified up and down the country aimed at testing out Lord Justice Auld's recommendation.

From the CPS point of view this is a vitally important development because if the prosecutor is there at the beginning of the process he will have an opportunity of influencing the course of the proceedings thereafter.

XVIII. CONCLUSION

These are exciting and challenging times for Crown Prosecutors. If aspirations are to be met, the two key essentials which need to be grasped are an ability to rise to the challenge of becoming increasingly involved at the charge and even pre-charge stage to an extent which justifies the confidence of police officers and the public as well; and secondly, the need to think cooperatively with the police and all others in the criminal justice system to meet the Government's ideal of a "joined-up criminal justice system".

THE EFFECTIVE ADMINISTRATION OF POLICE AND PROSECUTION IN THE UNITED STATES

*Anthony Didrick Castberg**

I. POLICE

A. The Police Role

The role of the police in the U.S. is popularly known as "to protect and serve," a phrase which adorns the sides of many police cars. While perhaps effective for public relations purposes, this phrase greatly oversimplifies the police role. Scholars have divided the police role into two components: order maintenance and law enforcement.[1] But this, too, is oversimplified. In reality the police play many roles, including those listed above. They are frequently the first agency called for a variety of problems faced by citizens, from lost children to disputes with neighbors over property lines. They have significant responsibilities with respect to traffic control. In short, they interact with the public far more frequently with respect to non-criminal matters than with criminal matters. While much of the actual police function involves service rather than law enforcement, and the average police officer never fires his weapon in the line of duty, the most important function of the police officer in the U.S. is law enforcement. It is through enforcement of the law that criminals are apprehended, evidence is collected, criminals prosecuted, order maintained, and the public served.

B. Control over the Police

Law enforcement in the U.S. is traditionally and historically a local function. The vast majority of cities, towns, and villages in the U.S. have their own law enforcement agencies, most often called a "police department."[2] Rural, or unincorporated,[3] areas are patrolled by sheriffs' departments, while major highways usually come under the jurisdiction of a state highway patrol. All of these agencies are autonomous and are under the control of the jurisdiction they serve. It might be useful to examine Los Angeles County as an example. The county has a population of almost 10 million, making it the most populous county in the U.S.; it has a population larger than all but eight states.[4] Most of the 88 cities in the county have their own police departments. Areas of the county not incorporated as cities fall under the responsibility of the Los Angeles County Sheriff's Department. Approximately 65% of Los Angeles County consists of unincorporated areas, which contain about 12% of the population.[5] Freeways in Los Angeles County are patrolled by the California Highway Patrol, while rural highways may be patrolled both by the Highway Patrol and the Sheriff. To complicate matters even further, some incorporated cities in Los Angeles County contract with the Sheriff for law enforcement protection. And sheriffs in Los Angeles, and much of the rest of the nation, are also responsible for management of county jails and security in courtrooms, among other functions. As we can see, then, even within one county in the U.S. there may be multiple, overlapping police jurisdictions and functions.

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1 James Q. Wilson, VARIETIES OF POLICE BEHAVIOR, Mass: Harvard University Press, 1968.

2 There are many different terms for law enforcement officers in the U.S., but for purposes of simplicity the term "police" will be used here for all law enforcement officers at the state and local level.

3 "Unincorporated" refers to those areas which do not have their own government or city limits, even though they are named and recognized as cities or towns by virtually everybody.

4 www.co.la.ca.us/overview.htm

5 Data from Los Angeles County web site: http://www.co.la.ca.us/.

Neither state governments nor the federal government exercise direct control over local law enforcement agencies, although state law may establish minimum training standards for law enforcement and both state and federal governments may provide subsidies for special programmes. Because state and local law enforcement agencies are autonomous, they are funded primarily by the jurisdiction they protect. Funding of local governmental functions in the U.S. comes primarily from property taxes, resulting in wealthy communities having a great deal more to spend on law enforcement than poor communities. These disparities may be made up to some extent by state subsidies, but there are nevertheless significant differences among agencies in salaries, equipment, and other resources. Regional cooperation, however, is common, so that every law enforcement agency need not need, for example, a sophisticated forensic laboratory but instead would pay nominal fees to have forensic examinations take place at a large agency nearby, at a state agency, or by the FBI. Nevertheless, small law enforcement agencies are at a distinct disadvantage compared to their large counterparts.

C. Diversity and Multiplicity of Law Enforcement Agencies in the U.S.

In 1999 there were 16,661 state and local law enforcement agencies in the U.S., employing almost 700,000 sworn personnel.[6] In addition to these agencies, there are over 1,000 specialized law enforcement agencies in the U.S., such as university police, public school district police, housing authority police, transit police, game wardens, alcoholic beverage control officers, and park police, all of which have limited law enforcement authority.[7]

At the national level there are numerous federal agencies, employing over 74,000 sworn personnel, which enforce federal laws and regulations. These agencies include the Immigration and Naturalization Service, U.S. Marshals Service, Federal Bureau of Prisons, Drug Enforcement Administration, Internal Revenue Service, and the best known, the Federal Bureau of Investigation.[8] In some cases, federal and state criminal law jurisdictions overlap, such as drug trafficking or bank robbery, which are both state and federal crimes, but for the most part federal law enforcement agencies have separate jurisdictions from state and local agencies. Federal offenses constitute a relatively small proportion of all crimes committed in the U.S. – fewer than 1% of all arrests are for federal crimes.

The size of local law enforcement agencies in the U.S. varies considerably, ranging from 2,245 agencies with only one sworn officer, to New York City, with almost 37,000 sworn officers.[9] Given the great range in size of agencies, it is natural that the organizational structures of the agencies vary, although most use the military model. In every police department at the local level in the U.S., however, the primary operational function is motor patrol, almost exclusively in marked vehicles. Nationally, approximately 70% of sworn personnel are assigned to uniformed patrol, while about 16% are assigned to investigation (detectives).[10]

D. Selection and Training of Law Enforcement Personnel

Only about 1% of police and sheriffs' departments require a 4-year college degree, and less that 10% require a 2-year degree for initial employment, although some agencies offer incentive pay for those with degrees. It is also becoming more common for police agencies to require a degree for promotion to higher ranks. Federal law enforcement agencies require a minimum of a bachelor's degree, with some exceptions, and pay is accordingly higher than in most local agencies. Local police departments in the U.S. require an average of 1,100 hours of training, while sheriffs averaged 900. Minimum training standards are established by the state and generally referred to as POST (Peace Officer Standards and Training), but individual law enforcement agencies may exceed the minimum requirements. Training takes place in classroom settings and after graduation from the police academy, in the field by a field training officer (FTO).

While there may be a considerable amount of time involved in training new law enforcement officers, the time devoted to their various responsibilities varies greatly. Of the 576 hours required by the Texas Commission on Law Enforcement, for example, only 45 are devoted to criminal investigation, including protection and search of the crime scene, interviewing techniques, and courtroom demeanor and testimony. Another 40 hours are devoted to arrest, search, and seizure, and only 8 hours to professionalism and ethics.[11] Texas standards are typical. The new police officer in the U.S., then, is not well-versed in either professional ethics or in preparing a case for prosecution.

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[6] Bureau of Justice Statistics (BJS), LOCAL POLICE DEPARTMENTS, 1999. *May 2001*, p. 1. "Sworn personnel" refers to officers with the power of arrest.

[7] Ibid., p. 12.

[8] BJS, FEDERAL LAW ENFORCEMENT OFFICERS, 1996. January 1998, pp 1-2.

[9] A sworn officer is authorized by law to make arrests.

[10] *Census*, op. cit., p. 6.

[11] Texas Commission on Law Enforcement, via WWW: http://www.tcleose.state.tx.us/BPOC.htm.

It is normally the responsibility of the detective to prepare a case for prosecution, so the success or failure of a case often depends upon detectives. Detectives, however, are often dependent upon the patrol officer for initial information from a crime scene, including statements of witnesses and suspects, collection of physical evidence, and crime scene protection. Mistakes made by the patrol officer may not be subject to correction - failure to adequately warn a suspect of his or her rights (the *Miranda* warning) is rarely subject to correction, and any admissions or confessions made without such warnings may be declared inadmissible. Detectives generally learn their skills through a combination of experience and formal training, but the amount of experience and formal training depends to a large extent upon the agency. Small agencies are seriously handicapped in this regard; in 1999, 6,285 agencies served populations of fewer than 2,500 persons and employed an average of only 3 sworn personnel per department.[12] Officers in small departments such as these must perform all law enforcement tasks, usually without formal training for the more advanced tasks such as crime scene investigation.

The nature of the law enforcement profession requires frequent in-service training. Technological advances and new appellate court opinions make this training necessary, but the amount of in-service training given to law enforcement personnel varies widely from agency to agency. Smaller agencies lack both the funds and the personnel to provide such training, while scheduling is a problem for all agencies – training takes time, and it may be difficult to find replacements for those who must be away from their regular assignment to receive such training. Of particular concern is the problem of keeping law enforcement personnel abreast of developments in procedural law. In common law systems, such as the U.S., appellate court decisions mandate how police may act in specific situations. Most of us are familiar with the *Miranda* warning that must be read to suspects who are in custody and are to be interrogated. The case of *Miranda* v. Arizona[13] changed police procedure in every law enforcement agency in the U.S.. A typical state or local law enforcement agency will be affected by opinions handed down by state intermediate and supreme courts, federal circuit courts of appeal, and the U.S. Supreme Court, necessitating constant reviewing of decisions coming from these courts. Few law enforcement agencies have legally trained personnel solely devoted to this task, but instead rely on local prosecutors, the state attorney general's office, or legal reference services for periodic updates on procedural law But the process is not always efficient nor is the manner in which this information is passed to officers consistent. Failure to abide by rules established in these decisions may result in cases being dismissed and convictions voided, so the stakes are high.

Pay for police officers is usually related to size of department, with larger departments paying more than smaller departments, although there are many exceptions to this. As noted above, financing of law enforcement agencies depends to a significant extent upon the wealth of the community served by that agency.[14] Annual police entry level salaries may be as low as $21,000 or as high as $40,000. Disparities such as these cause morale problems in departments with low pay and make it difficult to recruit qualified personnel. These problems, combined with inadequate training, leadership, and employment standards are prime contributors to police corruption.[15]

E. Politics and the Police

Police chiefs in the U.S. are usually appointed, either by a commission, by a city or town council, or by a local chief executive, while sheriffs are usually elected by the citizens of the county they serve. Sheriffs usually have a set term of office, such as four years, while police chiefs usually serve at the pleasure of the appointing body or official. In both cases, of course, politics plays a major role. In smaller agencies, the chief is usually selected from within the department itself, while larger agencies normally conduct a national search. The job of police chief or sheriff is a difficult one, requiring the person holding the position to not only be the top law enforcement officer in the agency but also part politician, part administrator, and focal point for problems in the department and in the community as well. When crime rates rise, criticism is directed at law enforcement and ends up on the desk of the chief or sheriff. The turnover rate of police chiefs in large departments in the U.S. tends to be high.

The political aspects of police administration frequently lead to problems in effective law enforcement. Historically, in cities such as New York, Philadelphia, and Chicago, appointments to law enforcement positions from patrolman to chief, as well as promotions, were based on political patronage. Loyalty and allegiance to a politician were far more important factors than honesty and integrity, and working for a politician's reelection campaign brought with it a virtual

[12] LOCAL POLICE DEPARTMENTS 1999, op.cit., p. 3.

[13] 384 U.S. 439 (1966).

[14] See Joseph E. Pascarella, *Municipal Police Salaries as a Function of Community Home Values, Household Incomes, and Physical Housing Characteristics*, in JSTICE RESEARCH AND POLICY, Vol .1 (Fall 1999) http://www.jrsainfo.org/pubs/journal/past_issues/Fall1999/police_salaries.htm.

[15] Frank L. Perry, *Repairing Broken Windows: Preventing Police Corruption with Our Ranks*, FBI LAW ENFORCEMENT BULLETIN, Vol. 70 (February 2001), pp. 23 - 26.

guarantee of a job, often on the police department. While this practice has diminished considerably in most large agencies, it is still found in smaller departments across the country, where hiring and promotion are based on whom you know, not what you know. When a law enforcement officer is beholden to a politician or other community influential for his or her position, it is highly unlikely that the administration of justice can be administered impartially. Police enforcement can be and is affected significantly by political concerns.

F. Corruption and Deviance in Law Enforcement

One must first define "corruption" in the law enforcement context before discussing the concept. For purposes of this paper, "police corruption" refers to police officers accepting money or goods in return for engaging in activities they are obliged to do under terms of their employment, for activities that are prohibited under the terms of their employment, or for improper exercise of legitimate discretion.[16] It does not include acts that are criminal, such as burglary or theft, nor does it include deviant acts performed within the law enforcement environment.

Corruption in law enforcement was widespread during certain periods in U.S. history, especially among larger agencies in the East and Midwest. Such corruption reached it peak during prohibition, that period in U.S. history extending from 1919 through 1933, during which time the manufacture, sale, importation, and transportation of intoxicating liquors was illegal.[17] The same period saw the rise of organized crime in the U.S., another factor which increased corruption in law enforcement. Many police officers were paid to ignore violations of the laws relating to alcohol, and some even provided armed escorts for those transporting illegal alcohol.

As a result of public outrage and resulting reform movements, however, law enforcement corruption in recent years has been significantly reduced. In 1997, for example, the FBI, often in cooperation with local agencies, opened 190 cases of law enforcement corruption, 48% of which were drug-related. During the same year, 150 law enforcement officers were convicted of corruption-related offenses, 53% of which involved drugs.[18] It is very likely that there were more cases than these figures indicate, as some could have been classified as theft or perjury, and many cases of corruption were dealt with at the local level rather than by the FBI. It is safe to say, however, that law enforcement corruption in the U.S., while not widespread, is still of great concern to the public. It should be noted, however, that one form of corruption – "gratuities" – is still widespread among law enforcement personnel. These gratuities include free or discounted food in restaurants, discount prices for cleaning uniforms, and other discounts given by local businesses to law enforcement personnel. While most, if not all, law enforcement agencies have rules prohibiting the acceptance of gratuities, few officers are disciplined for violation of the rules, primarily because there are very few complaints from the public. Debate continues on whether acceptance of gratuities constitutes corruption.

Police deviance and criminal activity are difficult to measure, as no national or state records are kept of such activity specifically involving police officers. When a police officer commits a crime which is not job-related, such as armed robbery, theft, or murder, it is newsworthy because of the occupation of the perpetrator. And sentences may be harsher for police officers than for civilians charged with the same offense, as most judges feel that police officers are held to a higher standard of conduct than the average citizen. But judging by news accounts, such offenses are rare, even taking into consideration such widespread corruption and criminal activity as took place in the gang unit of the Los Angeles Police Department several years ago. Crimes committed by police officers that are job-related, such as assaulting another officer, stealing money from funds to pay informants, or assaulting suspects in custody, are punished internally and, usually, externally as well. Again, however, statistics on such offenses are difficult, if not impossible, to obtain, as internal discipline is usually protected administratively from being released to the media, while prosecutions of officers who committed job-related offenses are not listed separately from such offenses committed by civilians.

Police deviance, or occupational deviance,[19] may be defined as acts that contravene agency rules and regulations. They may be divided into two sub-categories: simple rule violations and violations involving due process. The first category includes such violations as rude behavior toward citizens, improper wearing of the uniform, use of a police vehicle for personal purposes, while the second category involves such due process violations as planting evidence, writing false reports, or perjury. While some of these activities may constitute criminal behavior, they are not included in that category because they are not for self-gain but rather are motivated by a misguided effort to enforce the law. This

[16] This is a variation of the definition used by M.McMullen, "A Theory of Corruption," SOCIOLOGICAL REVIEW, vol. 9 (1961), pp. 181-201.

[17] Amendment XVIII to the U.S. Constitution.

[18] FBI figures.

[19] See Victor E.Kappeler, et.al., FORCES OF DEVIANCE: UNDERSTANDING THE DARK SIDE OF POLICING. Prospect Heights, Il: Waveland Press, 1998, p. 22.

form of deviance is particularly troubling because it may result in the conviction of innocent citizens. And while there is no collected source of statistics on this form of deviance, newspaper report would lead one to believe that it is not rare.[20]

A recent example of planting or falsifying evidence illustrates this type of deviance. At least 18 narcotics cases filed by the Dallas (Texas) police department were dismissed in January 2002 because what police alleged to be cocaine, based on field tests, turned out to be powdered sheetrock, a substance used in wallboards which, when ground up, resembles powdered cocaine. Almost 700 pounds (320 kilos) of crushed sheetrock was involved, and all of those arrested were Mexican immigrants. Most of the arrests were made by two narcotics officers, using an informant who was paid over $200,000 during the past two years for information provided in at least 70 cases. The two officers were suspended pending an investigation into the cases.[21]

Most law enforcement agencies in the U.S. have individuals or a unit responsible for internal discipline. Such units are commonly called "internal affairs," and have the responsibility of investigating violations of policy and law by police officers. Virtually all U.S. law enforcement agencies have written "general orders," which describe the structure and function of the organization as well as specific policies on administrative and operational matters. Operational policies frequently deal with such issues as vehicle pursuits, use of force, handling of domestic abuse cases and juveniles, and patrol procedures. Violations of these policies are dealt with by internal affairs, even if the conduct in question may be of a criminal nature, as administrative sanctions may be imposed regardless of the outcome of a criminal investigation. It is quite possible to be fired for violation of department regulations even though there is no criminal liability. Officers who are questioned by internal affairs have no right to silence – they must answer questions – but their answers cannot be used against them in criminal prosecutions.[22] Some larger cities utilize civilian review commissions or boards to perform the same function, as many citizens do not trust law enforcement agencies to police themselves, but such boards or commissions are not substitutes for internal procedures.

An especially difficult problem in law enforcement is obtaining evidence from one officer against another. There is a well-known "code of silence" in law enforcement, much like that found in prisons, which is part of the police culture, and which requires that law enforcement officers always back each other and never report deviant acts to supervisors. This code is based on trust, which is essential to survival in the law enforcement environment. Inasmuch as most officers do not work with partners, at least in all but very large agencies, one's safety is often a function of the closest officer to the potentially dangerous situation. When an officer finds himself or herself in a situation which might be dangerous – making a traffic stop on a stolen car full of young males in a poor area of town, for example – the officer will normally call for a back-up (the assistance of the closest officer to the scene). The speed with which the second officer responds may often make the difference between life and death for the first officer. Thus, trust is essential. It is not unheard of for officers who violate the code of silence, or who do not accept the law enforcement culture, to call for backup and receive no response. In other words, their fellow officers will not protect them because they have violated the informal code of ethics of that particular agency.

What is frequently lacking in law enforcement agencies with problems of corruption or widespread violations of rules and regulations is leadership. Law enforcement agencies in the U.S. are structured much like the military, and use many of the same terms for ranks (i.e., sergeant, lieutenant, captain, etc.). Under such an organizational structure, there is theoretically a clear chain of command, with each level of leadership responsible for those at the next lower level and reporting to the next higher level. Sergeants, therefore, are responsible for patrolmen, and sergeants report to lieutenants, who report to captains, with the pattern repeating itself all the way to the top, which is usually the police chief, police commission, or sheriff. The major difference between law enforcement agencies and the military, however, is that while the military works in groups, such as platoons, squadrons, and companies, police usually work alone (even though they may be assigned to a platoon, squad, or company for organizational purposes). This means that police administrators in leadership positions rarely observe or work directly with those under them. The first police officer on the scene of a crime is almost always the patrolman, who may have to make important decisions without any supervision. Cases can be won or lost and lives saved or lost based on these decisions.

The lack of immediate supervision makes it difficult for leaders to effectively evaluate and guide their subordinates. Police officers are usually evaluated by their written reports and the number of traffic citations issued rather than on how they interact with the public, how they deal with suspects, and how they gather evidence. Sergeants are considered

[20] Kappeler, supra., p. 24.

[21] Paul Duggan, "'Sheetrock Scandal' hits Dallas Police," THE WASHINGTON POST, Friday, January 18, 2002, p. A12.

[22] See *Garrity v. New Jersey*, 385 U.S. 493 (1967).

effective if their officers make enough arrests, issue enough citations, and generally stay out of trouble. And so the pattern goes throughout the ranks. Leadership skills are often learned on the job, and while this may work in some departments it does not work in all. Leadership must also be taught, and leaders must be held accountable for their subordinates. Promotion to leadership positions must be based on more than passing an examination, the primary criterion in most agencies, including some objective measures of leadership and effectiveness.

G. How to Fix the Problems

The most obvious way to deal with many of the problems affecting law enforcement in the U.S. is to consolidate agencies under some form of centralized control, probably at the state level. It is virtually impossible to bring about federal control of law enforcement due to the principle of federalism, which is deeply engrained in both the Constitution of the U.S. as well as history and tradition. But it may be possible to establish state control over hiring, training, pay, and major policies. This would eliminate the disparities between and among departments that seriously hamper effective law enforcement and breed corruption. A state commission would set hiring, training, and promotion standards, as well as being responsible for hiring regional law enforcement commanders. Existing facilities would very likely remain, and all existing personnel would be transitioned into the new agency.

Minimum standards for employment of police officers should be raised. While it is not clear that college-educated police officers are more effective than those without such an education, it is clear that the four years of college required for a bachelor's degree would produce a more mature person with a broader perspective. In 1967 the President's Commission on Law Enforcement and the Administration of Justice recommended that "police departments should take immediate steps to establish a minimum requirement of a baccalaureate degree for all supervisory and executive positions."[23] To date, as we have seen above, very few law enforcement agencies have established that standard.

It would be politically impossible to establish federal minimum standards for training of law enforcement officers, but the federal government could make accreditation a requirement for federal funds, and license agencies who accredit, much as is now the case with respect to accreditation of institutions of higher education. Accreditation would include minimum hiring and training standards and establish deadlines for compliance as well as frequent monitoring. Those agencies who did not apply for accreditation or who applied but did not meet the standards would not be eligible for federal funds. While police departments, as noted above, are primarily funded by the city, county, or state, there are many federal grants available as well, allowing agencies to purchase equipment or hire personnel they would not ordinarily be able to afford. At present , the primary accrediting agency is CALEA (Commission on Accreditation for Law Enforcement Agency), which is not licensed by the federal government but is an independent organization. As of early 2001, CALEA had accredited about 600 law enforcement agencies.[24] CALEA requirements list 439 standards, some of which are mandatory and some of which are "other than mandatory." In order to be accredited, the agency must meet all mandatory standards and 80% of the "other than mandatory" standards. Standards vary by size of department.[25] The fact that fewer than 4% of law enforcement agencies in the U.S. are accredited by CALEA is an indication that there is little incentive at present to achieve this status. Making federal funding dependent upon accreditation may provide the needed incentive for many agencies, but those most in need of upgrading – small departments and agencies in poor communities – rarely apply for federal grants and are therefore not likely to be affected.

Accreditation and federal funding will not solve all of the problems of policing, but they are a start. There are many political and economic obstacles to overcome. The history and traditions of law enforcement in the U.S. point to political solutions to most of the problems in law, which places the burden for solving problems on the electorate, which must demand improvement in law enforcement, hold politicians accountable, and be willing to pay additional taxes to bring about that improvement. At the same time, law enforcement must be removed from politics. Heads of law enforcement agencies should not be elected, nor should they be appointed by political figures or bodies, but instead by non-partisan commissions whose members are representative of the community served by the law enforcement agency. The commissions should make use of professional organizations to recruit new police chiefs and sheriffs, and focus on management skills rather than law enforcement experience. What is being said here is not new. A great deal has been

[23] President's Commission on Law Enforcement and the Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY. Washington, D.C., 1967, p. 110.

[24] "Police Professionalism and Accreditation," http://www.faculty.ncwc.edu/toconnor/417/417lect08.htm (North Carolina Wesleyan College).

[25] CALEA standards – http://www.calea.org/newweb/accreditation%20Info/standards.htm

written about reform in law enforcement but it seemingly has had little effect. Only a major restructuring of law enforcement can bring about the needed changes, and that will come only when the public wants it badly enough.

II. PROSECUTION

A. The Prosecutorial Function

The function of the prosecutor is essentially the same throughout the modern world: to represent the people by prosecuting those who have committed crimes. In the U.S., prosecutors are either elected or appointed. As elected or appointed officials, chief prosecutors play an important role in the community, a role that often extends beyond their primary function of prosecution. They are often spokespersons on issues involving crime, lobbyists before legislatures on a variety of matters involving criminal justice, and administrators who make important policy decisions with very little, if any, oversight. Prosecutorial decision-making as a whole is generally of low visibility; only crimes which receive a great deal of publicity are of interest to the general public. There is, therefore, no practical way for the public to have knowledge of or to evaluate a prosecutor's decision-making.

B. Becoming a Prosecutor

Prior to graduation from a U.S. law school one must look for work. The best students at the best schools will have been recruited by major firms before graduation, but the rest will have to actively seek employment. If one wants to become a prosecutor one will have to apply for that position. It should be noted that in the U.S., criminal law is one of the least respected areas in the legal profession; most law school graduates aspire to working in large, prestigious private firms, where starting salaries can be in the $70,000 to $80,000 range. New prosecutors in the U.S. rarely start at salaries over $35,000 per year. Therefore, the top graduates of better law schools rarely end up in prosecutor's offices.

In the U.S., the appointment of a new deputy or assistant prosecutor will depend on local requirements. The vast majority of prosecutors in the U.S., over 71,000, work for counties. They are almost always appointed by the head or chief prosecutor, although some qualify through a civil service system. Over 95% of head prosecutors are elected. There were 2,343 separate prosecutors' offices in the U.S. in 1996, most of them serving only one county.[26]

In the U.S., newly graduated attorneys rarely join a prosecutor's office with the intention of making prosecution a career but instead use the job as a stepping stone into private practice or the judiciary. In 1996, the median length of service for chief prosecutors was 6 years, with 25% having served 12 years or longer; data for assistant or deputy prosecutors are not available.[27] Almost all training of prosecutors in the U.S. is done on-the-job. One is not prepared to practice in any area of law upon graduation from a law school, primarily because law schools tend to focus more on theory than on practice, and because law schools generally do not teach the law of the states in which they are located, since their students will have come from many different states. There is usually some form of in-service training for prosecutors, and may be local or regional seminars for prosecutors of various levels or experience, but it is not always possible to send prosecutors to training due to budget or operational constraints. So prosecutors in the U.S. learn their profession primarily by working with more experienced prosecutors, and by starting with relatively simple cases under close supervision. Large offices will normally have a formal training programme, while smaller offices will not.

C. Working as a Prosecutor

As might be expected, prosecutors in small offices must be generalists, handling all kinds of criminal cases, whereas prosecutors in large offices may specialize in specific types of crimes, such as sexual assault or homicide. While it is generally true that smaller jurisdictions do not have as much crime or as complicated cases as larger jurisdictions, this is not always true, as may be seen in the widely-publicized 1996 murder of JonBonet Ramsey, which occurred in Boulder, Colorado, a town with a low crime rate and few homicides. It has been widely alleged that neither the police nor the prosecutors had sufficient experience to handle such a case. In situations such as this, an agency will usually request assistance in both the investigative and prosecutorial phases of a case, either from the county within which the city is located, or from the state. To do so, however, is to admit that one's own jurisdiction cannot deal with such cases. This, of course, has political implications.

It is possible for a prosecutors office to hire a private attorney with prosecutorial experience to take the lead, or to assist, in an important case, but this is expensive and done infrequently. Offices need a core of experienced prosecutors, which means that they must carefully recruit prosecutors and provide incentives for them to stay. This may be difficult

[26] All figures from Bureau of Justice Statistics, PROSECUTORS IN STATE COURTS, 1996. Document NCJ 170092, July 1998.

[27] Ibid., p. 3.

or impossible for some jurisdictions due to budget constraints, resulting in a rather steady turnover of new prosecutors. Large jurisdictions rarely have such problems, as they have depth of experience and competitive pay. Effectiveness, therefore, may be strongly related to size.

D. The Decision to Charge

The decision to charge an individual is one of the most important decisions made by a prosecutor in any country. In the U.S., the process is often complicated. Prosecutors must make an initial determination regarding sufficiency of evidence and desirability of prosecution. They are not necessarily the same, as sufficiency of evidence alone does not always result in prosecution. But assuming that mitigating factors are either weak or absent, and a decision is made to prosecute, the prosecutor in the U.S. must then decide what the charges will be.

Most crimes in the U.S. have degrees of seriousness. In Hawaii, for example, there five degrees of sexual assault, and under the general label of criminal homicide there are two degrees of murder, three degrees of negligent homicide, and the offense of manslaughter. The elements of each degree of a crime differ. And where the same act establishes an element of more than one offense, the defendant may be prosecuted for each offense.[28] A defendant may also convicted of a lesser included offense, so if a prosecutor charges a defendant with second degree sexual assault, the jury may find the person guilty of third, fourth, of fifth degree sexual assault instead. Another factor complicating the charging decision is plea bargaining, which will be discussed in more detail below. Prosecutors may charge defendants with as many offenses arising out of the same act as possible, or may charge a person with a more serious degree of an offense than is justified by the evidence, for plea bargaining purposes. Overcharging, however, carries with it the risk that the charge will not survive the grand jury or preliminary hearing processes.

E. The Grand Jury

About one-half of the states, and the federal government, require indictment by a grand jury, whereas other states allow a person to be charged through a preliminary hearing. Some states use both the grand jury and the preliminary hearing. The grand jury had its origins in medieval England, where it was developed to counter the almost absolute power of the King. Then and now, it consists of citizens who are charged with examining the evidence against an accused to determine whether such evidence is sufficient for the case to go to trial. Most grand juries in the U.S. have an investigative function as well. Investigative grand juries have the power to subpoena witnesses, and are frequently used to investigate suspected cases of official corruption. Here, however, we will focus on the power of the grand jury to indict. Grand jury composition varies from state to state and from the states to the federal government, but in general a gradn jury is composed of from 16 to 23 citizens who have the same qualifications as those selected for trial juries: U.S. citizenship, adult, reside in the jurisdiction, have no felony convictions, read and speak English, etc. As is the case for trial juries, grand jurors must have no conflicts of interest that would interfere with their ability to be impartial, but grand juries are not subject to the same rigorous requirements regarding being a cross-section of the community as apply to trial juries.

Evidence is presented to the grand jury by the prosecutor. The evidence may be in form of physical evidence (i.e., the murder weapon) or testimony by witnesses, but grand jury proceedings are all one-sided and non-adversarial, in that neither attorneys for the accused nor for witnesses may appear before the grand jury. The proceedings are secret, and not open to the press or the public. In some jurisdictions, grand jurors may question witnesses directly, while in others they must ask questions through the prosecutor. After all of the evidence has been presented, the grand jury is given an indictment form by the prosecutor. It may return a "true bill" of indictment, or it may refuse to do so (no-bill). As should be obvious from the composition of the grand jury and its domination by the prosecutor, the vast majority of cases presented result in indictments. Once the indictment is handed down by the grand jury, the prosecutor is free to proceed with the case.

F. The Preliminary Hearing

The preliminary hearing is similar to a trial, in that it is adversarial in nature and is open to the press and the public. Evidence is presented by the prosecution, and may be challenged by the defense. The goal of the prosecution is to convince the judge (preliminary hearings do not involve juries) that there is sufficient evidence to bind the case over for trial. Courts generally adhere to the standard of "probable cause" in determining whether the evidence is sufficient: probable cause that a crime was committed and that the accused committed it. If the case is bound over for trial, the prosecutor prepares an "information," which is roughly equivalent to an indictment. Preliminary hearings are not as formal as trials, especially as regards evidence. Since there is no right to a preliminary hearing under the U.S. Constitution, the rules of evidence are relaxed in many states, allowing evidence to be presented that would not be admissible at trial. In those

[28] Hawaii Revised Statutes (HRS) §701-109.

states where the state constitution provides such a right, however, the rules of evidence tend to be more strictly interpreted. Regardless of whether the preliminary hearing itself is a right or not, there is a right to counsel at a preliminary hearing.

The preliminary hearing not only determines whether there is sufficient evidence for a case to go to trial, but also allows the defense access to the prosecution's evidence before the official discovery process takes place. This can be very beneficial for the defendant, as it allows the defense attorney to hear and to cross-examine, and possibly impeach, prosecution witnesses. Finally, the preliminary hearing may act to narrow the issues to be dealt with at trial, or to reduce the likelihood of a trial taking place by facilitating plea bargaining, which will be discussed below. The function of the grand jury and/or preliminary hearing, then, is to make sure that prosecutors have sufficient evidence to bring a case to trial. It allows judicial oversight in the case of the preliminary hearing and citizen oversight in the case of the grand jury, and by so doing is supposed to prevent abuse of authority by prosecutors. These additional steps that are required of U.S. prosecutors may also have the effect of lengthening the time period between arrest and trial, although the constitutional guarantee of a speedy trial is vigorously applied.

G. Checks on Prosecutorial Discretion

In the U.S. the grand jury and/or preliminary hearing does exercise some oversight on the charging decision. The fact that some decisions to charge are not agreed to by a grand jury, or judge in a preliminary hearing, means that prosecutors do consider such oversight when making a charging decision, although political concerns may on occasion outweigh legal concerns. And while there are safeguards against overcharging or charging with insufficient evidence, there are virtually no procedural safeguards against a failure to charge. Nobody, including a judge, may require a prosecutor to charge a defendant. While there is recourse for citizens who are adversely affected by a decision not to charge in some countries, the only recourse a citizen in the U.S. has is political – bringing political pressure to bear on the prosecutor. This is rarely effective. Even though there is sufficient evidence to charge and to convict, there may be reasons that the prosecutor feels that prosecution is not appropriate, and the law and tradition leave that decision solely to the prosecutor.

There are important constitutional issues involved in decisions to charge as well. Most crimes have a statute of limitations that requires charges to be brought within a specified period of time after commission of the offense. Charging a person before there is sufficient evidence to convict, however, may result in losing the case, which precludes further prosecution of that defendant for that offense.[29] In the case of murder, which has no statute of limitations, prosecution may take place years after the commission of the offense, often helped by technology not available at the time the crime was committed. In most cases, however, charges either take place within months after the commission of the offense or not at all.

H. Plea Bargaining

Very few defendants in the U.S. initially plead guilty to felony offenses. Defense attorneys will virtually always tell defendants to plead not guilty even if there is overwhelming evidence against them. The burden, of course, is on the government to prove a defendant guilty beyond a reasonable doubt, and defense attorneys try to use that burden to their advantage. More importantly, however, both defense counsel and prosecutors try to avoid trials if possible. Trials are time-consuming and therefore expensive, and juries are often unpredictable. Judges, too, dislike trials for the same reasons. In the U.S., only about 10% of criminal cases go to trial, so trials are the exception rather than the rule.

Trials are avoided through plea bargaining. There are essentially two types of bargaining: charge bargaining and sentence bargaining. In charge bargaining, the prosecutor will drop a charge or charges, or reduce charges, in return for a guilty plea. Since most defendants are charged with more than one offense, there is usually room for negotiation. The bargain might be the dropping of the most serious count of a multiple count indictment, or dropping one offense arising out of the same act.. Should this be mutually agreed to, the defense attorney will file a motion to withdraw the not guilty plea and the defendant will go before the judge to plead guilty to the agreed upon charges. The judge will make sure that the defendant understands the implication of the change of plea before accepting it.

Sentence bargaining involves a guilty plea in return for a reduced sentence, or the prosecutor's recommendation for a reduced sentence. In some jurisdictions judges are part of the plea bargaining process, and can guarantee a specific sentence in return for a guilty plea, while in others they are not and the prosecutor cannot promise the judge will accept the sentence recommendation (although they almost always do in such situations). The process of plea bargaining varies from jurisdiction to jurisdiction, but plea bargaining itself is the norm in the U.S. criminal justice system.

[29] Subsequent prosecution is barred by the double jeopardy provisions of the Fifth Amendment to the U.S. Constitution.

The problems associated with plea bargaining are obvious. Because there is no trial, the facts of a case may not become public. One of the most well-known examples of this was the plea bargain made by James Earl Ray, the killer of Martin Luther King, Jr. Because there was no opportunity for the public to hear evidence in the case, rumors have persisted about conspiracies at high levels of government. From the perspective of the Constitution and the defendant, a serious problem with plea bargaining is that there is substantial pressure to plead guilty, even in cases where a trial might result in an acquittal. With a plea bargain the outcome is usually certain, so there is a great deal of temptation to engage in that practice. If one goes to trial, one may be exonerated or one may face a more serious penalty than would be the case in a plea bargain. A defendant must waive the right to a public trial by a jury – basic constitutional guarantees – because that defendant's attorney feels that the plea bargain is the best outcome. Plea bargaining might be considered a necessary evil. Necessary because the system is based on it – the criminal justice system could not guarantee all defendants a speedy trial. It is evil for the reasons stated above.

1. How to Solve the Problems

Just as is the case with law enforcement, there is no standard for hiring or training of prosecutors. For the same reasons discussed above with respect to law enforcement, however, it is highly unlikely that any national standards could be established for prosecutors. In theory, the democratic process maintains standards. Head prosecutors who are ineffective or who have ineffective subordinates can be voted out of office or not reappointed. In practice, however, prosecutorial decision-making is of such low visibility that the general public has very little knowledge of what takes place in the prosecutor's office. In addition, prosecutorial statistics with regard to cases won may be misleading if most cases are plea bargained for greatly reduced charges or sentences and there is no accounting of how many defendants are not charged due to lack of evidence that might well be available if enough effort is expended.

Political influence over prosecution is a problem of unknown dimensions. Because most prosecutors must run for office every 4 years, money must be expended for campaigns. For those who are appointed rather than elected, political alliances are important. In both cases, incumbent head prosecutors and prospective head prosecutors are indebted to those with money or influence or both. How likely is it that a prosecutor will file charges against a key campaign contributor? Or if filing of charges cannot be avoided, how likely is it that the maximum number and severity of charges will be made?

How much influence will a major campaign contributor have on decisions to file charges against a relative or a friend? This is not to suggest that many prosecutors are corrupt but simply that as long as becoming a head prosecutor is a political process, there will be political influence on prosecutorial decision-making. So one obvious to the question of how to fix the problems would be to eliminate politics from prosecution.

Politics cannot be eliminated altogether from prosecution because the prosecutor represents the public and the prosecutor must depend upon the political process for funding, but running for office requires that money be raised, which in turn makes a prosecutor beholden to those who financed his or her campaign. A prosecutor should not be beholden to anyone. There is no reason that prosecutor could not be appointed in the same manner suggested for police chiefs – by non-partisan commission of qualified citizens.

III. POLICE-PROSECUTOR RELATIONS

A. Mutual Dependence

The relationship between law enforcement and prosecution is mutually dependent – police are dependent upon the prosecutor to prosecute, and the prosecutor is dependent upon the police for evidence. While it is true that many prosecutors have their own investigators, their primary source of evidence is the police. County prosecutors in the U.S. do not play a significant investigative role, rarely personally engaging in investigation and using their investigators largely to supplement police investigations. This relationship is made difficult by the differences in educational level between police and prosecutors and by the fact that a county prosecutor will work with many different law enforcement agencies; as we have seen above, the Los Angeles County Prosecutor must work with over 80 individual police agencies.

Despite these obstacles, most law enforcement agencies have functional relationships with the prosecutors with whom they work. There is mutual trust and both focus on convicting criminals. Prosecutors often work closely with their law enforcement counterparts from the very beginning of an investigation, offering advice and researching the law to ensure that all evidence will be admissible. If a case comes to trial, prosecutors and officers work together closely with regard to testimony. Prosecutors may not tell officers what to say, but they may and do tell officers how to say what they are going to say. They will also coach them with regard to cross-examination, preparing them for the difficult questions that may be asked by defense attorneys. These working relationships make both police and prosecution operate more efficiently.

Law enforcement knowledge of prosecutorial policies allows and encourages effective law enforcement screening of cases, for example.

B. Problems in the Relationship

One of the major problems facing the administration of justice in the U.S. is perhaps too much trust between police and prosecutors. Prosecutors may not thoroughly review cases forwarded to them by law enforcement agencies because they have developed mutual trust over time, and this may result in wasted effort by prosecutors or even worse, the conviction of the innocent. As of the end of January 2002, 100 convictions in the U.S. had been overturned as a result of DNA testing which proved that the convicted person could not have committed the crime for which they were found guilty. A number of these individuals had been sentenced to death, and many had served decades in prison.

Miscarriages of justice occur for many reasons. Eyewitnesses are notoriously unreliable, yet many defendants are convicted primarily, if not solely, on the basis of such identification.[30] False confessions are also major problems. Some individuals with psychological problems will confess to crimes they had nothing they had to do with, while others will confess as a result of relentless questioning by police. Forensic evidence can be fabricated, such as the sheetrock that was represented as cocaine in Dallas recently. The Dallas case also points to the dangers of relying on informants; such reliance is common in the U.S., but requires police and prosecutors to deal with known criminals who may inform in return for leniency in their own criminal activity. Recent examples of forensic laboratory technicians who falsified evidence, including fingerprints, hair samples, blood types, and paint samples, may indicate a problem that is more widespread than thought. The "Innocence Project" of the Cardozo School of Law of Yeshiva University is well known in the U.S. for addressing these problems, especially those involving DNA. Professors and students from Cardozo have filed appeals on behalf of many individuals who have been wrongly convicted and won reversals of most of those convictions. Their efforts have given rise to similar programmes at other law schools.[31]

C. Resolving the Conflicts in Prosecution

Conviction of the innocent is the prosecutor's worst nightmare, yet there is ample evidence that this does occur, as we have seen above. One of the reasons that this may occur is that the role of the prosecutor is a complex one. The prosecutor must zealously represent the people in convicting criminals, while at the same time, as an officer of the court, act in the interests of justice. It is because of this dual role that prosecutors are given so much discretion. Without substantial discretion they would be unable to dismiss cases and reduce charges in the "interests of justice" nor would they be able to plea bargain. So prosecutors must be on guard against over zealousness. And they must be on guard against complacency in reviewing evidence. The miscarriage of justice in Dallas occurred because prosecutors accepted the alleged results of a police field test on what was purported to be cocaine. When prosecutors accept confessions given to police, eyewitness testimony given to police, information from police informants, and police field tests of substances without independent verification, they risk both conviction of the innocent and loss of a good case.

The prosecutor must, therefore, rigorously screen all cases, not just for sufficiency of evidence but for validity and truthfulness of evidence as well. No case should go forward based on a police field test; tests must be conducted by a certified laboratory. This may take more time and money, but it is the only way to guarantee that the substance is what it is purported to be. Prosecutors must be especially vigilant in reading police reports and alleged confessions to determine if there are inconsistencies, evidence of coercion, or other factors that could lead to a miscarriage of justice. Prosecutors in the U.S. are handicapped by rarely being able to talk to defendants,[32] so they must try to understand the defendant based on reports rather than direct contact. Prosecutors must also be certain to talk to all potential witnesses before charges are filed, a practice that does not always take place due to time constraints.

Finally, the practice of placing new, inexperienced, prosecutors in a screening capacity so that the more experienced prosecutors are free to prepare and try cases should end. Screening should be done by, or under the close supervision of, experienced prosecutors. Strong arguments can be made for eliminating the separation of functions in a prosecutors office so that experienced prosecutors take a case from initial screening through to trial with assistance from more inexperienced prosecutors rather than screening, preparation, and trial being separate functions carried out by different prosecutors.

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[30] See B. L. Cutler and S. D. Penrod, MISTAKEN IDENTIFICATION: THE EYEWITNESS, PSYCHOLOGY, AND THE LAW. New York: Cambridge University Press, 1995.

[31] Eric Slater, "DNA Proves What Man Long Insisted," LOS ANGELES TIMES, January 21, 2002, via www. http://www.latimes.com/news/nationworld/nation/la-000005490jan21.story

[32] This is the case for two reasons: defense attorneys will rarely allow their clients to talk to prosecutors, and if the defendant is not represented by counsel when the conversation takes place the prosecutor may end up being a defense witness to a statement made by the defendant.

Prosecutors are the most important figures in the criminal justice system – the system cannot work effectively or fairly if prosecutors are not rigorous in their practices – so the burden of policing the police as well as convicting the guilty falls to them. The burden is heavy but it is a burden that must be met.

PARTICIPANTS' PAPERS

EFFECTIVE MANAGEMENT OF THE POLICE AND THE PROSECUTION IN CRIMINAL JUSTICE

*Nobuyuki Kawai**

I. BACKGROUND

A. The Police of Japan

In Japan, the Police Law empowers each prefecture to carry out police duties to "protect life, person and property" and "maintain public safety and order by preventing, suppressing and investigating crimes, apprehending suspects and controlling traffic". Accordingly, the authority to execute police duties in the field is geographically divided into 47 prefectural jurisdictions, each of which is supervised by respective Prefectural Public Safety Commission. The total prefectural police force numbers approximately 260,000, including 230,000 ranked police officers and 30,000 civilian experts and clerks.

The law also empowers the national government to establish a central police organization to control and supervise prefectual police organizations. The National Police Agency, supervised by the National Public Safety Commission, is serving this role.

The police responsibility varies from crime prevention in general to protection of citizen's life and property, counter intelligence against terrorism and espionage, the fight against organized crime, traffic control and issuing driver's licenses, administrative control over private businesses such as entertainment businesses, private security and pawnshops, protection of victims and firearms control.

B. Criminal Investigation

As for criminal investigation, the Code of Criminal Procedure states that "when a police officer deems an offense has been committed, he shall investigate the offender and evidence thereof." Accordingly, the police are empowered to investigate all illegal acts punishable under Japan's judicial system, fulfilling the primary responsibility for criminal investigation in the country.

C. Political Neutrality

In order to ensure the political neutrality of the police, the Police Law put police organization under the supervision of public administrative commissions.

At the local level, the Prefectural Public Safety Commission exerts administrative authority over the respective prefectural police. Members of each Commission are appointed by the respective prefectural governor with the consent of the respective prefectural assembly. Each Commission exercises administrative supervision over its prefectural police by formulating basic policy and regulations for police operations. However, neither the Commissions nor the prefectural governors or elected assemblies may interfere with individual cases or specific law enforcement operations of the prefectural police. Prefectural police chiefs are appointed and dismissed by the National Public Safety Commission with the consent of their Prefectural Public Safety Commissions.

At the national level, the National Public Safety Commission exercises administrative supervision over the National Police Agency. While the Commission is under the jurisdiction of the Cabinet Office, the Prime Minister is not empowered to exercise direct command or control over the Agency. This guarantees the Commission's independence and ensures its political neutrality. The Commission supervises police by formulating basic policies and regulations, coordinating police administration in various fields, and supervising internal inspection of police activities. The Commission also appoints the Chief of the National Police Agency and other senior officers of prefectural police organizations. The Commission consists of a chairman and five members. The chairman is a state minister who presides over Commission meetings. Members, who serve five-year terms, are appointed by the prime minister with the consent of both houses of the Diet. They must be persons who have not served within five years of appointment as police officers or public prosecutors. To ensure political neutrality, no more than two members may belong to the same political party.

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II. EFFECTIVE MANAGEMENT OF THE POLICE INVESTIGATION

A. Morality, Integrity and Motivation Inspired and Tested by Various Challenges

The institutional setting alone does not necessarily guarantee the effectiveness of any organization. In order for an organization to be truly effective, its members must be aware of the importance of their responsibility to do the job, and become inspired and motivated to improve the efficiency of their own performance. The key to effective management of an organization is its independence continuously tested by positive challenges from outside of the organization.

Historically, the Japanese police had developed a strong sense of responsibility in the struggle to cope with various challenges as explained below. Its positive reaction to the constant pressure from those challenges has improved the capability and fidelity of the Japanese police. In order to fulfill its responsibility while maintaining its independence, the police have constantly been inspiring themselves.

B. Challenge in the Course of Collaborating with Prosecutors

It is the prosecutors who directly challenge and inspire the police in their role as prosecutors and investigators. In collaborating with prosecutors, the police are repeatedly inspired to realize the importance of their responsibility as the primary authority in criminal investigation.

1. Collaboration to Sustain Prosecutions at the Courts

In Japan, prosecutors bear exclusive responsibility to file and sustain prosecutions in the court. Needless to say, the purpose of police investigation is to identify the suspect and gather evidence which can lead to a conviction in court. The police strive to fulfill its responsibility as a primary authority for criminal investigation, by effectively identifying the suspect and gathering evidence while protecting the due process of law so as to support prosecutors' successful management of prosecutions. This challenge, coming from the prosecution, has always been one of major factors to stimulate the police to improve their capability and fidelity.

2. Cooperation as Investigators

While the primary duties of public prosecutors are to determine case dispositions and file and sustain prosecution, they are also empowered to conduct investigations.

In this context, it has to be pointed out that prosecutors have indeed excellent investigating capabilities, especially, when they initiate their own investigations on large scale intellectual crimes and political corruption cases. Prosecutors' successful investigations of such cases always inspire and motivate the police to improve their own skills and to challenge more and more difficult cases.

The prosecutors' investigations are generally supplementary. As the primary investigation authority, police managers try to perfect their investigations so that there is least amount of needs for the prosecutors to investigate the same cases even in supplementary manner.

C. Challenges from Citizens as to their Confidence in the Police

Police activities, including criminal investigations, can't be successful without support from citizens. Police will not get public support unless the citizens have confidence in the police's capability and fidelity.

1. Capability to Detect and Investigate Crimes Effectively

The police have to identify suspects effectively at the same time following the due process of law. This simple but basic point should not be overlooked. Prosecution of criminals is the most effective way to deter crimes. At the same time, any violation of legal or human rights, at any level, leads directly to a distrust, by citizens, of the justice system as a whole. To a lesser degree, the more incidents of unsolved crimes increase, the more the distrust and lack of faith in the police abilities grows.

2. Systematic Self-inspection

The police must be seen as an authority upholding law and order, protecting the rights and property of all citizens equally without bias or favor. Any mishandling of cases could trigger public questioning of police abilities and integrity. This could lead to instability in the police authority as a whole.

In order to maintain the integrity of the police officers, police exercise systematic self-inspection under the supervision of national and prefectural level public safety commissions. The police also disclose information concerning police misconduct to the public, laying itself open to public criticism.

D. Latest Challenges

It is becoming more and more difficult to conduct criminal investigation successfully because of the challenges mentioned below. The clearance rate of crimes continues to decrease. In order to fulfill the responsibility as a primary investigation authority and to meet citizen's expectations in maintaining safety on the streets, the police have to cope with many challenges caused by the modernization of society.

1. Increasing Anonymity in Society

In modern society especially in big cities, the old fashioned sense of "community" does not exist any more. People do not know nor care who is living next door. With such increasing anonymity in society, it is becoming more and more difficult for police to find witnesses to crime. The police have to identify suspects relying on material evidence supported by scientific analysis and gathered strictly following the due process of law.

In order to cope with this challenge, the Japanese police have been developing scientific capabilities for investigation, which include fingerprint identification, footprint identification, photograph identification, analysis of minute object gathered at the crime scene, and engagement of police sniffing dogs. More advanced forensic examination such as the examination and analysis of bloodstains, hair, drugs and DNA are available at the Criminal Investigation Laboratory in each Prefectural Police. Furthermore, at the national level, the National Research Institute of Police Science is promoting the development of cutting edge science in support of police activities.

Attention has been also paid to the legal implication of utilizing modern technologies in investigation, with a view to protect the due process of law and to avoid unintentionally violating human rights of crime suspects.

2. High-tech Crimes

High-tech crimes are increasing rapidly as Japan moves toward an information-oriented society. Computer hacking grows in sophistication as quickly as new computer technology develops. Almost as soon as safeguards are established to protect data systems, criminals are finding ways to breach those safeguards. A perpetrator is generally anonymous and often traces of an intrusion are difficult to detect. Not only is data pirated but also damage to multiple systems can be achieved through a single intrusion using a "virus" that can spread from one computer to another indiscriminately. In addition, due to the international nature of the Internet and other web-based networks, cross-border intrusions occur on a frequent basis.

Besides computer intrusions, analysis of data stored on computer hard drives, in peripheral components, on electromagnetic data storage disks, is becoming a critical aspect in the investigative process.

In the course of investigating high-tech crime, data retrieval is often difficult, especially if the data has been encrypted, deleted or destroyed. The National Police Agency established the High-tech Crime Technology Division to provide technical support to the prefectural police involved in high-tech crime investigation.

3. Internationalization of Society

Recent technology has enhanced transnational trade, commerce and transportation. Consequently, criminal activities such as terrorism, transnational organized crime and money laundering have flourished by this globalization. The rapid development of information technology has also created a borderless cyber space. Criminals can crack and attack computer systems, commit Internet fraud, and deliver illegal contents through the Internet beyond national borders.

In the fight against transnational crimes, there should be neither safe havens nor loopholes for either criminals or their illegal proceeds. In this regard, international cooperation among the law enforcement authorities is indispensable. Accordingly, the National Police Agency actively participates in international forums such as the UN, Interpol, G8 and FATF, which deal with these common issues throughout the world. The Agency is also promoting bi-lateral cooperation with relevant authorities in neighboring countries.

E. Police Training

In order to maintain a reliable police force, individual police officers have to be trained properly in order to cope with the latest challenges. Training is vitally important in effective police management, and for maintaining high moral standards of the individual officer. Thus, much time and resources are put into training programmes as follows.

1. Regular Training for Police Officers

Newly recruited prefectural police officers undergo a twenty one-month initial training programme at prefectural police academies. When promoted to a new rank, police officers again receive training, six weeks for new police sergeants and eight weeks for new assistant inspectors, so that they will be prepared for their new responsibilities.

2. Training of Police Managers

Officers promoted to the rank of police inspector enter the National Police Academy in Tokyo for a three or six-month training programme. They must master management and leadership skills and develop practical abilities to serve as managers in the police activities in the field. The Academy also provides training for officers of the rank of police superintendent to be prepared for assignments as the chief of police stations.

3. Training Specializing in Advanced Skills in Criminal Investigation

The National Police Academy also provides advanced training programmes for officers specializing in criminal investigation activities and who are expected to play managerial roles in the operations. The curriculum includes leadership, management skills and advanced techniques and technologies concerning criminal investigation.

III. COOPERATION BETWEEN THE POLICE AND THE PROSECUTORS

A. Cooperation in General

The police and the prosecutors cooperate closely and well in Japan. Police begin consulting with the prosecutors as appropriate in the early stages of investigation, to establish close collaboration.

As previously mentioned, the positively stimulating relationship between the police and prosecutors in their collaboration encourages each side to remain aware of the importance of each other's responsibility. It is the aim of the Japanese criminal procedure that, in all stages of investigation, either police or prosecutors will exercise their authority in paying due respect to each other's responsibility.

1. For the Prosecution

As for the prosecution, the Code of Criminal Procedure empowers the prosecutors to make general suggestions to the police, by setting forth standards for the essential requirements of criminal investigation needed to institute and support public prosecution.

Various standards for investigation, after informal consultation with the police at the national level, have been suggested by prosecutors and utilized in everyday-investigation.

2. For the Investigation of Prosecutors

As for the investigation of prosecutors, the Code of Criminal Procedure states that the prosecutors and police shall cooperate with each other in their investigations. Accordingly, the Code empowers prosecutors to issue general instructions to the police to mediate conflicts over jurisdiction on certain cases among different law-enforcement authorities including the prosecutors themselves. The Code also empowers the prosecutors, in the course of their own investigations, to instruct the police to provide assistance.

B. Effective Screening of Cases in Collaboration with Prosecutors

1. Effective Clearance of Crimes Following the Due Process of Law

False criminal charges against innocent suspects should by all means be avoided, and those innocents should be released from the scope of criminal investigations as early as possible. In this context, it should be pointed out that effective identification of suspects based on reliable evidence gathered in the due process of law is one of the most important screening methods in criminal procedure. With close collaboration with prosecutors, police are carrying out this task as a matter of prime interest.

2. Diversion of Minor Offenses Through a Simplified Process

Based on the general standards suggested by prosecutors, the police are disposing of certain minor property offenses without referring to prosecutors. As for juvenile offenses, police refer certain minor offenses to prosecutors with certain simplified procedures so that the offenses are diverted from the process of probation or conviction. Accordingly, the police play a major role in the early stage of screening minor offenses.

3. Collaboration with Prosecutors in Non-indictment Dispositions

In 1993, the National Police Agency prepared a bill to amend the Firearms Control Law so that the mitigation of, or exemption from, criminal sanctions for the voluntary surrendering of illegal firearms was introduced. The bill was passed in both houses of the Diet in the same year, and the motivation for illegal possessors to surrender their firearms to the appropriate authority was legislatively institutionalized.

To realize the aim of this amendment, the police are keeping close contact with prosecutors in handling such cases of voluntary surrender of firearms, and the prosecutors are exercising non-indictment disposition in many of such cases. Such collaboration makes it possible to collect many illegal firearms and to reveal the illegal distribution chains. In the year 2001, about 14 % of confiscated illegal firearms were those voluntarily surrendered.

EFFECTIVE ADMINISTRATION OF THE POLICE AND THE PROSECUTION IN CRIMINAL JUSTICE IN MALAYSIA

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I. INTRODUCTION

The fundamental principle underlying the criminal justice system in Malaysia is that an accused person is innocent until proven guilty. Consonant with this principle, the criminal justice system of Malaysia provides various safeguards to protect accused persons.

Some legislation, like the Dangerous Drugs Act and the Anti Corruption Act, contains certain statutory presumptions that can be invoked against the accused. Thus, when a person is charged for an offence under these laws, the burden is shifted on to the accused to rebut the presumptions.

The criminal justice system in Malaysia also ensures that a person who is guilty of an offence is punished in accordance with the law. It is also in the public interest that the police force maintains law and order in the country.

The duty to investigate an offence is with the police, and the duty to decide whether a person ought to be charged lies with the Attorney-General, who is also the Public Prosecutor. Lawyers bears the duty to defend an accused person and the court adjudicates.

II. THE SYSTEM OF ADMINISTRATION OF CRIMINAL JUSTICE IN MALAYSIA

In the realm of administration of criminal justice in Malaysia, the approach is two pronged. They are Investigation of crimes and Prosecution of criminal cases in court. The investigation of crimes is the responsibility of the enforcement agencies, namely, the Royal Malaysian Police, Anti Corruption Agency, Royal Customs and Excise, Securities Commission, Central Bank of Malaysia etc. whilst prosecution is solely in the hands of the Attorney General, who has the power exercisable at her discretion to institute, conduct or discontinue any criminal proceedings.

The general law governing investigation is the Criminal Procedure Code [Act 593]. Apart from that there are other special laws governing investigation, namely, Anti Corruption Act 1997 [Act 575], Securities Commission Act 1993 [Act 498], Securities Industry Act 1983 [Act 280], Banking and Financial Institutions Act 1989 [Act 372], etc. The law enables investigators *inter alia*, to trace and apprehend offenders, gather oral and documentary evidence for purposes of proof of an offence in court.

In terms of prosecution, the power is bestowed upon the Attorney General. This is categorically spelt out in the Federal Constitution, which is the supreme law of Malaysia. Clause 3 of Article 145 of the Federal Constitution provides that the Attorney General shall have the power, exercisable at her discretion, to institute, conduct or discontinue any criminal prosecution. Further subsection 1 of section 376 of the Criminal Procedure Code provides that the Attorney General shall be the Public Prosecutor who shall have control and direction of all criminal prosecutions. In the exercise of her discretion, the Attorney General is empowered to act of her own accord and is not subject to any control. The general principles that the Attorney General must, in performing her duties, act in the public interest applies with particular force to her powers under clause 3 of Article 145.

Nevertheless, the discretion by the Attorney General can only be exercised based on the outcome of the investigation undertaken by the relevant enforcement agency. Upon receipt of the result of investigation from the enforcement agency, the Attorney General will decide whether to institute prosecution against a perpetrator of crime. In arriving at the said decision the Attorney General is always guided by legal principles. Public interest shall also be the paramount consideration.

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III. CURRENT LAWS, REGULATIONS AND DIRECTIVES GOVERNING THE CONDUCT OF PROSECUTORS

A. Laws And Regulations

1. The Federal Constitution of Malaysia, the Supreme Law

(i) *Clause 3 of Article 145*

- The prosecutor may institute and conduct any proceedings for a criminal offence.
- May discontinue criminal proceedings that are instituted.
- May amend a charge at any point of time during the conduct of a prosecution, if there is proper basis.
- Courts cannot compel the Attorney General to institute prosecution which he does not intend to institute or to proceed with any criminal proceedings which are to be discontinued.
- Courts cannot compel the Attorney General to enhance a charge when he is content to proceed on a lesser charge.

(ii) *Clause (1) of Article 5*

- *No person shall be deprived of his life or personal liberty save in accordance with law.*

Prosecutors are to ensure that this fundamental liberty is strictly observed.

(iii) *Article 7*

- *No person shall be punished for an act or omission which was not punishable by law when it was not done or made, and no person shall suffer greater punishment for an offence that was prescribed by law at the time it was committed.*
- *A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.*

Prosecutors are to observe the above principle against double jeopardy before making a decision to prosecute.

(iv) *Article 8*

- *All persons are equal before the law and entitled to the equal protection of the law.*

Prosecutors are to observe this principle of equality before the law before embarking on a decision to prosecute. The principle underlying Article 8 is that law must operate alike on all persons under like circumstances, not simply that it must operate alike on all persons in any circumstance, nor that it must be general in character and universal in application and that the State is no longer to have the power of distinguishing and classifying persons for the purpose of legislation.

(v) *Article 121*

- A prosecutor has to ensure compliance with this Constitutional provision which caters for the judicial power vested in the various courts in the country.
- Together with this provision, a prosecutor's role in instituting criminal prosecution is regulated by the other laws made pursuant to the Federal Constitution with regards to the jurisdiction and workings of the superior and inferior courts. Examples of such legislation are Courts of Judicature Act 1964 [Act 91], Rules of the Federal Court 1980 [P.U. (A) 33], Rules of the Court of Appeal 1994 [P.U. (A) 524], Rules of the High Court 1980 [P.U. (A) 50], Subordinate Courts Act 1948 [Act 92], Subordinate Courts Rules Act 1955 [Act 55] and the Subordinate Courts Rules 1980 [P.U. (A) 328]
- The jurisdiction of the criminal courts has to be in consonance with the penal provisions providing for the particular offence.

2. Criminal Procedure Code and other Written Law Governing the Procedure for the Manner or Place of Inquiring into or Trying of the Relevant Offences
   - A prosecutor has to be fully appraised of the provisions of these laws. These laws regulate the prosecution of offences in a court of law.

3. Evidence Act 1950 [Act 56]
   - This Act defines the law of evidence. The basic analysis of the process of criminal prosecution expresses the need for an understanding of the law of evidence.
   - Evidence may be defined as material which persuades the court of the truth or probability of some fact asserted before it.
   - Hence the need for a prosecutor to appraise of the mechanics of the law of evidence in order to convince the court to receive and admit a piece of evidence.
   - For a prosecutor evidence must be seen not only in the context of the mechanics by which it is to be presented, but first and foremost, in the context of the law which allows the evidence to be tendered/adduced.

4. Directives
   Public Prosecutor's Directives made from time to time to regulate manner and conduct of prosecutions in court.

IV. THE PROSECUTION DIVISION OF THE ATTORNEY GENERAL'S CHAMBERS

In exercising the prosecutorial discretion, the Attorney-General functions *via* the Prosecution Division of his Chambers. The Division is headed by a Senior Deputy Public Prosecutor (SDPP), deputized by also another SDPP. Complementing them are Deputy Public Prosecutors (DPPs) and Assistant Public Prosecutors (APPs). They are fit and proper persons appointed by the Public Prosecutor, and at all times under the general control and direction of the Public Prosecutor. They exercise all or any of the rights or powers exercisable by the Public Prosecutor except rights and powers which are to be exercised by the Public Prosecutor personally.

The Prosecution Division comprises the Headquarters Unit and the State Prosecution Units. There are twelve (12) State Prosecution Units. The Headquarters Unit comprises the following sub units:

- Appeals
- Research and International Criminal Law
- Classified and Sexual Crimes
- Commercial Crimes
- Narcotics and Forfeiture of Property

Apart from the above, there are also Deputy Public Prosecutors assigned to the Anti Corruption Agency, Royal Customs and Excise Department, Securities Commission and Central Bank of Malaysia. The SDPPs, DPPs and APPs appear in all courts in the country to conduct prosecution. There are also prosecuting officers from *inter alia* the Royal Malaysian Police, Royal Customs and Excise Department, Ministry of Domestic Trade and Industry, Securities Commission, Central Bank of Malaysia, who appears in court to conduct prosecution. Apart from the SDPPs, DPPs and the APPs the other prosecution officers are authorized in writing by the Public Prosecutor to appear in a court to conduct prosecutions. Administratively, the Headquarters Unit of the Division monitors and supervises the various prosecution units in the country. It is also responsible for the formulation of prosecution policies nationwide.

V. POLICE INVESTIGATIONS

The police, as an investigating agency, is generally empowered under the Police Act 1967 to investigate the commission of any offence and to apprehend the suspect(s) responsible. The Criminal Procedure Code spells out in detail the procedure for investigating all offences and the manner and place of trying offences.

The preliminary investigation of any offence is carried out by the police. Such investigation may commerce either as a consequence of a complaint received for an offence alleged to have been committed, or in certain circumstances as a result of information obtained by the police. Upon completion of investigation, the relevant Investigation paper is sent to the Attorney-General's Chambers. The Deputy Public Prosecutor will study the relevant investigation paper submitted by the police. If he is satisfied that sufficient evidence is available to prosecute a person for a particular offence, then he will direct prosecution. A charge is then framed against the suspect.

VI. THE ROLE OF PROSECUTORS IN CRIMINAL INVESTIGATIONS

Prosecutors are hired to represent the *rakyat* and to act as the people's advocate. But prosecutors fulfill a second, equally important function. An honest prosecutor is the strongest fortress and protection for the integrity of the Federal Constitution. The role of a prosecutor, then, serves two masters. First, the prosecutor has an obligation to attempt to present evidence to courts advocating the people's position, upholding the law, and obtaining convictions for violations of the law. Second, and no less importantly, the prosecutor has an obligation to ensure proper and candid investigation of crime. Where it appears that the investigation has violated the constitutional rights of suspects, the prosecutor then has an obligation to the public to take whatever action is necessary and appropriate to remedy those violations of individual rights. This is called prosecutorial discretion. Prosecutorial discretion may also include the power to conduct a prosecution, to prefer a charge, to proceed with multiple offences, to make submissions, to withdraw charges and powers to appeal.

The crucial decision which has to be made by prosecutors having conduct of criminal cases, is as to whether or not a charge should be preferred. Naturally the degree of importance depends to some extent on the gravity of the offence but a wrong decision either way can have disastrous consequences affecting not only the suspect but, in certain circumstances, the whole community. If a guilty man is not prosecuted, he may go on to cause untold further harm; yet if an innocent man is prosecuted, he and his family may be seriously affected even if the offence is comparatively minor and he is ultimately acquitted.

The prosecutor must not act as a private attorney on behalf of victims of crime, but rather, as an objective advocate on behalf of the interests of the society itself and all the people.

The paramount purpose of prosecution is the attainment of justice and to ensure that in the interest of justice the accused is punished for the crime he has committed.

It cannot be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a judge what the prosecution considers to be credible evidence relevant to the alleged crime. Prosecutors have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate strength, but it must also be done fairly.

The role of the prosecutor excludes any notion of winning or losing; his function is a matter of public duty. It is to be efficiently performed with an ingrained sense of dignity, bearing in mind the seriousness of the offence and the justness of judicial proceedings.

When a courtroom setting is adversarial, the prosecutor must ensure that the criminal justice system functions in a manner that is scrupulously fair. Justice is an ideal that requires strict adherence to the principles of fairness and impartiality. The prosecutor as the representative of the State is responsible for seeing that the system for law enforcement works fairly.

In the exercise of their prosecutorial discretion Prosecutors are expected:

- To act in the exercise of any prosecutorial function including the exercise of discretion, fairly and dispassionately;
- To act in the spirit to seek justice, not merely to obtain a conviction and to present to the court in a firm and fair manner evidence that the lawyer considers to be credible and relevant;
- Not to prevent or impede one charged with an offence or in peril of such a charge from being represented by counsel or from communicating at reasonable times with counsel;
- To ensure that the right person is prosecuted for the right offence and that all relevant and admissible evidence is tendered in court.

- To be fair minded and independent. Decisions made must be free and not biased or tending on race, creed or religion nor affected by improper or undue pressure from any quarters.

- To review evidence and decisions from time to time, so that prosecutors can take into account any change in circumstances. Upon review prosecutors can advise on further investigations, if necessary or may decide to amend the charges or discontinue prosecution.

- To be satisfied that there is sufficient evidence to provide a realistic prospect of conviction against an accused on a particular charge. They must consider what the defense case is/may be and how it is likely to affect the prosecution case.

- When deciding whether there is sufficient evidence to prosecute, to scrutinize the reliability and admissibility of such evidence. There may be instances in which the evidence may not be as strong as it first appears. In such instances, prosecutors must ask themselves the following questions:

  Can the evidence be used in court?

  - Is it likely for the evidence to be excluded by the court?

  - There are certain legal rules which disallows relevant evidence to be adduced at the trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against hearsay evidence?

  - If so, is there other sufficient evidence for a realistic prospect of conviction?

  Is the evidence credible?

  - Is it likely that a confession is unreliable?

  - Is the witness background likely to weaken the prosecution case? This may involve treatment of evidence of an accomplice, hostile witnesses etc.

  - Having satisfied that the evidence itself can justify criminal prosecution, the prosecutor must then consider whether public interest demands prosecution. The public interest criteria that can affect the decision to prosecute depend on the seriousness of the offence or the circumstances of the offender. Regard must be had to the effect the prosecution, would have upon public morale and order, and on other matters affecting public policy. Some factors may increase the need to prosecute but others may suggest that another course of action would be more appropriate. Such a course of action may include disciplinary action.

- To ensure sufficient copies of documents such as bank statements, resolutions, and other documents should be made available to be given to the opponents and the court as and when the originals are tendered in court. This step too will avoid unnecessary delay of a criminal trial.

- Not to initiate or indulge in unilateral communications with the court concerning the matter currently before the court without the consent of all other counsel involved or the accused, if unrepresented. Delivery of pre-trial memoranda or other material to the court without contemporaneously making reasonable efforts to forward it to other counsel or the accused, if unrepresented, is a violation of this duty.

- Not to negotiate and recommend a plea agreement if the defense, by such an agreement, is obliged to plead guilty to an offence or charge not reasonably supported by the facts.

- To take extra caution when engaging in discussions with defense counsel pertaining to the prosecution at hand. This will ensure that the prosecution is not jeopardized in any way.

- To conduct themselves professionally in all their undertakings. They are required to comply with the highest standards of morality and integrity. They must comply with all laws and regulations with regard to their conduct as a public officer.

In Malaysia prosecutors are not investigators. They are not involved in criminal investigation because they cannot investigate crimes on their own. In term of the investigation the prosecutors' role only extend to the following matters:

- To hold consultative meetings with investigating officers periodically. The purpose is to manage and eventually solved any problems faced by investigating officers with regard to criminal investigation. By clarifying and analyzing the actual situation and problems, prosecutors may advise the Investigating officer on their respective investigation.

- To scrutinize the Investigation papers thoroughly and to decide whether or not to prosecute the suspect based on the evidence available.

- To give legal advice and instructions to the police to connect certain facts in issue so as to complete the chain of evidence. This is for the purpose of proof in the court of law.

- To advise on further investigation so as to ensure that the prosecution has sufficient evidence.

- Not to coach witnesses or fabricate evidence with the sole intent of procuring a conviction. Liaison with witnesses must be through the Investigating Officers. This will avoid any form of aspersions on the prosecutors. With regard to commercial fraud cases, prosecutors can seek clarification from bankers and other expert witnesses, with the sole purpose of an insight understanding of the mechanics of the system in which fraud has been perpetrated. This will facilitate prosecutors whilst examining such witnesses.

VII. COOPERATION BETWEEN THE POLICE AND THE PROSECUTORS

The police and prosecutors play an important role in the administration of criminal justice in the country. The police use their skill, largely derived from training and experience when conducting investigation of crimes. They initiate the criminal justice process when they set the investigation process in motion. The investigation process involves gathering of evidence, recording statements from witnesses and apprehending suspects.

Prosecutors rely on the evidence gathered by the police to obtain a conviction against an accused person in a court of law. Save for non-seizable offences, wherein a prosecutor may order for investigation to be carried out, investigation of crimes is not within the realm of the prosecutors.

It is at this juncture the cooperation between the police and the prosecutors is necessary. Upon completion of an investigation, the police refer the Investigation paper to the prosecutor, who is in a position to advise the police on further investigation, if necessary. This is beneficial to both the police and the prosecutor. The advice rendered may tantamount to concretizing the evidence available for purposes of proof in a court of law and ultimately to obtain a conviction. In the absence of such advice, the evidence gathered may fall short of concrete proof in a court of law, tending to an acquittal of an accused person. This may well result in a miscarriage of justice, as the accused person is purely acquitted on technical grounds, although he may have been criminally culpable. Thus cooperation in such a form of discourse is paramount to meet the ends of justice. This illustrates the bondage shared by both the police and prosecutor will the ultimate aim of securing justice.

Criminal investigation essentially involve statements from witnesses, real evidence in the form of property, document and other implements of criminal activity which may complement the statements of witnesses. It is normal for certain material and relevant witnesses not traceable. These witnesses may be essential to connect the accused with the crime. The availability of those witnesses may also ensure completion of the chain of evidence, essential for proof of the offence committed by the accused person in a court of law.

The prosecution may have to proceed with its case in the absence of those witnesses. This is consonant with the provisions of the Malaysian Evidence Act which allows the prosecution to put in statements written or verbal made by a person who is dead or who cannot be found or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense. In receiving this evidence, the court may be circumspect, since the maker of the statements are not available for cross-examination. In this regard the cooperation of the police is necessary so as to ensure that proper attempts are made to trace the witnesses. Evidence of the attempts is necessary before the prosecutor can convince the court to have the evidence admitted as otherwise an adverse presumption may be drawn against the prosecutor for withholding evidence.

VIII. ARBITRARY POLITICAL AND EXTERNAL INFLUENCE

(i) The Attorney General decides to prosecute based on evidence available and submitted in the form of an Investigation Paper by the relevant enforcement agency, be it by the Police or the Anti Corruption Agency. The decision is made notwithstanding the fact that the accused person may be a leader of the ruling party, opposition party, a top civil servant or even a leading corporate figure in the country.

(ii) If the investigation reveals insufficient evidence to prosecute the suspect, the Attorney General will choose not to prosecute.

(iii) It is a policy that a decision to prosecute is made based only the evidence available and no person enjoys any form of immunity from prosecution. The decision is also not influenced by any form of arbitrary factors be it political or any other extraneous matters. The decision to prosecute is solely legal, with public interest as the paramount consideration.

IX. EFFECTIVE CASE SCREENING BY PROSECUTOR OR OTHER COMPETENT AGENCIES

Movement of the Police Investigation Papers

Commission of Offence

↓

Report Lodged

↓

Police Investigation and Arrest

↓

Investigation Papers Send to Senior Investigation Officer (SIO)

↓

Investigation Papers Send to OCCI

↓

DPP

↓

A-G

(Public Interest Case)

Positive: To certain extent the case screening is good because no innocent person is charged.

Negative: There may be an element of delay in the decision making process.

Counter measures to improve case screening (police)

Report lodged

↓

IO open IP

↓

IP send to OCCI

↓

DPP

X. OTHER RELEVANT ENFORCEMENT AGENCIES

Example: (i) Anti Corruption Agency
(ii) Royal Customs and Excise Departments
(iii) Securities Commission

(iv) Central Bank of Malaysia

There are Deputy Public Prosecutors assigned to these four agencies. All investigation papers investigated by these agencies will be submitted to the DPP's of that particular agencies for direction or decision.

EFFECTIVE ADMINISTRATION OF THE POLICE AND PROSECUTION IN CRIMINAL JUSTICE OF PAPUA NEW GUINEA

*John Maru**

The criminal justice system of any society depends very much on the thorough, efficient and effective functioning of its pillars that are involved in the dispensation of justice.

As these pillars are separate entities the efficiency and effectiveness of one can easily be hampered by the inefficiency and incompetence of the other. Therefore in order for the system to operate smoothly, co-operation, coordination and concerted efforts of the pillars, namely the police, the prosecutors, the judiciary as well as the correctional services is necessary.

Unfortunately this is easier said than done especially in a country like Papua New Guinea (PNG) where the governmental agencies are beset by financial, technological and other institutional restraints and where the citizenry are increasingly becoming alienated from each other.

I. SEPARATION OF POWERS

The Constitution of PNG divides the government into three equal and coordinated branches, namely the legislative, executive and the judiciary, each of which is supreme within their respective spheres. Neither of them may encroach upon the function or domain of the other.

The law-making function is lodged with the National Parliament of PNG, whose members are elected by the people of the whole country. The executive function whose duty it is to enforce the laws falls on the Prime Minister of the country. It is to the Supreme Court and the other courts created by law that the judicial functions are lodged.

Among these three branches, those that are directly involved in the administration of justice are the executive branch through the police and the other numerous law enforcement and prosecution agencies, as well the correctional institutions, and the judiciary.

The agency that is primarily in charge of law enforcement is the Royal Papua New Guinea Constabulary and the control comes under the Minister for Police in political matters and the Commissioner of Police for all its day-to-day operational requirements.

The Public Prosecutor's office is the principal agency in charge of the prosecution of offenders and comes under the control of the Minister for Justice. There is however, a unique agency of the government, which is the Office of the Ombudsman, charged with the investigation and prosecution of certain crimes involving public officials or those connected with the performance of public functions.

II. THE FIVE PILLARS OF THE CRIMINAL JUSTICE SYSTEM

A. The Law Enforcement

The law enforcers are at the forefront of the criminal justice system of the country. They are the ones that directly deal with the citizens and are directly exposed to the criminal elements. There is, therefore, the necessity for the members of these law enforcement agencies to be well oriented with, and trained in the ways of the civil society.

Thus, the Royal PNG Constabulary is charged with the duties of crime prevention, law enforcement, preservation of peace and order, and as well as the internal security of the government of the day.

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Also within the police organizations, there is an Internal Affairs directorate tasked with the investigations of complaints against erring officers. The efficiency and effectiveness of this directorate help polish the image of the police organization as a body that people can rely on.

B. The Public Prosecutor

The prosecution function is lodged mainly with the Public Prosecutor's office, under Department of Justice. It is composed of the Public Prosecutor's office, regional and provincial prosecutor's offices. The Office of Public Prosecutor has the following functions:

a) Receive files from law enforcement and other investigative bodies and prosecute crimes
b) Decide appeals from decisions of the regional and provincial prosecutors
c) Investigate administrative charges against prosecutors

The regional and provincial prosecutor's office is charged with the administrative task of supervising and coordinating prosecutions within the region and the provinces.

There has been innovations instituted by the prosecution department with regard to the handling of cases involving different crimes, particularly in terms of specialization in the handling of criminal cases, however dire shortages of manpower experienced by the department, has had prosecutors handling variety of criminal matters as they become available. This has led to prosecutors being assigned cases that they are not familiar with, particularly the intricacies and strategies in handling of such cases.

The Public Prosecutor is also involved in special cases that are referred from the Office of the Ombudsman. The office of the Ombudsman is created under the Constitution of PNG and is independent of the executive branch of the government. This office is mandated among others, to investigate and refer to the prosecutor's office cases involving public officials and employees who have committed crimes in relation to their employment. It is because of this function that its independence is of paramount importance - reason being to insulate it from the political branches of the government.

The other agency is the Electoral Commission. This agency is charged with the investigation and the enforcement of all election related matters. Matters related to electoral offences are also referred to the public prosecutor's office for determination as to whether or not offenders be charged or prosecuted. This office is also independent of the three main branches of the government.

There is also an Office of the Public Solicitor. They are paid by the government to provide legal assistance to the general public who cannot afford to pay their own legal costs. Financial and other institutional restraints like staff shortages, however limits the number of the cases defended by this office. Accordingly the Public Solicitor is quite stringent as to which cases are to be defended. Their setup in the regional and provincial level is similar to that of the Public Prosecutors.

There are also institutions or individuals outside the government that are offering legal assistance to the needy, like the PNG Law society and the legal aid programmes of the law school at University of PNG.

These benevolent institutions and the individuals help immensely in the administration of justice, as they facilitate the disposition of cases before the prosecutors or the courts and safeguard the constitutional rights of their clients.

C. The Judiciary

The judiciary is the final arbiter of controversies, of competing claims and interests, including the determination of guilt or innocence of a person charged with the commission of a crime. The judiciary in PNG is composed of a Supreme Court, which is at the top of the hierarchy, and the other courts created by law.

The judiciary is independent and has it's own fiscal autonomy. The Chief Justice is charged with the responsibility to oversee its functions. The executive branch of the government appoints the members of the bench with the Prime Minister of PNG as the chairman. The Judges are only removable from office by a serious breach and conviction of a culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust.

The other courts are the National Court, District Courts, Local Courts, village courts and the 'special courts'. Due to the diverse nature of the country with its many cultures and a little over 700 different language groups, there is a combination of traditional and imported court systems.

The Supreme Court, the National Court, and the District Courts are based on European models and have many formal rules. Appearances at these courts normally require assistance of lawyers to present arguments because of the laws and the legal procedures involved. The Local Courts and Village Courts however are more informal and are intended to deal with customary complaints between citizens.

Village Courts normally take cares of problems of 5 or 6 nearby villages or settlements. The magistrate is normally a local resident appointed by the people of the area covered by the court. The aim is to have people settle local disputes in their own way.

Then we have the Special Courts. These courts have limited powers. Examples of these courts are: Land courts, Juvenile courts, Coroners court, Wardens court and finally the Court of Disputed Returns.

D. Correctional Institutions

The agencies involved in the punishment of convicts fall under the Ministry of Correctional Services. The Commissioner of Corrective Services is charged with the operational and administrative responsibilities of the services.

E. The Community

The members of the community also play a very important role in the criminal justice system. It is from their ranks that the offenders come and it is with them that they will end up. The involvement of these people in the programmes and projects of the government, even those that are not necessarily connected with the administration of justice, contribute to the lessening of crimes, as their efforts are diverted to more productive matters. They can also contribute immensely in solving crimes by assisting police in investigations, giving testimonies, providing leads and the arrests of criminals. Included as part of the communities are government agencies not involved with the administration of justice, as well as the members of the private sectors.

III. PROCEDURES IN THE ADMINISTRATION OF JUSTICE IN PNG

Majority of the crimes committed in main urban centers of PNG are property related. Car jacking, break-enter and stealing, and armed robberies top the country's list everyday. Rapes, murders and drugs related matters are also common occurrences.

Regardless however of the types of the crimes committed, be they heinous, serious or light, the procedure for the investigation, prosecution and trial of the cases is more or less the same, except for those triable under the rules of summary procedures.

A. The Law Enforcement Process

The enforcement process begins the moment the crime is reported or a complaint is filed before the police. The police then conduct an investigation of the crime, take testimonies of witnesses, collect available evidences and take steps to apprehend the offender.

In cases where the police in the act of committing the crime, attempting to commit or having just committed the offence catch the offender, the suspect is detained. The arresting officer than decides if a crime has been committed or not. If he is satisfied than he/she prepares the appropriate paper work and information to have suspect processed.

If on the other hand there exists some doubt as to the proof of his case, then the member has to arrange for the release of the suspect. The decision as to whether or not to charge is made on the ground by the general duty members attending to complaints or CID members following a case.

If in the event that a decision to charge has been taken, then appropriate paper works or the complete file is then forwarded on to the prosecution section of the police Force who will then have suspect arraigned the next (working) day at a courthouse.

B. The Prosecution Process

Once the investigating officer is through with the investigation of his case, he forwards his findings to the OIC of the police prosecution unit for the proper procedures. If the OIC is satisfied with the file, the matter is then filed at the courthouse. Police prosecutors handle all minor criminal matters at the local or the district court level. Serious criminal matters are normally referred as an 'hand-up briefs' through a grade 5 District court magistrate to the Public Prosecutor's

office for election as to whether the matter be referred to a National court for a trial. If the public prosecutor is of the opinion that the matter can be tried successfully at the National court his office takes over the file and his aides handle the matter.

C. The Judicial Process

Criminal matters in PNG are cited as *The STATE versus (name of the accused)*. Once the Public Prosecutor's office takes carriage of the matter it is then filed at the National Court with a date set for the arraignment of the accused. At the set date the charges are read to the accused that then takes a plea. If he pleas guilty the matter is concluded without a prolonged trial, however if the accused pleas not guilty, then the matter is adjourned for a date where the trial will take place with appropriate witnesses from both sides in place to give their testimonies.

During the adjournment period normally a Pre-Trial conference (PTC) takes place between the prosecutor and the accused's counsel to sort out all the minor details so that a speedy trial will ensure at the date of trial. Matters dealt with and agreed upon at the PTC are inadmissible as evidence against the accused. Unless the same is reduced to writing and signed by the accused and their counsel. Many judges are particular about PTCs and its importance and therefore non-attendance to a PTC by counsels can become a subject for sanction at the discretion of the Judge.

At the trial the prosecution witnesses are individually dealt with first and cross examined by the defence counsel, followed by re-examination by the prosecutor. After all the prosecution witnesses have been through, the defence brings his witnesses to the box after the accused had given his side of the story. Defence witnesses are then cross examined by the prosecutor, followed by re examination by the defence counsel should there be any damage caused by the cross examination.

After the judge has heard all the witnesses from both sides, submissions are made by both the prosecution and the defence. The matter is normally adjourned at this stage for a decision to be made by the judge.

During the trial rules of evidence is of paramount importance. PNG has not yet gone into the use of technology in the courtroom but several systems have been looked at, which will no doubt speed up trials because accused do not need to be personally in the court room to have their matters heard. This will no doubt save the judiciary system a lot of time and monies in moving prisoners from one location to another.

D. Remedies For The Accused

When the court finds that the evidence against the accused is insufficient to convict, the accused is acquitted and no accusation based on the same act(s) can be filed against him, nor can any appeal be therefrom because of the principle of double jeopardy.

If on the other hand the court is satisfied beyond reasonable doubt with the evidence presented to him by the prosecution, he will convict the accused and sentenced him accordingly after the counsels have addressed on the sentence.

The accused has a right to appeal to the Supreme Court on the following grounds:

a) that errors of law or irregularities have been committed during the trial prejudicial to the substantial rights of the accused.
b) that new and material evidence has been discovered which the accused could not, with reasonable diligence, have discovered and produced at the trial, and which if introduced and admitted, would probably change the judgment of the court.

E. Inefficiency in Court Proceedings

The following have been identified to be the cause for delays:

a) Increase in number of cases filed at courts due to the general population becoming more aware of their legal rights.
b) Lack of courts and slowness in filling up vacancies on the bench.
c) Budget allocations by the government do not meet needs.
d) The complexity of the rules of the procedure.
e) Failure in the cooperation of court related agencies

F. Overcrowding of Jails

As the National and the Supreme Court diaries become increasingly filled with backlog of cases from the past years, the jails throughout the country are beginning to overcrowd into dangerous proportions.

In the last few years there has been a numerous breakouts from jails through out the country, with the latest one in June/July of last year 2001, where little over fifty prisoners dashed for freedom from an overcrowded jail just outside of the country's capital city. At the time of this writing less than 15 escapees from this breakout have been recaptured. Some of those still at large are hardcore and quite notorious criminals.

Constant requests to the government from the police, the public prosecutor, the judiciary and the correctional services for additional funding to meet respective needs have fallen by the wayside. This has not been by choice. The government of PNG in the last 10 years or so has been faced with some trying economical situations. During these times many departments had huge financial cuts in their budget allocations and had to make do with whatever was allocated. The effects of these are now becoming apparent.

G. Strategies

Towards the end of last year (2001) representatives from all the pillars of criminal justice system met at various locations to discuss strategies as to how to deal with the concerns of overcrowding jails, the Constitutional rights infringements, the health concerns and mass breakouts resulting therefrom.

The following matters were raised:

a) Unnecessary arrests for trivial matters. The police through the appropriate commanders to bring to the attention of their men and women to use more discretion in assessing situations before arrests are made.
b) Police Bails. Discretion on police bails should be encouraged wherever possible except for serious crimes.
c) Court Bails. Courts have been overly concerned at the number of absconders and have on many occasions issued warrant of arrests, even in minor matters, rather then just having the bail forfeited. These have resulted in creating backlog of cases all listed on the court diaries. In the event that the absconder is arrested he is remanded in custody for lengthy period of time waiting for his matter to come to court. Courts are encouraged to use discretion particularly in minor and trivial matters.
d) Mediation. Police and courts to encourage mediation between parties to have matter dealt with according to customs to prevent workload for police, courts and the overcrowding of jails.
e) Indictable offences. In many instances police are to eager to have person arrested even before adequate evidence is collected, resulting in suspects remanded for lengthy periods awaiting his file to be completed. Police commanders to advise men to stop this illegal practice.
f) Indictable offences that can be tried summarily. District Court magistrates should use more discretion to have matters, which in their opinion can be dealt with in their court, finalized at the time it comes before them rather than referring it to a committal court. They can take a plea so that the file is referred immediately to the public prosecutor's office for election, rather than await going before a grade 5-committal hearing, which could take months. Chief magistrate is tasked to discuss with his lower court magistrates.
g) Election responsibilities. This task is delegated by the public prosecutor to the senior police prosecutors to alleviate workload on his office.
h) Sentencing of prisoners. Magistrates should look at alternatives forms of punishment rather than having every convicted offender for minor offences sent to jail. Community services or other informal punishment at the supervision of police station commanders could be looked at.

H. Recommendations

a) Decriminalise some minor offences
b) Encourage out of court settlements such as mediation, counseling.
c) Police training to include mediation and counseling techniques.
d) Police to improve system of adjudication of court files to ensure sufficient evidence is on hand before charges are laid.
e) Current procedure of issuing certificate of election be delegated to senior police prosecutors.
f) Police and courts to encourage bails.
g) Call over and PTC between magistrates and counsels be introduced in lower courts.
h) Custodial sentencing to be discouraged for minor offences, particularly, first time offenders.
i) Separate jail facilities for remandees and convicted prisoners.

IV. CONCLUSION

As in any emerging society, our democracy cannot work unless the rule of law is objectively and impartially observed. If the government do not themselves observe the rule of law, then our society is headed for disaster.

I believe that it is up to us, the disciplines that form the pillars of the criminal justice of our society. Our cooperation with each other, regardless of the hard economical times that we are going through in limited resources, from finances to manpower to infrastructures, absolute cooperation, coordination and concerted efforts will get us there.

I believe PNG is heading in the right direction by coming together to discuss its criminal justice issues and I look forward to be part of that team.

EFFECTIVE ADMINISTRATION OF THE POLICE AND PROSECUTION IN CRIMINAL JUSTICE: THE PRACTICE AND EXPERIENCE OF THE UNITED REPUBLIC OF TANZANIA

*Laurean Mutahunwa Tibasana**

I. INTRODUCTION

The goal and principal objective of any criminal justice system is the effective and efficient delivery of justice. The Administration of the Police and Prosecution, central players, in the justice delivery system must be guided by the cardinal maxim that justice must be manifestly seen to be done at all times. This principle however is more easily stated than applied to a set of facts in a given case. A supposedly just outcome of a case could be viewed with criticism or open controversy by different people. In developing countries where the principles governing the criminal justice system were modeled on the practices and principles acceptable to the former colonial rulers, the criminal justice system, the laws and principles governing it may remain an incomprehensible complexity for the majority of the rural uneducated people. In such a case it is more likely the perception of justice of such people would vary markedly from the official position. In most jurisdictions the police or equivalent institutions have the monopoly of the investigative process mainly because the bulk of crimes are reported to the police. In some jurisdictions the police in addition to investigation undertake the prosecution of suspects as in the case of Tanzania and some common law jurisdictions. Yet in other jurisdictions the functions of investigation and prosecution are carried out by different organs. In England and Wales where since the emergence of statutory police forces in 1829, the police until recent years, handled both the investigation and prosecution of suspects; a constantly voiced criticism was that the police responsibility for investigation and prosecution could lead to over-vigorous and one sided preparation and conduct of prosecution (Hetherington 1989:4).

Since 1986, in England and Wales prosecution is the responsibility of an independent Crown Prosecution Agency clearly separated from the investigative role of the police.

On the other hand the very role of prosecution does raise a number of issues. What role should a public prosecutor play? Should he/she be an investigator in the sense that the prosecutor takes part in the investigation as well as the prosecution of offenders? Under the Inquisitorial System Prosecution Agencies routinely participate in investigations alongside the police, a practice which would be frowned upon in common law (Adversary System) jurisdictions. A legitimate question would be which system (Adversary/Inquisitorial) best responds to the delivery of justice? Is an objective answer possible to this question?

These are but a few of the complex issues likely to arise when considering the investigative as well as prosecution roles. We would be over-ambitions to promise to undertake a detailed examination of all of them. Though where we deem fit some of them may be broached over, this paper has a more modest objective.

It sets out to examine the practice and experience of the United Republic of Tanzania in relation to the structuring, organization as well as management of two crucial processes in the justice delivery system namely the investigative and prosecution processes. In part one we discuss the functions of the Police in Tanzania as well as its administrative structure. Since the police essentially deal with crime we also take some time off to examine the crime situation in the country generally in order to acquaint ourselves with the magnitude of the task of dealing with crime which faces the police as well as the citizens' assessment and reaction to crime. Since our examination of the police organizational and administrative structure points out some outstanding problems we address these in the final section of this part. In part two we examine the investigation machinery of the police essentially exercised through its Criminal Investigation Department. We take a detailed look at the mandate of the Criminal Investigation Department as well as its place in the administrative structure of the Tanzania Police Force. The investigation of crime gives rise to complex issues and problems. We examine these in the final section of this part.

Since the purpose of investigation is among other things to determine whether a prosecution will be instituted or not we discuss the process of prosecutions in Part three of this paper. Here we have occasion to examine the central role of

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the state in relation to criminal prosecutions, the control of public prosecutions by the Director of Public Prosecutions as well as some inherent problems in the set up and execution of the prosecution process.

In the Tanzania set up the Public Prosecutors belong to and are employed by the investigative agency – the police and are thus subject to the same disciplinary and supervisory control by their superiors like other police officers. In this context it may be said to be more of a situation of interaction between the public prosecutor and the police officer investigating a particular a case than that of co-operation between the prosecutor and the police where the assumption is that the two belong to different agencies.

This unique position notwithstanding there are issues which merit consideration within the context of the set up. We address these issues in Part Four of this paper which for want of a better term we reluctantly title co-operation between the prosecutor and the investigator. This leads us to Part five where we briefly examine the question of independence from arbitrary political and external influence or indeed the absence of it, where the process of investigation and prosecution is concerned. Finally we attempt to weigh up a number of propositions in relation to the future of the criminal justice system in Tanzania.

II. THE POLICE: ITS FUNCTIONS AND ADMINISTRATIVE STRUCTURE

A. Functions

The Tanzania Police Force is a national police force. The functions of the Police Force are stated thus in the Police Force Ordinance.

> *"The Force shall be employed in and throughout the United Republic for the preservation of peace, the maintenance of law and order, the prevention and detection of crime, the apprehension and guarding of offenders and the protection of property, and for the performance of all such duties shall be entitled to carry arms." (s.5 of the Police Force Ordinance Cap.322).*

The Inspector General of Police has overall command and superintendence of the Tanzania Police Force subject to general directions of the Minister for Home Affairs. In the administration of the Police Force the Inspector General is assisted by four Commissioners, heading the departments of: Administration and Finance, Operations and Training, Criminal Investigation and the fourth commanding the Police force deployed in Zanzibar. For administrative purposes Tanzania is divided into twenty five regions: twenty on Mainland Tanzania and five in Zanzibar. A Regional Police Commander is appointed by the Inspector General to command the Police Officers deployed in each region. In turn each region is divided into a number of districts and an officer is appointed by the Inspector General to command each district for which responsibility he/she is answerable to the Regional Police Commander. Though Administrative districts do not always coincide with police operational districts particularly in large urban areas like the commercial capital of Dar es Salaam, suffice to note that there are 123 Administrative districts countrywide with 113 on Mainland Tanzania and 10 in Zanzibar. Districts have a number of police stations each under their command and an officer of appropriate rank is appointed to command each police station. In urban areas as well as some police stations with extensive jurisdictional areas, police posts, which serve as initial reporting and crime processing centres have been established. Police posts usually have a strength of a few police officers under the command of an Inspector or a senior NCO, depending on size, location and frequency of crime in the area.

We noted earlier the functions of the police force. In practical terms, it may be said to be the duty of the police within the context of maintaining law and order to prevent the commission of offences, to apprehend those believed to be committing, about to commit, or to have committed offences with the object of bringing them to justice. The extent to which the police will perform their crime control function efficiently and effectively is influenced by among other factors the prevalence or extent of crime.

B. The Crime Situation

For the past five years (1996-2000) an average of about half a million crimes are reported to the Police in Tanzania. Figure one illustrates the crimes reported to police over the past eleven years and it is clear that over that period there has been a steady rise of crimes reported to police every year albeit with slight fluctuations in certain years. The increase in the number of crimes reported to police may not be a bad thing in itself. The fluctuation in the statistics of crime reported to police may be a function of the adoption of a particular policing style by the police at a given time. If the police remain in their station houses (reactive style) and wait for victims to report crimes, they may well record fewer crimes as citizens (victims) may for one reason or another neglect to report to police crimes they have been victims of

particularly if they consider the crimes to be minor and thus not worth reporting. On the other hand if the police get out of their station houses onto the street or thoroughfare (proactive style) they may end up viewing more crimes and booking more offenders. While the former (reactive style) may have the effect of reducing the statistical figures, the latter (proactive style) may have the opposite effect.

While we consider the statistics of crimes reported to police to be the best illustration of the crime situation when compared to records held by other organs e.g. the Judiciary or the Prisons Departments for that matter, we are not unaware of their vulnerability to non reporting, which contributes to be the 'dark figure' of crime. Studies carried out in the USA have put the dark figure as high as 35% of recorded crime in relation to specified offences (Ennis 1967). Another study carried out in three London boroughs concluded that only 10% of crime that had occurred was reported to police (Sparks, Genn and Dodd 1977). Closer to home a recent victim survey carried out in the City of Dar es Salaam (Robertshaw, Louw and Mtani 2001) concluded that there was low reportability rates for particular crimes and high reportability rates for others. Thus while 83% of victims of car theft filed a report with the police, the reporting rates for violent crimes were relatively low with only 47% of victims of robbery and 45% of victims of assault reporting to police, respectively. The researchers further found that other crimes like crop theft and simple theft were unlikely to be reported to police. Among the factors identified to be at the core of non reporting are: the distance to be covered to reach the police reporting facility, the perceived seriousness of the crime by the victim, a perception that the police would not be interested or would not treat the crime as worth their effort to solve, fear of reprisals where the perpetrator of the crime and the victim were known to each other or were in an intimate relationship and a perception that the police are too corrupt and may require the victim to pay for the assistance they will give him/her.

The Police function of dealing with crime involves the making of choices. The police have to decide when, how and where to enforce which law and to what extent. We shall for convenience call the making of such choices the exercise of discretion. The discretion to enforce the law is separable into two categories: administrative and functional discretion.

1. Administrative Discretion

The territory of the United Republic of Tanzania covers an area of 945,037sq.km (equivalent to 364,881sq.mi.). It has a population of 32 million as estimated in 1998. Within that context, at the present police strength a police officer is responsible for an area equivalent to 45sq km. and the ratio of police to population is presently 1:1200 persons. Because of the paucity of police officers compared to the area of the country the police have to be stationed in various places in varying degrees of numerical strength. The power to decide on the number of police officers to be posted in any area of the country and that of deciding who to post where is what we call the administrative discretion. This has effect on the work of the police. More police officers deployed to one area may result in booking more criminals and thus higher crime statistics while the converse has the opposite effect.

2. Functional Discretion

While administrative discretion is exercised by the police leadership: the Inspector General, his immediate assistants and heads of units at various levels, functional discretion is exercisable by every police officer of whatever rank. Faced with various criminal incidents for example a police officer attending a road accident has to decide whether to continue to deal with the accident or pursue a pick pocket who is getting away with loot from the accident victims. In a similar dilemma an officer has to decide whether to go after remandees escaping in a stolen motor vehicle or to respond to a call from a night guard at a shop where a burglary has taken place. These are instances of the exercise of functional discretion. Whichever way functional discretion is exercised, it has an effect on the work of the police and its outcome.

C. Public Reaction to Crime

Our purpose for examining the crime situation and crime rates in particular in relation to the police organizational structure and administration is twofold. Increasing crime rates have a negative impact on the quality of life. The prevalence of particular incidences of crime give rise to fear of victimisation among members of the public.

In a study on robbery in London, Sir Leon Radzinowicz made the following succinct observation:

> *"In the general increase in crime over recent years there are certain offences which have given rise to more public alarm than others and of these robbery is one." (Radzinowicz 1961).*

In another study carried out in the United States of America Hunt (1973) was led to the following conclusion: "Ask virtually any American city dweller today what crime he (she) is most apt to be a victim of some day. In all likelihood he (she) would answer "mugging".

A more recent crime victimization survey carried out in Dar Es Salaam (Robertshaw *et.al* 2001:95) found that there was a general feeling among the respondents that crime had increased generally and nearly two thirds of those interviewed (61%) felt unsafe in their areas after dark. The survey further reveals that women, young people between 15-25 years, those with the least education and those living in new and established suburbs felt unsafe after dark in their areas of residence.

Fear of crime may lead members of the public to take extraordinary measures in self-protection. More importantly however prevalence of crime leads the citizens to question the efficiency and effectiveness of crime control strategies adopted by the police. This is our second reason for examining crime rates.

The administration of the police has to be structured in such a way as to be able to control crime. Crime is perhaps the stock in trade and *raison d'etre* of police organizations. Which police organizational structure and administrative set up best responds to the crime control mission will definitely be determined by the prevailing conditions in an area, the political set up, the culture and customs of the people etc. Nevertheless the top leadership as well as middle management of police organizations must constantly keep in focus the principal mission of the organizations they lead. We shall have occasion to return to this aspect later on in this paper.

D. Functions of the Police: Problems and Future Prospects

The problems faced by the police are many. Problems related to the investigative function shall be dealt with in the next part following. We shall for the purpose of this section address problems related to the management and administration of the police, which in turn militate against its effectiveness.

1. Budgetary Problems

The Police Force has serious budgetary constraints. These problems affect the efficiency and effectiveness of the police in terms of its management, administration and above all its ability to discharge its mission i.e controlling crime. In particular budgetary constraints have brought about persistent shortages of personnel, inadequate skills and mobility problems.

(i) *Failure to Recruit New Personnel*

With the ratio of police to population standing at 1 to more than 1200 population and one police officer being responsible for more than 45 sq km, the need to recruit new police officers in order to reduce the high ratio is obvious. It is only when there is an adequate number of police officers patrolling the streets that the deterrent effect to crime can be seen and felt by members of the public. Consequently the fear of crime may be reduced and the quality of life enhanced. To this effect the failure to recruit sufficient personnel due to budgetary constraints has affected the effectiveness and efficiency of the police negatively.

(ii) *Training*

In the present century when crime is becoming more and more sophisticated the police need new skills in order to meet the challenges of crime. New skills may be transmitted to police officers through training. Budgetary constraints however have made it difficult for the police force to put in place the requisite training to transmit the necessary skills to its officers particularly when the required training is only available in an overseas country. country. The level of skills of police officers therefore leaves a lot to be desired. Unfortunately a low level of professional skills makes it difficult to sustain high ethical standards which creates fertile grounds for corruption.

(iii) *Inadequate Mobility*

Budgetary constraints also restrict the police force's ability to acquire mobility resources like vehicles, motor-cycles, etc. Lack of mobility cripples the police forces ability to respond timely to calls for assistance by the public thus eroding the confidence of the people in the police force, exacerbates the fear of crime thus lowering the quality of life and the public rating of the effectiveness of the police.

2. Conceivable Measures and Prospects for the Future

Budgetary problems may take time to resolve as they depend on the economic ability of the country. The following are however the various measures taken and to be taken in particular to resolve the manpower constraints by tapping on available resources i.e the citizens.

(i) *Auxiliary Police Units*

Assisted by the police declared areas with special policing needs for their areas of undertaking e.g. agricultural, mining concerns or local governments are being encouraged to establish Auxiliary Police Units. Such units are under the command and supervision of the Inspector General of Police although they remain employees of the concerns in question. An application for declaration as a special area has to be submitted to the President of the United Republic through the Inspector General by the management of the concerns involved.

(ii) *Community Policing*

This is a policing strategy aiming at involving the community actively in being responsible for the security of their neighborhood. Initiated on experimental basis a few years ago it is expected to be inaugurated officially on Police Day in July this year.

(iii) *Special Constabulary*

The Special Constabulary system which had been allowed to lapse some years ago will be revived. Negotiations are under way with the Government to fix a rate of allowance to be paid to these citizen volunteers who will assist the police when called upon to do so.

(iv) *Private Security Companies*

Some 200 private security companies have been licensed to provide security to willing customers. However there is at present no law regulating private security companies. In the meantime the Inspector General has issued some guidelines to regulate their activities. Some problems have began to emerge in the form of breach of trust by some employees of some of the private security companies.

III. THE INVESTIGATION MACHINERY

A. The Criminal Investigation Department and its Mandate

We noted earlier that one of the four principal assistants to the Inspector General of Police is the Commissioner of Police in charge of the Criminal Investigation Department. More commonly known as the Director of Criminal Investigation (DCI), he/she is answerable to the Inspector General of Police for the proper administration of, and the control of personnel in the Criminal Investigation Department. The Police General Orders (subsidiary legislation issued by the Inspector General to provide for administration and control of the Police Force) sets out the general responsibilities of the Criminal Investigation Department (CID) as follows in order No. 3:

a) The prevention of crime.
b) The efficient investigation and detection of serious crime and incidents.
c) The collection and collation of all information regarding crime in the country so that the Inspector General and the Government may be kept informed in all matters of criminal interest.
d) The maintenance of close and effective liaison with all branches of the Force and, in particular with the General Duties Branch.
e) The maintenance of criminal records and statistics.
f) The provision of advice and assistance in all investigations giving rise to difficulty or doubt and the seeking of legal advice as may be necessary.

B. Serious Crimes

The Criminal Investigation Department is the organ most concerned with the investigation of crime in the United Republic of Tanzania. It may be instructive to note however as we have just seen that the Criminal Investigation Department is mostly concerned with the investigation of serious crime and incidents. The Criminal Investigation Department may thus be said to be a specialised organ for the investigation of serious crimes and incidents. Its personnel must thus possess specialist investigative skills. This also means that the investigation into minor offences – not meriting the classification 'serious' is left to the General Duties Branch of the police.

The table below is a statistical comparison between serious and minor offences reported to police between 1996 and 2000.

Table 1 Statistical comparison between total crime and serious crime/incidents reported to the police 1996 - 2000

Year	Annual Total Crime Reported	Annual Serious Crime/Incidents	Statistical Comparison
1996	507,507	97,065	19.1%
1997	528,710	110,026	20.8%
1998	517,078	105,738	20.4%
1999	531,202	113,147	21.3%
2000	510,875	101,984	19.9%

Source: *Police Annual Crime Statistics*.

Statistically, serious crimes/incidents in any one year are likely to form a small percentage of total crime reported and recorded by Police. This is not however to understate the magnitude of work at the hands of the Criminal Investigation Department. Serious crimes/incidents are not only complex but also are likely to be the ones that provoke the outcry of citizens for police action and are the likeliest to give rise to fear of crime.

An overview of the nature of serious crime/incidents will illustrate this point. Serious crimes reported to the Police in Tanzania are broadly classified into three types or categories. These categories or types are crimes against the person, crimes related to property and crimes against social order. Accidents involving rail, air and all forms of marine transport are also classified as serious incidents.

- Crimes against the person are those which injure or affect the person of an individual. They include homicide, rape, sodomy, infanticide and crimes against children or infants e.g. child stealing etc..

- Property crimes are those committed for economic or property gain. They include robbery with violence (mugging) and armed robbery, theft of motor vehicles, frauds against the government, public corporations and private commercial or financial institutions, counterfeiting offences, burglary and stealing involving high value property, theft/illegal possession of firearms and cattle theft.

- Crimes against social order is a rather broad category taking account of the so called victimless crimes like illicit drug abuse, illicit drug trafficking, possession of illicit drugs like cocaine, heroin, cannabis etc... smuggling, possession of illicit liquor, illegal possession of government trophies. Corruption and offences related to the gemstone and precious stones industry also fall under this broad category.

- Accidents involving rail, air and all forms of marine transport viz. ships, steamers, boats, dhows etc.. are also classified as serious incidents because of their potential impact in terms of loss of or injury to life. Road traffic accidents are not included in this category.

Our purpose for examining the categories of serious crimes is threefold. First to illustrate the magnitude of the responsibility of the Criminal Investigation Department. It handles the bulk of investigation into the crimes/incidents at the core of the perception by society as to the effectiveness and efficiency of the police force. The CID is therefore a crucial department for that purpose. Secondly the nature of crimes which are dealt with by the Criminal Investigation Department points to the quality of skills the personnel of the department possess or must possess. We will return to this point elsewhere in this paper. Thirdly by examining these categories of serious crimes/incidents we hope to put in perspective some of the problems we will identify later in relation to the investigative process.

The Criminal Investigation Department is structured in the same way as the rest of the police force it forms part of. At Regional and District levels the CID units are headed by Regional Crime Officers and District Officers in charge of Criminal Investigation respectively. Regional Crime Officers are answerable to Regional Police Commanders and similarly District officers in charge of Criminal Investigation are answerable to District Police Commanders.

C. The Machinery of Investigation: Problems and Future Prospects

We noted earlier the problems affecting the Police Force in their generality. The Criminal Investigation Department as part of the police force is also vulnerable to the problems we examined. In this section we shall concentrate on problems considered unique to the Criminal Investigation Department.

The Judicial Review Commission in its report published in 1977 identified the following major problems in relation to the Criminal Investigation Department. Unfortunately more than two decades later, today, the findings of the Judicial Review Commission still ring true.

The Commission found that:

a) The system for training investigators was inadequate.

b) The Police use a chemical/pathological laboratory owned and controlled by the Ministry of Health which is too pre-occupied with matters other than those which relate to criminal investigation to be able to render speedy and prompt services to police cases.

c) The present ballistic laboratory is inadequate.

d) The police are not adequately provided with law books, copies of Acts and other material necessary for their work.

e) The standard and methods of selection and recruitment of trainee police investigators is too haphazard and unlikely to provide the force in general and the Criminal Investigation Department in particular with persons of a high integrity and acumen.

Some of the above problems have good prospects for resolution in future. The selection and training of investigators in specified fields like the investigation of terrorism and related acts has been undertaken. Similarly there are on going negotiations with friendly countries which may result in a lasting solution to the problem of the Forensic Laboratory for the police.

IV. THE PROCESS OF PROSECUTION

A. The Role of the State

> *"Every act which the law constitutes to be a crime is, as such, an offence not against the individual who may have been injured by it, but against the community or the State. Where, therefore, an offence has been committed, it ought not be left to the will or the ability of an individual to institute a prosecution, but such a prosecution should be instituted by, and on behalf of the State through (an) appointed officer."*
> *per* Lord Chief Justice Lockburn (Hetherington 1989:9)

The quotation above now in essence of historical importance only, serves to illustrate the central role of the State in the prosecution of offenders. The prosecution of persons suspected of having violated the law is part of the measures which the government undertakes to ensure on behalf of the State the preservation of peace and order. Indeed the prosecution of suspects forms part of the criminal justice process. The general aim of that process is to punish the guilty and protect the innocent or those whose guilt is not proved beyond reasonable doubt.

B. The Control of Criminal Prosecutions

In Tanzania, except in the Primary Court the task of prosecuting persons suspected of having violated the law is almost entirely undertaken by specific organs of government on behalf of the State. All criminal prosecutions are the direct concern of the Director of Public Prosecutions (DPP). He/she is appointed by the President of the United Republic from among persons qualified to practice as advocates of the High Court of the United Republic and have been so qualified for not less than five years prior to appointment (s. 89 Criminal Procedure Act No. 9/1985, henceforth cited CPA).

The Director of Public Prosecutions has powers in any case in which he/she considers it desirable so to do: (s.90 CPA)

a) to institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed by that person.

b) to take over and continue any such criminal proceedings, that have been instituted or undertaken by any other person or authority, and

c) to discontinue any such criminal proceedings instituted or undertaken by him (her) or any other authority or person.

The power of the Director of Public Prosecutions to institute or take over criminal proceedings begun by any other person is exercisable by the holder of that office alone or persons acting under his/her direction or authority. However a person or authority that has instituted criminal proceedings may with leave of the court withdraw the proceedings (s.90(3)CPA). Further the Director of Public Prosecutions enjoys full independence and discretion in the exercise of his/her powers. The DPP may not receive any directions from any other person except the President of the United Republic (s.90(5)CPA).

The Director of Public Prosecutions is assisted in the discharge of his/her functions by lawyers (State Attorneys) based at the Chambers in Dar Es Salaam as well as in the zones, of whom however there are too few. We shall revert to this aspect later on.

C. Appointment of Public Prosecutors

In order for the process of prosecution of suspects to function effectively and because of the paucity of state attorneys the Director of Public Prosecutions has been vested with powers to appoint public prosecutors for Tanzania generally or for any specified area of Tanzania or for any specified category of cases (s.95 CPA). It is in the exercise of these powers that the Director of Public Prosecutions has appointed every police officer not below the rank of Assistant Inspector of Police to be a Public Prosecutor. (Criminal Procedure (Public Prosecutors) Order. Government Notice No. 382 of 1943).

In exercise of the same powers referred to above the Director of Public Prosecutions has appointed various other public officers to be Public Prosecutors. As such Labour Officers, Health Inspectors, Postal officials and other public officers prosecute cases related to their occupations. Public Prosecutors so appointed however remain subject to the directions of the Director of Public Prosecutions in the conduct of the prosecution. In Tanzania there is room for a private person to conduct a private prosecution provided he/she seeks and obtains leave from the magistrate inquiring into the case. The private prosecutor may after obtaining such leave conduct the prosecution in person or by an advocate. A private prosecutor may also withdraw from the conduct of prosecution so begun. It must be noted however that a private prosecution so instituted may be taken over or discontinued by the Director of Public Prosecutions as we saw earlier. It is clear therefore that the right of a private person to maintain the conduct of a prosecution is not absolute.

D. Supervision of Prosecution by the Director of Public Prosecutions

It may be argued that all the prosecutions in Tanzania are the business of the Director of Public Prosecutions. In theory, this may be true at least for two reasons. First because the law as we saw it gives power to the Director of Public Prosecutions to initiate prosecutions or criminal proceedings against any person, take over any criminal proceedings begun by any person or authority whatsoever and to discontinue any criminal proceedings whether initiated by his/her office or any other person or authority. The second reason for the theoretical truth of the argument is that all public prosecutors are appointed by the Director of Public Prosecutions and thus subject to his/her control and supervision.

Theoretical truth however sometimes belies the practical truth on the ground. In Tanzania except for those cases where his/her explicit consent is required by law before a criminal proceeding is instituted and prosecution undertaken, the Director of Public Prosecutions may never see or know anything about a case. In cases where the consent of the Director of Public Prosecutions is required before the institution of criminal proceedings not only would he/she demand to see the investigation file and thus evaluate the evidence, but also he/she may give guidance to the investigative agencies. Cases requiring the consent of the Director of Public Prosecutions in Tanzania are in our submission few and far between. The reason is that they comprise offences like raising discontent and ill will among the inhabitants (s.63B of the Penal Code), incest by males or females (s. 158 and 160 of the Penal Code), abuse of office by public officials (s. 96 of the Penal Code) and a handful of other offences, which in reality are not the most common offences.

It is also worth of note in this context that the powers of appointment of Public Prosecutors by the Director of Public Prosecutions are exercised more in generic terms than in specificity. Except in rare cases where specific named persons are appointed Public Prosecutors such appointment is more likely than not to take the form of holders of named offices, or ranks as is the case of appointment of all Police officers holding the rank of Assistant Inspector and above to be Public Prosecutors. While the Director of Public Prosecutions may possibly insist on the basis of law that only Police officers of the appropriate rank act as Public Prosecutors, the decision as to who becomes promoted to that rank is clearly not

that of the Director of Public Prosecutions but that of the Police Force – the agency which employes the public prosecutor. This is not a position unique to the Police agency, it is also true for other government departments where the appointment of Prosecutors is done in generic terms rather than specific named persons. Need we point out here, however, that generic appointment has the convenience of perpetuity when compared to appointment of named individuals. A balance may have to be struck between the perceived advantage and certainty.

In spite of the above limitations the Director of Public Prosecutions does exercise a limited screening in at least three instances: serious cases of particular legal difficulty in the course of investigation of which the Director of Criminal Investigation has found it necessary to seek his opinion, cases in which the consent of the DPP is required before a prosecution may be instituted and cases triable on indictment by the High Court. In all three instances the DPP would be able to scrutinise the case file and guide the investigation where there was a need and finally make the decision to prosecute. In up-country stations the screening would be done by State Attorneys in the Zonal Chambers of which there are nine in conformity with the High Court Registries.

E. The Prosecution Process: Problems and Prospects for the Future

We have somewhat at length noted some inherent problems associated with the process of prosecution. In this section we shall examine problems related to the control and supervision role of the Director of Public Prosecutions while those related to prosecution by the Police are examined in the next part.

1. Inadequate Personnel

The Chambers of the Director of Public Prosecutions has a serious problem of shortage of personnel at the Headquarters in Dar Es Salaam and at Zonal Chambers up country. This problem was identified as early as 1977 by the Judicial Review Commission. It has no been satisfactorily resolved to day. Shortage of personnel may affect the ability of the DPP to exercise his supervisory powers over Public Prosecutions.

2. Budgetary Constraints

The office of the DPP is under the Ministry of Justice. For a long time this Ministry has had budgetary problems which have threatened to cripple the justice delivery system. The Judicial Review Commission in 1977 pointed out the shortage of law books and law journals at the DPP's Chambers, possibly the outcome of budgetary constraints. Without sufficient materials for reference the very quality and reliability of the decision or opinion of the DPP may be in jeopardy.

3. Conceivable Measures to Resolve the Problems

(i) *An Independent Prosecution Service*

The establishment of an independent Public Prosecution Service under the office of the DPP was one of the recommendations of the Judicial Review Commission in 1977. It has no been established to date. In our view its establishment would go a certain extent some of the problems related to the DPP's supervisory role over public prosecutions.

(ii) *The Legal Sector Reform Programme*

A reform programme in the legal sector was launched in 1993. Among its terms of reference was an examination of the terms and conditions of service of personnel in the Legal Sector. We are in no doubt it has more work ahead since the terms and conditions of service in the Legal Sector to day do not seem to attract sufficient personnel to be able to resolve the endemic shortages of personnel.

(iii) *The Commission on Human Rights and Good Governance*

The establishment of a Commission on Human Rights and Good Governance is an important contribution to the criminal justice system of Tanzania as it will play an important role in educating people as to their rights in addition to listening to their grievances.

(iv) *Private Prosecution*

As part of the recommendations of the Judicial Review Commission in 1977 the right to private prosecution was retained. Under s. 99 CPA a private citizen may with leave of the Magistrate institute a prosecution in person or through an advocate. It is an important right provided it does not amount to an abuse of court process, a possible defect curable by the DPP's power to take over and discontinue proceedings.

V. CO-OPERATION BETWEEN THE POLICE AND PROSECUTORS OR CO-ORDINATION BETWEEN THE INVESTIGATORS AND PROSECUTORS

A. A Preliminary Issue

It may sound somewhat enigmatic in the case of Tanzania to talk of co-operation between the police and the prosecutor. In our view the term co-operation in this sense assumes that the police and the prosecutor act for or are employed by separate or different agencies. In Tanzania where the bulk of prosecutions are conducted by police officers of the rank of Assistant Inspector and above, who are employees of the Police Force, the same agency which undertakes investigation; the optimum approach would be to discuss coordination rather than co-operation. For this reason and for avoidance of doubt we felt we needed to dispose of this as a preliminary issue; hence our phrasing of the sub-theme in this part in the alternative. In this part therefore we discuss the question of co-ordination of the functions of the public prosecutor and the functions of the investigator as well as other issues incidental thereto. In particular we examine how the work of the public prosecutor is supervised and co-ordinated with that of the investigator, the capacity or preparation of public prosecutors and the inputs into the making of the decision to prosecute.

B. Supervision and Co-ordination

We saw earlier the structure of the Criminal Investigation Department, and noted that at regional and district levels a Regional Crime Officer and District officer in charge of Criminal Investigation respectively, supervise the criminal investigation units, answerable of course to the Regional Police Commander. Public Prosecutors in the police force fall under the general supervision of Regional Crime Officers, the principal supervisors of crime investigation at regional level. They are however expected to co-ordinate their work with other officers such as officers in charge of Police Stations where the cases submitted to them for prosecution originate directly from police stations as in the case of offences triable in summary proceedings by Subordinate Courts.

There are two categories of investigators. Minor offences are normally investigated by investigators from the General Duties Branch i.e. uniformed officers. Serious offences are investigated by detectives from CID units. While the co-ordination of the investigation into minor offences where such need arises will be the responsibility of the officers in charge of stations, protracted investigations requiring the meticulous collection of evidence will be done by CID units. It is thus not uncommon for cases begun by the uniformed branch to be transferred to detectives in the CID units. Indeed one of the terms of the mandate of the Director of Criminal Investigation in exercise of his/her discretion is to take over the investigation of any crime where deemed expedient to do so. The Director of Criminal Investigation will in befitting cases instruct Regional Crime Officers to act in that regard. This perhaps ties up the equation. With the Public Prosecutor and the investigator both falling under the supervision of the Regional Crime Officer, we may conclude that it is his/her duty to co-ordinate both the process of investigation and the conduct of the prosecution.

C. Capacity Building

We borrow this term for its convenience and currency in management jargon. We intend here to address the question of what it takes to make a Public Prosecutor in Tanzania. Mr. Justice Chipeta made this succinct observation regarding the qualities of a public prosecutor:

> *"Like many occupations the job of a public prosecutor demands intelligence, training, courage, common sense, tact, patience, capacity for hard work and an interest in the job. A public prosecutor with these qualities is certain to derive pleasure and satisfaction from the work, and is an asset to the administration of criminal justice". (Chipeta 1982:xiii)*

The bulk of prosecutions in Tanzania is handled by the Police countrywide. This is a challenge to the administration of the police to ensure that persons assigned the job of public prosecutor have relevant skills. It is a policy of the Tanzania Police Force that prior to assignment to a particular job or function the candidate must undergo training to acquire the relevant skills. A police officer assigned the function of public prosecution will have undertaken at least one of the following five courses: a degree course in law which is a four year programme administered by the Faculty of Law of the University of Dar es Salaam, leading to the award of a Bachelor of Laws degree, a Certificate Course in Law also administered by the same University for at least one year whereby the candidate becomes qualified as a para legal officer, a one year course on Public Prosecution administered by the Institute of Development Management at Mzumbe under the auspices of the University of Dar es Salaam, or a three month Public Prosecution course organized at the Police College, one of the training institutions owned by the Police Force. This course is administered to Police Officers who have previously undergone a six month course covering Criminal Procedure, Criminal Law, the Law of Evidence and

handful of other disciplines. The Public Prosecution course focuses specifically on prosecution skills *viz* ethics, advocacy in general and court etiquette, hence its short duration.

In appreciation of the need for well skilled public prosecutors the Tanzania Police Force in 1972 sought and obtained leave of the Faculty of Law of the University of Dar es Salaam to organize the para legal Certificate Course in Law within the Police Force using the classroom, library and other facilities of the Police College at Dar es Salaam. This arrangement was necessitated by the fact that similar courses organized by the Faculty of Law which were also open to other government departments admitted but too few police officers. Further this Faculty of Law administered course had another disadvantage. Because it was administered on a part time basis it lasted for two years. Two years was considered too long to wait before qualifying just a few public prosecutors. After agreement was obtained to run the Certificate in Law Course at the Police College on a full time basis, now the course runs for one year on a residential basis with an average of 35 police officers participating every year. Lectures are given by qualified lawyers from the Police Force while the Faculty of Law administers the examinations in order to ascertain the quality of teaching and maintain the requisite high standards of the University. The successful candidates become qualified para legal officers ready for deployment as Public Prosecutors and investigators.

Our purpose in dealing at length with capacity building for Police Public Prosecutors in Tanzania is threefold. First to dispel any lingering doubts as to the skills possessed by them to discharge their duties. With the level of training the prospective public prosecutors receive there can be no doubt that they have the requisite skills to discharge their duties in professional style. The second reason is to commend the wisdom and foresight of the top administration of the Police Force. With the bulk of prosecutions, being undertaken by the police and the Director of Public Prosecution's Chambers being unable to offer adequate due to being understaffed, the gap left by this malfunctioning of the DPP's Chambers had to be filled and by personnel with relevant skills and competence. This is what is done by the capacity building scheme for police public prosecutors. The third reason is to lay a foundation for our examination of the integrated roles of investigation, screening of cases and decision to prosecute which we do presently.

D. Police Screening of Cases and the Decision to Prosecute

The trajectory of a case in Tanzania will normally go through four main stages: reporting by the victim of the crime, gathering of evidence by the investigators, the reading or study of the case file and the making of the decision to prosecute. Each is characterized by the number of activities. On receiving a report by the victim or any person who may be aware of the crime the police officer receiving the report will have to decide whether the report discloses any offence and if so which offence. To initiate the collection of evidence the scene of crime will have to be visited by a senior officer in order to appreciate the circumstances of the event since he/she will be the one to supervise and guide the investigation by issuing appropriate instructions to the investigator. Depending on the complexity of the case the collection of evidence will take a long or short time and at some stage the suspect will be arrested if he/she was not arrested immediately after the commission of the crime. The arrested suspect will be presented to a magistrate's court with a charge on the basis of what appears to be the offence committed after initial inquiries. In any case the suspect may not remain under police custody for more than twenty four hours without appearing before a court. Samples from the scene requiring examination by the Government Chemist will be presented for examination at some stage and the report placed on the case file. After the collection of what appears to be sufficient evidence, the investigator will present the case file to his/her immediate supervisor for preliminary scrutiny and further guidance if necessary. If the supervisor is satisfied the case file will be presented to the Regional Crime Officer who will study the case file in minute detail. This stage sometimes called 'screening' will be done meticulously weighing provisions of the law against the facts as discovered by the investigator.

Need we mention at this stage that Regional Crime Officers have the necessary skills and competence to carry out the screening function. Of the twenty five Regional Crime Officers country wide at least 25% of them are qualified lawyers, the remaining are para legal officers having attended the certificate course in law we described earlier. Their immediate assistants also have similar qualifications in the majority. In Tanzania therefore there is no shortage of legal skills where the study and evaluation of available evidence in a case file is concerned.

After evaluation by the Regional Crime Officer of the evidence on the case file and weighing it up against the law three possible courses of action may follow. The first is the decision to prosecute. It is made where the case has no complex issues requiring superior guidance. In such an instance the local Public Prosecutor is instructed by the Regional Crime Officer to proceed with the prosecution on the basis of the charge as laid earlier or an amended one where appropriate.

Where the Regional Crime Officer is of the view that further evidence ought to be collected the case file is returned to the supervisor of the investigating officer with detailed instructions as to what further action need to be taken and the

specific pieces of evidence which need to be collected. The third course of action relates to cases with complex issues, cases requiring the consent of the Director of Public Prosecutions, and cases triable on indictment by the High Court. Cases with complex issues are referred to the Director of Criminal Investigation for perusal and guidance. In turn the DCI may seek the guidance of the Director of Public Prosecutions where he/she sees it necessary or give the guidance himself/herself. Cases requiring the consent of the DPP prior to prosecution are also submitted to the Director of Criminal Investigations for perusal. On satisfaction that all the necessary evidence has been collected, the DCI submits the case file to the Director of Public Prosecutions with views and opinion regarding the merits of the case.

All cases triable on indictment by the High Court are submitted to the Director of Public Prosecutions for perusal as well as guidance. More importantly however is that Police Public Prosecutors have no *locus standi* to appear before the High Court. Appearance for prosecution before the High Court is the preserve the State Attorneys. After perusal of such cases where the Director of Public Prosecutions is satisfied that all the relevant evidence has been collected he/she will instruct a State Attorney to appear before the High Court and prosecute the case. Where the DPP or a Zonal State Attorney is of the view that further evidence ought to be gathered the case file will be returned to the Director of Criminal Investigation or the Regional Crime Officer, as the case may be, with such instructions.

E. The Investigation and Prosecution Roles: Problems and Future Prospects

The system where the police investigate and prosecute suspects was possibly a result of expediency. It has not been without critics at home and abroad. Critics for example point to the importance of objectivity in deciding whether or not to prosecute. They argue that where the same agency which investigates crimes also makes the decision to prosecute objectivity may be compromised. The Criminal Justice Committee for England and Wales thus observed:

> *"The honest, zealous and conscientious police officer who has satisfied himself that the suspect is guilty becomes psychologically committed to prosecution and thus to successful prosecution. He wants to prosecute and wants to win. (Criminal Law Review" (1970:668)*

Among the critics of the set up in Tanzania for almost the same reasons was the Judicial Commission Review Report published in 1977. The Commission wondered whether the appearance of impartiality by the court does not suffer considerably where the officer who conducts prosecution before the court is a member of the organ which investigated the case. In somewhat dramatic conclusion the Commission opined that an accused person brought before the court where the prosecutor, the dock officer and the court orderly are dressed in police uniform may have reason to think that the courts are run by the police. "Am I before a police court?" the accused may well wonder. (Judicial Commission 1977:95).

The Judicial Commission recommended the abolition of the system whereby the decision whether to prosecute or not is made by the same organ – the police which also investigates crimes. Twenty four years later today the system set up almost six decades ago has not been changed.

It is worth of note however here that the administration of the police in Tanzania remains wide awake to the need for objectivity on the part of the police prosecutor while in court. Police General Orders No. 243 directs thus in paragraph 4 (c):

> *"Prosecutors* **may** *and if the accused is not represented* **must** *bring out any facts and make any objective comment which the facts justify which may tend to mitigate the seriousness of the offence. If the accused is represented, they will ensure that all the facts which may assist the defense advocate in mitigation are known to him" (PGO No. 243 para 4(c)* (emphasis supplied)

With those lucid directives to Police Prosecutors it is clear that the police force's policy is to ensure impartiality and objectivity. Two other problems associated with the integrated system are the apparent delays between first appearance and eventual disposal of the case. In part the delay may be a function of the integrated system and also the irregularity of High Court sessions due to budgetary constraints of the Judiciary. As a result of the delays remand prisoners suffer considerable congestion. In some cases suspects awaiting trial by the High Court have remained in remand prison for up to five years.

1. Conceivable Measures to Resolve the Problems

(i) *An Independent Public Prosecution Service*

The establishment of an Independent Public Prosecution Service as recommended by the Judicial Review Commission in 1977 would go a great extent in relieving the police of the triple role of investigating, deciding to prosecute and actively prosecute. It will also render the impartiality of the court more apparent in our criminal justice system.

(ii) *The Sixty Day Rule*

In order to minimize delays a rule requiring the final disposal of a case within sixty days from the date of its inception was incorporated in the Criminal Procedure Act s.225(4) being part of the recommendations of the Judicial Review Commission in 1977

(iii) *Case Flow Management Committees*

Case Flow Management Committees have been established at Regional and District level to oversee and speed up the trial of cases. Though it has had limited success for budgetary constraints it has the potential for minimizing delays in trials and should have all the support it requires.

(iv) *Parole*

A Parole Law was enacted a few years ago. The concept of parole is however still new in the Tanzania Criminal Justice system. With time and experience the parole system should go some way in reducing overcrowding in the prisons which is considerably serious.

(v) *Checks and Balances*

An important check on the monopoly of functions inherent in the integrated system is the residual power of the Director of Public Prosecutions to take over and withdraw criminal proceedings instituted by any person or authority. It is an important potential balance of the powers exercised by other organs usually without the DPP's knowledge particularly in the decision to prosecute.

VI. INDEPENDENCE FROM ARBITRARY INFLUENCE

A. The Setting

We chose to address this sub-theme at this stage of our paper in order to place it in a proper setting after examining the role of police in the investigation and prosecution of crimes. We take independence in this context to mean the absence of external or political formal control or influence brought to bear on the police functions of investigation and prosecution. Independence for this purpose takes two forms: organic independence and structural independence. Organic independence is said to exist where the agency in question is separate from political institutions and thus not subject to their control or influence. We shall take structural independence to be seen to be present where matters before the police for action or decision are attended to on the basis of law alone without any extraneous consideration or influence. This may also be called functional independence.

B. Absence of Political Influence

In a multi-party democracy it is imperative that police agencies remain separate from politics. It is the only way to ensure that the decisions of such agencies are based on law and law alone. In Tanzania Article 147 (3) of the Constitution of the United Republic prohibits any member of the armed forces including the Police Force to subscribe to or be a member of any political party. It is contended that by this provision of the Constitution members of the police force are unlikely to be influenced by any political considerations and neither may they be dictated to by any political functionary in the discharge of their investigative or prosecution function.

C. Organizational and Structural Independence

The policing of the United Republic of Tanzania including Zanzibar falls squarely on the shoulders of the Tanzania Police which as we saw is a national Police Force. The Inspector General has overall command of the Police Force. Though the Police Force falls under this Ministry of Home Affairs, it is contended that this is essentially for political accountability only. The Minister for Home Affairs is the parliamentary spokes person for the Police Force and other departments falling under this Ministry of Home Affairs. Further the Minister where need arises may issue general directions to the Inspector General. However, the operational command and superintendence of the Police Force is the responsibility of the Inspector General of Police.

We may make one observation before leaving this part. Given the set up we briefly examined police action whether related to investigation or prosecution is unlikely to be influenced arbitrarily by politicians or other external organs. The legal setting where police officers are clearly separate from politics and political influence lays a firm foundation for their actions in relation to investigation and the decision to prosecute for that matter to be based on legal considerations alone. Perhaps the para-military command structure of the police force further buttresses this position. A uniform command structure runs from the top command: The Inspector General all the way to the lowest ranking officer: the Police Constable or Detective Constable. In this context police officers at all levels take commands and instructions from their superiors in rank alone which in our view leaves little room, if any, for any extraneous influence, political or arbitrary to be brought to bear on the actions of the police force.

D. Independence from Arbitrary Influence: Problems and Future Prospects

The Constitution excludes the police from politics. That may be a guarantee that their operational decisions including the decision to prosecute will not be politically influenced. Similarly the DPP may not receive directions from any other person except the President of the United Republic. That is as far as guarantees can go at law. There are likely problems however. Like other Public Servants senior police officers have no security of tenure of office. On the other hand the DPP is structurally under the Attorney General, an *ex officio* Member of Parliament. The Attorney General ceases to hold office with the dissolution of Parliament and has to be reappointed every five years by an in coming President.

In order to resolve the problem of potential arbitrary influence in the exercise of Police functions there should be certain safeguards. Such safeguards could take the form of clear provisions regarding the tenure of office of specified officers, procedures and mechanisms for their appointment and removal from office as well as their superannuation schemes.

VII. CONCLUSION

We have examined in some detail the administrative structure of the Tanzania Police Force in the light of its functions of investigation and prosecution of suspects. This set up where the Police exercise both functions: investigation and prosecution and hence the decision to prosecute has been in existence for more than five decades – since 1943 when the Director of Public Prosecutions appointed Police Inspectors to be Public Prosecutors. We saw the limitations of this arrangement and those of the office of the Director of Public Prosecutions in exercising the decision to prosecute in full. In part the problems we saw may be resolved by establishing an independent Public Prosecution Service under the office of the DPP as recommended since 1977 by the Judicial Review Commission. It should however be established under a law which among other matters shall stipulate its powers, relations with investigative agencies, code of conduct and tenure for its senior officers.

In the year 2000, the Government launched a Public Service Reform programme which is to last through to 2011. The programme admits the constraints under which it has been launched as its slogan runs 'In pursuit of Quality Public Services under severe Budgetary constraints.' In our humble opinion, budgetary constraints notwithstanding, the delivery of justice is an important public service. It is our hope that at an appropriate future time the delivery of criminal justice in all its ramifications will be addressed under the programme.

Finally it is our opinion that the newly established Commission on Human Rights and Good Governance is an important instrument for laying a foundation for reforms in the Criminal Justice system of Tanzania. Concerned as it will be with the education of the public as to their rights as well as listening to their complaints in relation to acts of public officials that infringe good governance principles including corruption it will provide a link to justice for the common man which even the criminal justice system could not provide.

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APPENDIX 1

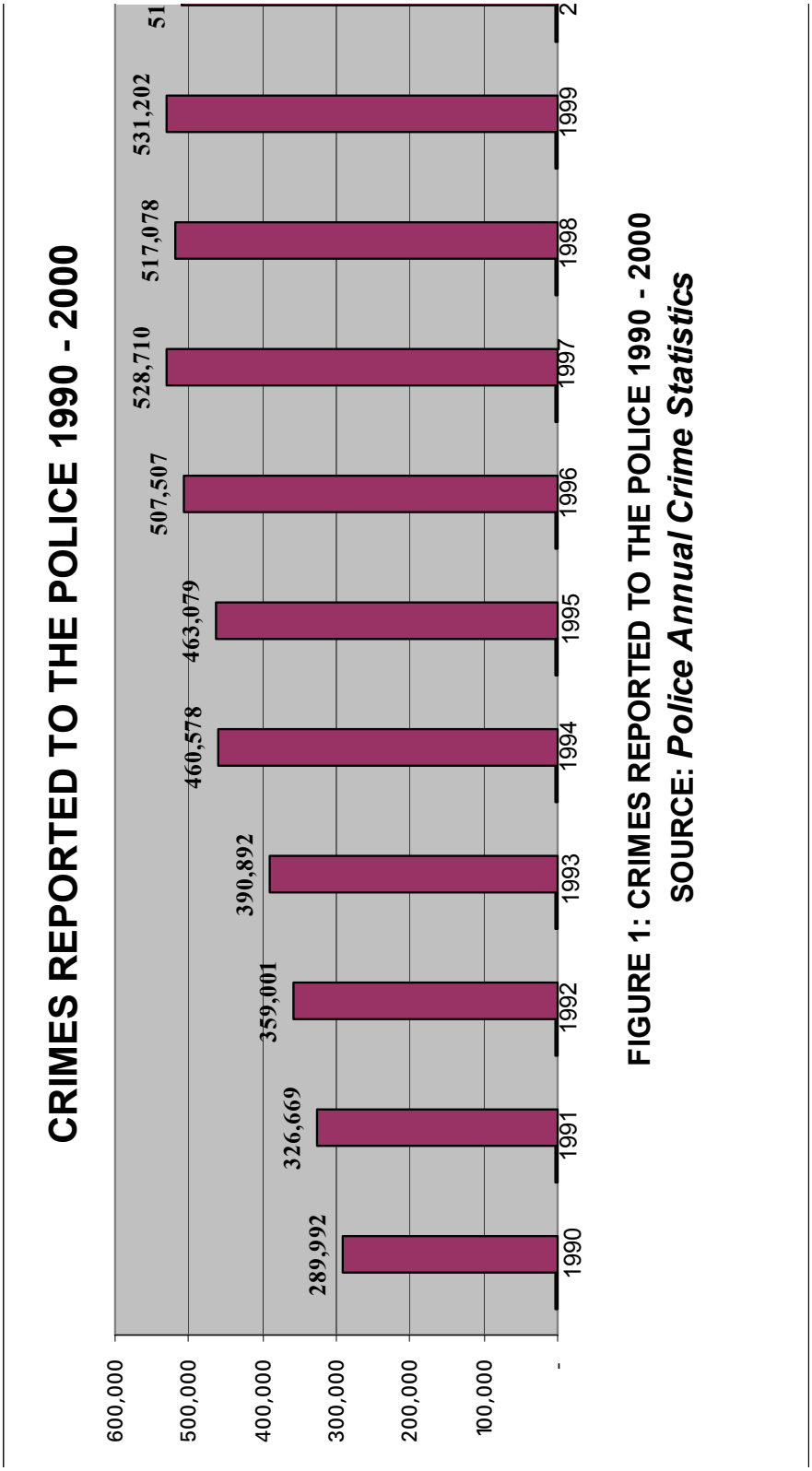
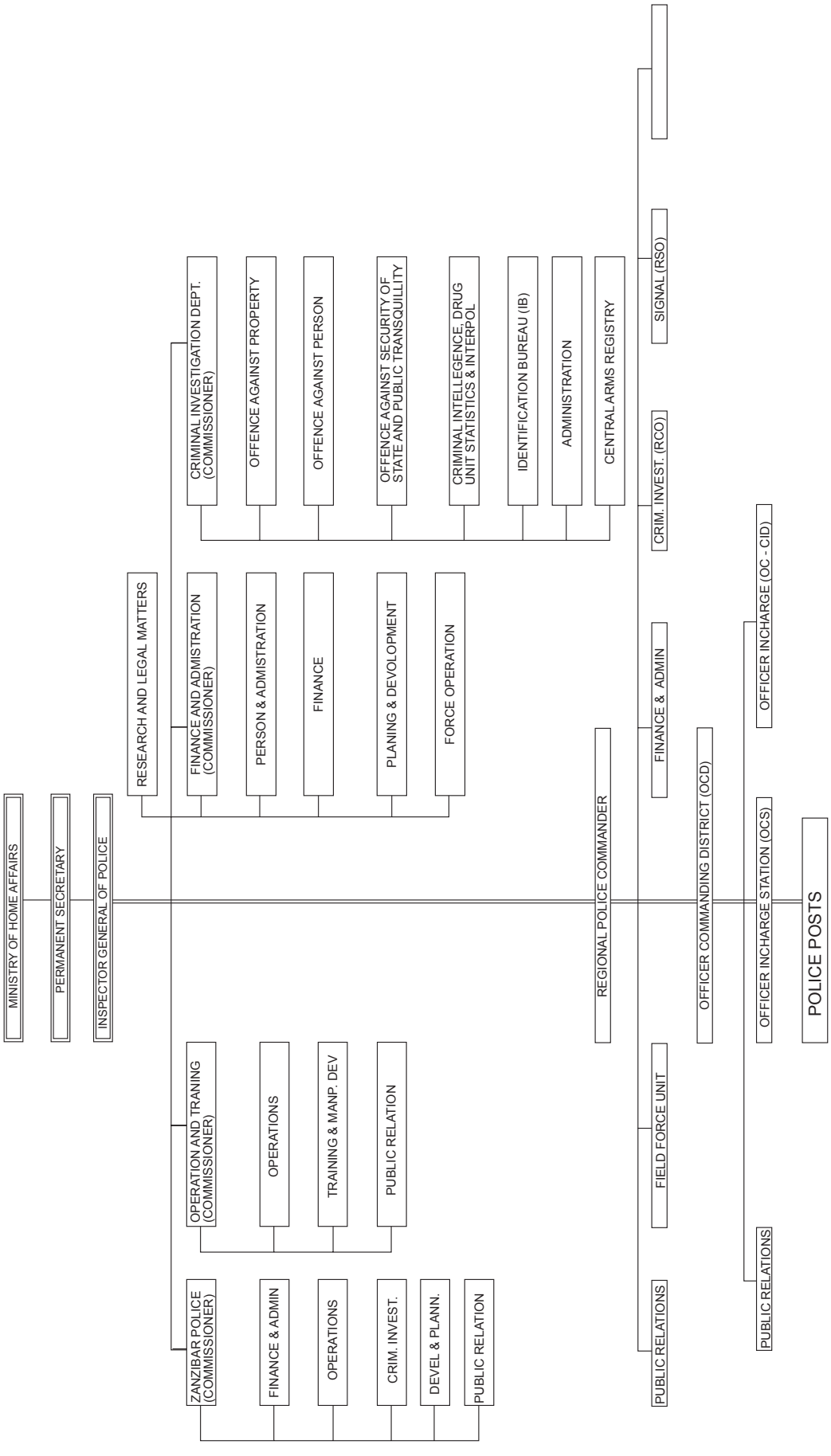


FIGURE 1: CRIMES REPORTED TO THE POLICE 1990 - 2000
SOURCE: *Police Annual Crime Statistics*

APPENDIX 2


MINISTRY OF HOME AFFAIRS
PERMANENT SECRETARY
INSPECTOR GENERAL OF POLICE
RESEARCH AND LEGAL MATTERS
FINANCE AND ADMISTRATION (COMMISSIONER)
PERSON & ADMISTRATION
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IDENTIFICATION BUREAU (IB)
ADMINISTRATION
CENTRAL ARMS REGISTRY
SIGNAL (RSO)
CRIM. INVEST. (RCO)
REGIONAL POLICE COMMANDER
FINANCE & ADMIN
OFFICER COMMANDING DISTRICT (OCD)
OFFICER INCHARGE (OC - CID)
OFFICER INCHARGE STATION (OCS)
POLICE POSTS
OPERATION AND TRANING (COMMISSIONER)
OPERATIONS
TRAINING & MANP. DEV
PUBLIC RELATION
FIELD FORCE UNIT
PUBLIC RELATIONS
ZANZIBAR POLICE (COMMISSIONER)
FINANCE & ADMIN
OPERATIONS
CRIM. INVEST.
DEVEL & PLANN.
PUBLIC RELATION
PUBLIC RELATIONS

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GROUP 1

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I. INTRODUCTION

The eleventh session of the United Nations Commission on Crime Prevention and Criminal Justice will, among other matters, discuss the question of "Criminal Justice Reform". It is thus an appropriate moment to discuss police systems, their effectiveness in achieving the goals for which they are established, the problems faced by the various police systems of the world and the ways and means to resolve those problems. Police institutions under whatever form or organization or administration play an important role in the overall criminal justice system of any country. In tune with the moment and the times they have to undergo reforms with the object of rendering them more efficient and effective in the delivery of their services to the people who look upon them to do so.

This is a report of a general discussion on effective police systems. In the discussion we examined selected police systems of the world, addressed their effectiveness in the achievement of their objectives, and the problems they encounter which may militate against the attainment of their goals. Finally we examined a number of measures, which we suggest may be adopted to resolve the perceived as well as existing problems in order to render the police systems more effective and efficient.

We should mention here that this paper does not have the purpose of offering a termination of the discussion on the subject, and that it is related to the reality of the involved countries, the analysis presented herewith may not represent the reality of other countries.

The analyses presented within this paper is oriented and pertaining to the existing situation in the involved countries, therefore, when taking into consideration the conclusions and recommendations pointed out such circumstances should be taken into account.

For purposes of discussion and clarity of approach the police systems of the countries under review have been classified into three types or systems, namely:

A. Centralized or National Police Systems
B. Semi-centralized (Dual Control) Police Systems, and
C. Decentralized Police Systems.

This classification however has been adopted for purposes of discussion only. It is not an exclusive or rigid classification for, depending on the vision and perspective of a country, one police system may overlap or fall into more than one classification or be a mixture of two or more systems. We hasten to point out, for avoidance of doubt that this classification is in no way an indicator of the preference of the participants as to any one policing system, since the choice of a policing system is a prerogative of the country concerned and a sovereign decision.

II. DEFINITIONS

The following terms used in this report shall have the meanings ascribed to them as below.

A. Centralized Police System — Shall mean a police system in which there is a national police agency or police institution which is centrally commanded and controlled through a vertical chain of command and such police institution has unlimited jurisdiction throughout the territory of the country.

B. Semi-Centralized Police System — Means a police system in a federal system of government or similar constitutional arrangement where the responsibility for law and order is vested in the governments of the component states, provinces or prefectures and the control of the police agencies in the states, provinces or prefectures vests in both the Federal (Central) government as well as the governments of the component states, provinces or prefectures irrespective of the extent and measure of control exercised by either organ.

C. Decentralized Police System — Means a police system in a federal, union or similar form of political or constitutional arrangement, where responsibility for law and order and consequently the operational control, management, and superintendence of the police agencies or institutions is the exclusive responsibility of the governments of the states or provinces; components of the federal or union arrangement as the case may be.

III. CLASSIFICATION OF THE POLICE SYSTEMS

Nations have varying police systems. Some countries like Chile, El Salvador, Indonesia, Kenya, Malaysia, Nepal, Papua New Guinea, Tanzania, Thailand and Uganda have centrally controlled or national police systems. Generally such countries are characterized by a single designated national police chief who has overall command, superintendence and management of the national police agency. Some countries like Brazil and Japan have Semi-centralized or dually controlled police systems. Generally in such countries national bodies in the form of Public Safety commissions or similar form of designation exercise indirect powers of supervision over police agencies in the states or prefectures through appointments and the formulation of policies while the operational command and control remains the responsibility of the states, prefectures or provinces. Some countries like India and Pakistan have decentralized police systems. In such countries law and order is a state subject and consequently the operational command and control of the police agencies in the states is the exclusive responsibility of the state governments concerned while the role of the central (national) government is limited to financial support only.

A. Countries With a Centralized (National) Police System

1. Chile

The Political Constitution of the Republic of Chile states that The Forces of Order and Public Security comprise the *Carabineros de Chile* and *Policia de Investigaciones*. Accordingly the Chilean police forces are entrusted with law enforcement, public order and internal security throughout the country. The Forces of Order and Public Security fall under the Ministry of National Defence.

2. El Salvador

According to the Constitution of the Republic of El Salvador the responsibility to maintain public security and internal peace throughout the country is assigned to the Civil National Police (*Policia Nacional Civil* — PNC), which is headed by a General Director, appointed by the President of the Republic.

For the past ten years, due to peace agreements signed after the war the PNC has been under several ministries (Ministry of Interior and Public Security, Ministry of Public Security and by a recent reorganization the newly created Ministry of Government).

3. Indonesia

The national police force of Indonesia comes under the office of the President. It is headed by the Chief of Indonesian National Police with the rank of General, who is assisted by subordinate commanders deployed in formations and units throughout the country and answerable to the Police General.

4. Kenya

The Kenya Police Force comes under the President's office. It has jurisdiction throughout the whole country and is headed by the Commissioner of Police, assisted by three Senior Deputy Commissioners responsible for Administration, the Criminal Investigation Department and the General Service Unit.

5. Malaysia

The National Police Force of Malaysia comes under the Ministry of Home Affairs. It is headed by the Inspector General of Police and has jurisdiction throughout the country.

6. Nepal

The Kingdom of Nepal's National Police Force comes under the Minister of Home Affairs. The Inspector General of Police heads it. The commanders of formation and units throughout the country are responsible to the Inspector General of Police.

7. Papua New Guinea

The National Police Force of Papua New Guinea comes under the Minister for Police. It is headed by the Commissioner of Police. The PNG Police Force has jurisdiction throughout the country and the unit and formation commanders deployed throughout the country are answerable to the Commissioner of Police.

8. St. Christopher and Nevis

The National Police Force of St. Christopher and Nevis comes under the Ministry of National Security, which is in turn under the Prime Minister. The Police Force is headed by the Commissioner of Police and has jurisdiction throughout the country. Subordinate commanders in charge of formations or units throughout the country are answerable to the Commissioner.

9. Tanzania

The United Republic of Tanzania has a national police force—the Tanzania Police Force, which has jurisdiction in both parts of the Union namely mainland Tanzania and the islands of Zanzibar. The police force comes under the Ministry of Home Affairs. It is headed by the Inspector General of Police assisted by four Commissioners, one of whom is responsible for the formations and units of the police force deployed on the isles of Zanzibar and is answerable to the Inspector General.

10. Thailand

The National Police Agency of the Kingdom of Thailand is an independent unit under the office of the Prime Minster. It has jurisdiction throughout the Kingdom of Thailand and it is headed by an officer with the rank of Police General who is assisted by commanders of formations and units deployed throughout the Kingdom and answerable to the General Command for the proper administration of their respective units and formations.

11. Uganda

The National Police Force of Uganda comes under the Interior Ministry. It has jurisdiction throughout the Republic of Uganda. It is headed by the Inspector General who is assisted by a deputy inspector general and other subordinate commanders deployed in the formations and units and answerable to the Inspector General for the proper administration of their respective commands.

B. Countries With a Semi-Centralized (Dual Control) Police System

1. Brazil

The function of policing in Brazil, according to the provision given by the Federal Constitution, is distributed among the Union Government and the Federal States. The Constitution assigns responsibility for public safety in their respective territories to the Federal States. As such each of the 26 Federal States and the Federal District controls two police agencies namely the Military Police and the Civil Police. The Union Government controls the Federal Police, which among other tasks exercises functions as federal judiciary police. The Union Government is also responsible for the control of specialized police formations like the Federal Highway Police and the Federal Rail Police. Under the constitutional arrangement of Brazil the Federal Police under the Union have responsibility for crime with interstate, national or international implications e.g. drug trafficking while the police formations under the Federal States and the Federal District have responsibility for public safety, in general, comprising crime prevention, law enforcement and maintenance of order within their respective territories and any other crime not under the responsibility of the Union formations.

2. Japan

The best example of a Semi Centralized (dual control) Police System, Japan's police administration and organization is an embodiment of two concepts: political neutrality and democratic control; the latter being implemented through delegation of authority to local levels. The police organization of Japan comprises the National Public Safety Commission

under the jurisdiction of the Cabinet office and the National Police Agency. The National Public Safety Commission issues general guidelines, and appoints the Commissioner General of National police Agency, as well as other senior officials of the prefectural police organizations. Public Safety and the policing of the prefectures is vested in the respective prefectures. The National Public Safety Commission however exercises indirect supervisory power over policing activities in the prefectures through the National Police Agency.

C. Countries With Decentralized Police System

1. India

The Constitution of the Republic of India designates law and order as a state subject. The police agencies in the 28 states are under the control of the respective state governments. However the police force in the 07 Union Territory Administrations function under the Ministry of Home Affairs of the central government, which also control specialized investigation agency, the CBI — Central Bureau of Investigation, as well as several central police organizations, which are often deployed to assist the state police in the event of emergency. The Central Government's role is restricted to the financial support of the states and the issue of general administrative guidelines and policies.

2. Pakistan

Under the Federal Constitution of the Islamic Republic of Pakistan police and consequently law and order is a provincial subject. Each of the four provinces has its own police agency. The provincial police agencies are headed by an officer with the rank of Inspector General appointed by the provincial government who is answerable to the respective provincial government for the proper administration of the police agency. The Federal Government's role in relation to the provincial police force is limited to the issuing of general policy guidelines while the operational control remains in the provincial government.

IV. PROBLEMS IDENTIFIED IN RELATION TO THE POLICE SYSTEM

A. Budgetary Problems Affecting Efficiency

Proper recruitment, selection, education and training of officers are important aspects to be considered in respect of policing. Moreover, police officers engaged in police duties under law enforcement agencies require to be supplied with other particular logistic items, such as: equipment, vehicles, weaponry, uniforms and reasonable pay, etc.

There are two stages in a police officer's career: First, when they are training in a police academy or school; and, second, the life that starts when they incorporate and go to work dealing with crime. In both of these cases, there are insufficient budgetary appropriations by governments or institutions in charge.

Even when most of its needs are satisfactorily supplied, the budget is not enough for the police to provide the welfare conditions for their families, as for good education, security and access to health, a good pay, good pension and adequate rest time.

If these needs are fulfilled we could expect optimum efficiency from the entire law enforcement organ.

B. Lack of Training

1. Qualification

As a matter of fact, many police officers are never involved in a crisis situation, most of them never fire a gun in the line of duty. Much of their time is spent in routine activities related to social services, such as attending domestic brawls, etc, as some research studies have indicated.

Many police agencies do not focus their training on important qualities, because they assume their personnel have developed these skills prior to joining the agency. For instance, many law enforcement officers have deficient skills in relation to tact, physical courage, emotional stability, impartiality and honesty.

2. Education

What level of education is most appropriate for a new entrant to join a police agency is a sensitive and controversial issue.

Although, it might be assumed that higher education is important, that is not necessarily the case as research studies have indicated. However, education increases police officers' sensitivity and gives additional qualities to face problems on duty.

3. Training

In fact, many fields of training focused on technical courses are wasted because they are neglected. In other cases many police officers are trained on particular law enforcement and other professional skills but they are not being deployed to areas that require and can use their new skills and knowledge.

C. Lack of Cooperation

In many cases, there is a lack of cooperation between police agencies or between departments within a same agency due to;

1. Creation of too much bureaucracy in police organizations because each section perceives itself as better than the other,

2. Lack of technology to share information, especially when it needs scientific methods to collect, collate official data and put it to appropriate use. That is why collecting official data and using them is difficult,

3. They think that developing secrecy is one of their most effective sources of power and to share such information would weaken their power base.

D. Corruption

In fact, most misbehaviour by police officers does not differ significantly from the normal citizens' conduct, however, people expect much more from police; and many people think that police corruption is pervasive within the organization. It is impossible to deny that corruption exists among police agencies at various levels of magnitude. Many police officers are subjected to such strong pressures to which they succumb and become corrupt. In some countries corruption is characterized by the following factors;

1. Acts of corruption are not exposed due to a kind of "Code of Silence" among officers,

2. Some officers are charged with acts of theft and violation of drug related laws,

3. The media occasionally reveals that even the highest-ranking officers have participated in cases of corruption, more often in drug related cases,

4. There are two types of corrupt police officers, on one hand there are those who take bribes routinely from organized crime gangs in order to protect such criminal gangs from arrest and prosecution, on the other hand there are those who take bribes occasionally and persistently keep seeking opportunities to demand and take bribes. In both cases, i.e. the regular bribe takers and the occasional bribe takers become dependant on corruption for their life styles.

E. Arbitrary External Interference

This is a difficult matter to deal with, because it involves real problems within the police system. In fact, arbitrary external interference symbolizes abuse of power be it by the government, high-ranking officers or influential people within the political or social set up of a country.

As a matter of fact, those who seek to exert arbitrary influence view themselves to be above the law. As a result, powerful people can commit serious crimes using police institutions. In many cases it ends up as a violation of civil rights. Even while society is determined to make reforms to improve the independence of the police system, unfortunately in several countries, the police is forced to abandon their roles of law enforcement, order maintenance and service.

F. Lack of Personnel

In many situations, some countries are facing crime without the required quality and quantity of police officers. But even when the quality attained is of a high level there are not enough personnel to perform such police functions, as gathering information, attending crime scenes, inspecting victimised premises and performing other tasks needed to register criminal complaints. Sometimes many people do not feel attracted to become police officers, as there are insufficient incentives to do so. However, in most cases, the problem is the budget. Irrespective of the type of policing system lack of personnel affects efficiency and effectiveness.

G. Lack of Accountability

People may lose confidence in a police agency for various reasons. Loss of confidence is not occurring in all countries, however it is affecting those countries that have problems dealing with corruption, abuse of power and institutional crimes. It is hard to trust police officers whose private lives are not in conformity with their professional ethics. In the same way, people are not going to have accountability when those who are in charge of law enforcement, break the rules, even it be relatively inconsequential rules like jumping a red light.

Common people do not tolerate excessive use of force, even if police use of force is lawful. In addition, lack of accountability is likely to increase in case police agencies do not emphasize community relations, if they embrace corruption and failure to observe exemplary private life styles among some of the police officers.

V. CONCEIVABLE MEASURES

A. Budgetary Constraints

The constraint of budget is one of the factors that can effect many areas of the police organizations, leading up to situations that inevitably harm police effectiveness, such as: lack of skills, caused by insufficient training; lack of appropriate or insufficiency of equipment, and lack of logistic support, which deteriorates their operational capacity and affects the police officer's motivation; as well as low pay, which in the same way leads to lack of motivation of personnel, and as a reflection makes the police service less attractive for recruitment of personnel.

Insufficient budgetary allocation for supporting police needs and expenses is commonly found in countries under severe conditions of social and economical development.

Besides being a result of the establishment of administrative and governmental priorities, the shortage of budgetary allocation for police forces, as a matter of fact, also seems to be related to the economic capacity of the country.

In this sense, for the purpose of providing satisfactory financial support for police forces, special attention by the Government is required, in order to fairly attend the institutional needs of the police, the social expectations on public safety and the sustainment of the required level of provision of service to the people.

B. Accountability of the Police

The awesome powers given to the police must be matched with the proper system of accountability to ensure that the powers given to the police are not misused. The way accountability is enforced presently is very diffused and vague. Presently there is no outside assessment of various aspects related to the functions of the police in order to determine whether police is efficient and effective.

The responsible ministries or other bodies under which the police fall have neither the expertise nor wherewithal and sometimes not even the time to properly evaluate the working of the police. In some countries commissions, like the human rights commission, or commission for women only look into specific aspects of police work. Therefore there is a need for periodical inspections of the police to be carried out by an independent governmental organ, similar to Her Majesty's Inspectorate of Constabulary, in the UK, and report to the concerned ministry whether the police is functioning efficiently and effectively. The head of the police would be required to offer his comments on the reports of such an organ. Thereafter these reports should be published and laid before the Legislature.

To enable the designated organ to assess the work of the police the government should define a certain limited number of key objectives for the police force to be accomplished during the year. Similarly for each police formation or unit certain local key objectives should be defined. To assess the performance of the formation or unit certain performance indicators/indices need to be developed and proper information on those needs to be gathered on the basis of surveys.

Proper evaluation criteria should be developed to judge the performance of a formation or a subdivision of it, up to the lowest level, e.g. a police station. Similarly, there is a need to evolve proper evaluation criteria to judge the performance of individual officers who head these formations or units. The evaluation criteria need to be understood by all members of the police and published for information.

Complaint Authorities should be set up in accordance with the customs and practice of each country, preferably headed by persons with judicial experience. Investigation into all complaints against police would in the first instance, be done by the superiors in the police department or agency itself. Those who do not find satisfaction can approach the

Local Complaint Authority, which should have power to direct the police to reinvestigate the complaints. There should be a mandatory judicial inquiry into all cases of: alleged rape of a woman in police custody, and death of suspects while in police custody.

Transparency of police agencies is important in order to win the confidence of the citizens they serve. Police agencies should therefore establish an internal section or department whose function among other should be to release information on a routine basis regarding actions taken by the police against officers engaging in acts of misconduct.

C. Arbitrary Political Interference

Arbitrary external and political influence is an unfortunate reality in many countries. The level of interference varies from country to country but all in all where it takes place, it leads the police forces to deviate from the public interest. It is one of the factors that certainly cause inefficiency and ineffectiveness in the functioning of the police.

In democratic states the principal functions of the police forces are to enforce the law and the protection of the community, acting according to the rule of law. For this purpose the police have to function under the politicians, in order to receive guidance and keep the sense of orientation on the public interest. On the other hand, politicians are the ones entrusted to get the views and aspirations of the people, playing the role of issuing general policies, on behalf of the people's interest.

As a distortion of what is mentioned, there are instances where politicians take advantage of the police forces, by getting them to act for private or personal interests. As the police is normally one part of the executive branch of the government, functioning under the politicians and consequently in a relation of hierarchical obedience, it becomes an easy way to intervene internally in the police forces. In addition, the selection of the police chiefs is normally made under the discretion of one individual politician.

Police forces are, in this sense, highly vulnerable to external pressures, particularly those of a political nature, due to the fact that the police chiefs are subordinated to the political authorities that have put them in the position they are vested in. In such circumstances a vitiated relationship might be set, as the police heads may feel morally in debt to the politicians and obliged to do particular favors for them. In cases where the police chief refuses to stoop to this kind of relationship he will then be likely to be removed.

In several countries, in addition to nomination of the police chiefs, political authorities are also given the power to decide promotions and posting of high ranking officers, as well as to determine disciplinary sanctions; such powers enable them to strongly interfere in police matters in several ways.

As a result, some police institutions are affected in their performance, in situations such as: frequently posting and removal of personnel, harming the continuity of programmes and actions; unreasonable political recommendations that harm their recruitment processes, leading them to incorporate personnel with low or unsuitable qualifications; making decisions on promotions based on political criteria, rather than the evaluation of the performance and other legal requirements; misuse of the police force for attending personal or private and political purposes; as well as unlawful interference in investigations and directions given to the police forces.

Since it is obliged to strictly take the rule of law into account, as matter of principle, police must stand apart from politics. On the contrary, what has been seen in some countries is a tightening of the relationship between politics and police, and a steady increase of the politicization of police officers.

When police organizations have deviated from their real objectives, it is most likely they will experience declining standards of their component units and individual police officers. Such a situation leads invariably to public outrage manifested in diverse ways.

Certainly the solution to the problem of external and political arbitrary interference is not easy work, however it could be appropriate to consider the invigoration of the police organizations and an increase of its autonomy, as relevant inputs in this regard.

In this sense, the central idea is to keep the police functions insulated from external and arbitrary pressures, by way of providing structural safeguards, in order to ensure that the police functions are conducted strictly in accordance to the law. The executive branch may have demands in regard of preventive police actions and issue guidance on administrative/

regulatory functions of the police; however, the investigative functions of police should be totally preserved from any external interference. Presently in some instances investigations of cases involving high political and governmental authorities, and other VIPs, can not succeed, due to the existing control over the police apparatus.

Police officers must be shielded from undesirable and unwanted interference in posting and transfers. There must be some neutral mechanism to ensure it. In this regard, the adoption of a police organization in which the control over the police by the executive branch is exercised by way of an organ that can ensure its impartiality and political neutrality seems to be the most important recommendation.

For that purpose, the Japanese police system based on political neutrality and democratic control is fit for consideration, as it is built in such a way as to ensure absence of arbitrary and political interference. This system may be suitable for some countries in either its entirety or with minor modifications.

The following is a brief description of the main characteristics of the Japanese police system:[1]

"The National Public Safety Commission and the National Police Agency constitute Japan's national police organization. The National Public Safety Commission exercises administrative supervision over the National Police Agency. While the Commission is under the jurisdiction of the Cabinet Office, the Prime Minister is not empowered to exercise direct command or control. This guarantees the Commission's independence and ensures its political neutrality.

The Commission formulates basic policies and regulations, coordinates police administration on matters of national concern and authorizes general standards for training, communication, criminal identification, criminal statistics and equipment.

The Commission appoints the National Police Agency's Commissioner General and other senior officials of prefectural police organization. The Commission indirectly supervises prefectural police organizations through the National Police Agency.

The Commission consists of a Chairman and five members. The chairman is a state minister who presides over Commission meetings. Members, who serve five-year term, are appointed by the Prime Minister with the consent of both houses of the Diet. They must be persons who have not served as police officers or public prosecutors within five years of appointment. To ensure political neutrality, no more than two members may belong to the same political party."

Providing a reasonable tenure for officers at senior levels is an important step to improve police performance. In order to ensure that the office of the police is independent, another recommendation that could be considered is to grant security of the tenure for the police chiefs, at national and state/provincial level. By way of having a fixed tenure the police chiefs will have no fear in the exercise of their functions, as they do not have to be under the threat of being transferred or removed. Clear provisions should however be laid down for the removal from office of police chiefs. They should be removable for unsuitability or other causes or proven misconduct.

This treatment is similar to what is done for the prosecution service in various countries, where prosecutors are given certain prerogatives such that they may be removed only under certain circumstances.

In Japan, for instance, prosecutors may only be removed in circumstances, such as: voluntary resignation, reaching retirement age, found unsuitable for the position by the public prosecutors qualifications examinations committee, and disciplinary action. Other countries such as Germany and Brazil, similarly, have successfully granted strong prerogatives for prosecutors, in order to immunize them from external influence.

Matters of promotions and disciplinary actions related to police chiefs and high rank police officers in order to insulate them from external and political arbitrary interference should be dealt with by a constituted organ (as per the previous recommendation), which exercises control over the police. In the same way, this measure aims to strengthen the self-confidence of police chiefs and police officers in order to keep the functioning of the police according to the rule of law, with no fear of retaliation.

[1] Text extracted from the magazine *Police of Japan 2001*, issued by the National Police Agency of Japan, page 02.

D. Politicization of Police Officers

It has to be mentioned that the politicization of police officers can strongly harm the performance of the police agencies. In this context the intrusion of politics into police forces may give rise to negative consequences. Among such negative consequences: police officers showing lack of professional standards, more concerned with their own interests; lack of commitment with police duties and low level of discipline, resulting in a weak chain of command.

The gravity of the involvement of politics into police forces can be more clearly understood if the perceived connection between politicians and organized crime is taken into consideration. In this regard the existing police apparatus cannot oppose such kinds of coalition, when the police itself is already contaminated.

E. Police Corruption

Police corruption is widely accepted as being a matter of concern on police management, since police officers are known to serve in a very sensitive and peculiar environment, subjecting them to rather potentially corrupting situations. However, corruption is not considered an endemic occurrence in some countries.

The causes of corruption of police officers in addition to the environmental conditions of the police service are also related to other circumstances, such as: lack of ethical standards, which is the foundation of professional conduct; long periods of service exercising the same functions, which makes an officer develop overrated self confidence in his/her own capacity; social environmental conditions; as well as low level of training and education.

Police corruption, understood as the dishonesty within the law enforcement function, is the conduit pipe through which criminalization and politicization of police officers passes. It is a complex and harmful situation, which requires special attention of police management at the governmental level, since its occurrence leads to the development of mistrust of the police organization.

In this regard, for purposes of improving the situation, some practical measures are recommended, as follows:

1. Ethical standards

The establishment of internal regulations on ethics set up by a code of conduct for police stipulating the standards expected of the police and its officers in the performance of their duties is highly necessary. Such provision should emphasize honesty, dedication to duty, exemplary behavior in public, service to people, the rights of private citizens and human rights. Such provisions should also put in place the necessary sanctions to be imposed in case of misconduct. The administration of the disciplinary sanctions should be charged to senior police officers within the police department.

It would also be necessary that a similar code of conduct, both for the government servants as well as the elected representatives at the various levels be provided, as well as strictly enforced, and not remain on paper only.

2. Training

By way of proper training the Code of Conduct and its ethical values have to be drilled into the minds of police personnel during the initial training as well as in-service training. As part of the continuous training of the police regular ethics courses should also be conducted.

3. Punishment

The punishment for proven corruption should be dismissal from service and nothing less. Assets acquired through corrupt means need to be forfeited. Procedures for holding departmental enquiries should be simple and fast.

4. Social/Economical support

Police officers have to be granted reasonable conditions for supporting their individual and family needs; with particular attention to the lower ranking police officers' working conditions, living conditions, such as: proper housing, schooling for their children and medical assistance.

5. Other measures

Making it compulsory to file annual property returns by all ranks of police, which after submission are scrutinized and analyzed properly would make it unattractive for police officers to amass wealth through corruption.

To improve in-house vigilance, confidential reports on supervising officers should contain a paragraph regarding efforts made by the officer to control and curb corruption in the subordinate staff.

Regular inspections, visits and supervision by senior officers should be done in order to discourage various forms of police misconduct and acts of indiscipline.

Occupational deviance, like the falsification of evidence, planting of evidence in order to secure conviction should be discouraged and perpetrators of such acts should be punished in accordance with the disciplinary code.

Police agencies serve in given contextual settings. In situations where police corruption is pervasive it is also possible that acts of corruption exist in other sectors of the public service. This calls upon a holistic approach to fight corruption in other sectors of the public service. Countries should therefore consider seriously the setting up of independent anti-corruption organs/agencies to investigate acts of corruption among the other members of the public service.

F. Lack of Training

Training is at the very heart of effective and responsible policing. While a lot of lip service is paid to it, in reality it is a rather neglected area. Training institutions are not given the importance they deserve nor the resources they require. A very small percentage of the total police budget is spent on training. It is mostly unwanted persons who are posted to a training institute, on occasions as punishment posting. Lack of interest on the part of police chiefs in the matter of training and the budgetary constraint, are the major inhibiting factors. Training should not be treated as an end in itself. The real challenge is to translate the best possible training into the best possible police performance.

There has to be a co-relation between training undergone by the officer and his posting. No officer should be posted to a new discipline unless he has undergone the requisite training. Promotion should be linked to the training and passing of certain departmental examinations. As such training should not be considered as once-in-lifetime affair at the beginning of the career. In-service training needs to be given greater attention. There is a need for total reorientation in the approach for training. All training needs to be subdivided in two areas: one that is basic, is motivational; value based which enhances discipline and communications skills; the second area of training should have its objectives, acquisition of specialized skills and professional expertise. Training in both these areas together should achieve two purposes, namely: an attitudinal transformation and development of skills.

Each police chief should constitute an in-house "committee on training". The committee should prepare a panel of competent trainers without whom the training programme would receive a set back.

Police behavior, image, public relations and efficiency are inter-related areas. Of this, police behavior is the most vital parameter and critical variant causing positive or negative impact on the remaining three areas. Police in each country should adopt the concept of "change-agent-action plan" like a part of the UNDP (United Nations Development Programme) project on Improving the Organization and Law Enforcement System and train the required number of change agents at various levels of police hierarchy. More international cooperation including funding is required to boost the training programmes in the developing countries.

The impact of training needs to be evaluated properly. There should be a method of such evaluation of each person who has undergone a training programme at the end of one year after the training. Relevant entries should be made in the officers' evaluation report by the superior officer about the use of skills acquired in the training.

There must be greater emphasis on joint training of officers belonging to various components of the criminal justice system. Such joint training programmes, including participants from police, prosecution, judiciary, correctional institutions and prison are very useful for effective coordination and development of mutual understanding among the various wings of the system. Perhaps it would be still more useful if some members of the community with relevant expertise who are in a position to give good feedback about police work are also included in the joint training programmes as participants as well as guest lecturers or resource persons as the case may be.

Facilities available at police training institutes need to be up dated. The need for improving the infrastructure at the training institutes, improving the quality of trainers and provision of incentive to trainers is to be recognized and implemented with proper allocation of budget.

G. The Role of Police Associations

In some countries Police Associations bringing together various levels of police officers have been established, which have played a considerable role in the improvement of the conditions of service for police officers, and raising ethical

standards, which has in turn raised the officers' morale and consequently their efficiency. There is however no practice or custom of establishing such associations in some countries and therefore this recommendation may be of limited utility.

Hence we recommend that in the countries where local custom, practice or law permits the establishment of police associations, consideration should be given to establishing them, so that they may assist in various areas of police reform.

GROUP 2

COOPERATION BETWEEN THE POLICE AND PROSECUTORS

Chairperson	Mr. John Maru	(Papua New Guinea)
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I. INTRODUCTION

At the 120th UNAFEI International Senior Seminar, the participants from fifteen countries[1] discussed a topic of "Cooperation between the Police and Prosecutors" in their consideration of "Effective Administration of the Police and the Prosecution in Criminal Justice". The purpose of the discussion was to suggest possible directions with which the police and prosecutors can work together to improve effectiveness in the investigation and the prosecution while maintaining accountability of the criminal justice system.

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

II. BACKGROUND

A. Establishment of the Rule of Law

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

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

B. Consideration of Effectiveness

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

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

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

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

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

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

[3] Reports of the Course, 107th International Training Course

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

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

2. Increasing Responsibility in Terms of De-regulation

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

III. ROLE OF PROSECUTORS IN INVESTIGATIONS

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

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

A. Giving Guidance/Instructions to Police Investigators

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

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

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

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

B. Supplementing Police Investigations

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

C. Conducting their Own Investigations

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

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

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

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

IV. PROBLEMS DISCUSSED

A. Psychological Traits of the Police and Prosecutors

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

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

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

B. Conflicting Views over Case Disposition

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

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

C. Lack of Shared Common Goals

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

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

D. Lack of Objectivity

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

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

E. Lack of Discretion in Police Investigations

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

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

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

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

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

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

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

V. SYSTEMATIC RELATIONSHIP BETWEEN THE POLICE AND PROSECUTORS

A. Systematic Checks and Balance Mechanism of Criminal Justice

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

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

B. Elaboration of the Relationship

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

1. Sharing Common Values

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

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

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

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

2. More Communication

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

(i) *Intensive Early Stage Consultation*

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

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

(ii) *Regular Meetings, Workshops, Seminars*

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

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

(iii) *Close Liaison*

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

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

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

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

3. Legislation

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

4. Cooperation Models for Simplified Proceedings/Diversion

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

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

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

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

V. CONCLUSION

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

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

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

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

GROUP 3

EFFECTIVE CASE SCREENING BY PROSECUTORS OR OTHER COMPETENT AGENCIES

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I. INTRODUCTION

A. Definition

According to the Longman Dictionary of Contemporary English, screening means "to test in order to find out ability, health, suitability, loyalty, etc. and so be able to remove those that do not reach the proper standard." In our context, case screening can be said to be a process of vetting relevant documents to see whether there is sufficient evidence to charge a person in court or otherwise. In certain countries, case screenings are done through vetting the investigation papers submitted by the police and to decide whether or not to prosecute the suspect based on the evidence available. If he/she is satisfied that sufficient evidence is available to prosecute a person for a particular offense then he/she will direct prosecution. However in some countries like Japan and Korea, prosecutors have a discretionary power to suspend a prosecution even if there is sufficient evidence to guarantee a conviction. This is classifiable as case screening merely because in those instances the prosecutor expunge cases from the ordinary criminal procedure. Apart from that, there is another method of case screening conducted in Japan known as summary proceedings.

B. Necessity and Importance of Case Screening

The importance and necessity of case screening is the interests of justice. There are two types of case screening. One is the test whether there is sufficient evidence to obtain conviction. This case screening ensures expeditious prosecution of cases, helps to ensure that no innocent person is charged and where appropriate the accused is punished for the crime he/she committed. Another case screening is the test whether or not to prosecute even when there is sufficient evidence. This test helps to reduce overloading of the court with trivial or minor cases, and in other cases where it would not be in the public interest to prosecute all of them but only the most serious cases. When the courts are overloaded with criminal cases, the consequential effect would be delayed trials. Justice delayed is justice denied. Effective case screening helps to reduce government expenditures and can ease the problems of overcrowding in prisons. As far as the accused is concerned, it ensures the right of the accused to a speedy trial so that the stress that the accused has to undergo would be obviated. In addition, prosecutors can consider diversion as so-called "restorative justice" at the case screening.

C. Who Conducts Case Screening

According to various criminal justice systems adopted by different jurisdictions of the world, case screening is conducted by different authorities at different stages of the procedure. In some countries, the court is also involved in this process. Since the main theme of this seminar is effective administration of the police and the prosecution in criminal justice, therefore we would like to focus our attention solely on the case screening segment which is conducted by the police and prosecutors.

II. HOW CASE SCREENING IS DONE

A. Case Screening by Prosecutors

1. Authority Given to Investigate or Otherwise

In Brazil, El Salvador, India, Kenya, Malaysia, Pakistan, Papua New Guinea, Saint Christopher and Nevis, Tanzania, Thailand, Uganda, England as well as other countries, prosecutors are not investigators. They are not involved in criminal investigations because they do not have the authority to investigate crimes on their own. Upon completion of an

investigation, in these countries the police refer the investigation report to the prosecutor who will then scrutinize or screen the investigation paper thoroughly and decide whether or not to prosecute the suspects based on the evidence available. The prosecutors would then be in a position to advise the police on further investigation, if necessary, so as to ensure that the prosecution has adequate and tangible evidence for prosecution.

In Chile, Nepal, Japan, Korea, Germany, and other nations, prosecutors play a significant role in the investigation. In Indonesia, however, prosecutors can only investigate corruption cases. Prosecutors in these countries other than Indonesia can initiate investigation or direct the police regarding all crimes. Prosecutors can conduct investigations including interviewing witnesses and suspects. Therefore, they are able to supervise the legality of the investigations and thus the screening by the prosecutor can be said to be more accurate. Due to this rigorous screening, the conviction rate is normally high. For example, in Korea and Japan the conviction rate is constantly more than 99 percent. But we should admit that the conviction rate is not the only barometer of efficiency of a criminal justice system.

2. Suspension of Prosecution

In some countries, prosecutors have the discretionary power to suspend or not initiate prosecution even if there is sufficient evidence to convict a suspect. This is called the Principle of Discretionary Prosecution. The prosecutor may decide not to prosecute a suspect taking into account the suspect's age, character, criminal records, circumstances, his/her relationship with the victim, etc. In Japan and Korea, suspension of prosecution is specifically provided for in the Code of Criminal Procedure. The rate of suspension of prosecution is approximately 60 percent in Korea, and 40 percent in Japan. In Korea, suspension of prosecution applies both to juveniles and to adult offenders, and they are entrusted to the protection and guidance of a member of the Crime Prevention Volunteers Committee for a period of 6 to 12 months, taking into account the possibility of committing a crime in the future. This system was introduced so as to prevent juvenile and adult offenders from being repeat offenders and to rehabilitate them into sound and reasonable citizens.

3. Evidentiary Test and Public Interest Test to Initiate Prosecution

In the common law countries, there are two tests applied by the prosecutors in making a decision to prosecute. The first test is the evidential test. If the case does not pass the evidential test, it must not go ahead, no matter how important or serious it may be. If the case does meet the evidential test, prosecutors must decide if a prosecution is needed in the public interest. The second test is the public interest test. Public Prosecutors will only start or continue with a prosecution when the case has passed both tests. Japanese prosecutors also actually practice in the same way.

The Code for Crown Prosecutors in England and Wales regarding case screening is as follows;

The evidential test

a. Prosecutors must be satisfied that there is enough evidence to prove a "realistic prospect of conviction" against each accused on each charge. They must consider what the defense case may be, and how that is likely to affect the prosecution cases.

b. A realistic prospect of conviction is an objective test. It means that the court must be properly directed in accordance with the law, and is more likely to convict the defendant of the charge alleged.

c. When deciding whether there is enough evidence to prosecute, Prosecutors must consider whether the evidence can be used and is reliable. There will be many cases in which the evidence does not give any cause for concern. But there will also be cases in which the evidence may not be as strong as it first appears.

Prosecutors must ask themselves the following questions.

Can the evidence be used in court?

(i) Is it likely that the evidence will be excluded by the court? There are certain legal rules which might mean that evidence which seems relevant cannot be given at a trial. For example, is it likely that the evidence will be excluded because of the way in which it was gathered or because of the rule against using hearsay as evidence? If so, is there enough other evidence for a realistic prospect of conviction?

Is the evidence reliable?

(i) Is there evidence which might support or detract from the reliability of a confession? Is the reliability affected by factors such as the accused's age, intelligence or level of understanding?

(ii) What explanation has the accused given? Is a court likely to find it credible in the light of the evidence as a whole? Does it support an innocent explanation?

(iii) If the identity of the accused is likely to be questioned, is the evidence about this strong enough?

(iv) Are there concerns over the accuracy or credibility of a witness? Are these concerns based on evidence or simply information with nothing to support it? Is there further evidence which the police should be asked to seek out which may support or detract from the account of the witness?

The Public Interest Test

a. The public interest must be considered in each case where there is enough evidence to provide a realistic prospect of conviction. A prosecution will usually take place unless there are public interest factors tending against prosecution which clearly outweigh those tending favour. Although there may be public interest factors against prosecution in a particular case, often the prosecution should consider when sentence is being passed.

b. Prosecutors must balance factors for and against prosecution carefully and fairly. Public interest factors that can affect the decision to prosecute usually depend on the seriousness of the offense or the circumstances of the suspect. Some factors may increase the need to prosecute but others may take another course of action which would be better.

c. The following lists of some common public interest factors, both for and against prosecution, are not exhaustive. The factors that apply will depend on the facts in each case.

d. The more serious the offense, the more likely it is that a prosecution will be needed in the public interest. A prosecution is likely to be needed if:

(i) a weapon was used or violence was threatened during the commission of the offence;

(ii) the evidence shows that the defendant was a ringleader or an organizer of the offence;

(iii) there is evidence that the offence was premeditated;

(iv) there is evidence that the offense was carried out by a group

4. Plea Bargaining

In Kenya, Papua New Guinea, Tanzania, Saint Christopher and Nevis, India, etc., plea bargaining is an acceptable practice but must be exercised in a very cautious manner. The process of plea bargaining varies from jurisdiction to jurisdiction, but plea bargaining itself is the norm in the U.S. criminal justice system. Plea bargaining is done solely between the prosecution and the defense for an amendment/reduction to a less serious charge in exchange for the guilty plea. Normally, this is taken up/discussed after the formal charging of the accused where the prosecution and the defense can compromise on this aspect. In certain countries, Prosecutors are entitled to plea bargain any case, while in Pakistan the system is limited to economic crime cases only. Prosecutors normally consider plea bargaining, after consultation with the police and on completion of their investigation. To prevent the abuse of power especially in serious crimes and public interest cases, prosecutors will have to lay down the reasons for reduction or amendment of charges before the investigation papers is submitted to their superiors for the approval. Only with the approval of the superior can the charge be amended or reduced.

5. Victim's Request

In some countries, there are times where a victim will lodge a police report against the suspect but later decide not to pursue the matter. The victim will write to the Public Prosecutor informing them that he/she has no further intention to proceed with the report. The Public Prosecutor usually requests the investigation papers or file, screen it and decide whether to allow the application or otherwise. Normally such application is allowed only in petty or minor cases. However, it's exercised only when the interest of justice demands.

6. Summary Proceedings

Summary Proceedings are proceedings in some countries such as Korea and Japan whereby the court usually imposes a fine on the accused. In such countries, the public prosecutors have the authority to screen and to decide whether to

proceed with the case to the court, by summary or formal proceedings. In summary proceeding, a single judge adjudicates the case based on documentary evidence, and is applied only in cases where the suspect admits to his/her guilt, and accepts a monetary sentence. In most cases of summary proceedings, the ordinary trial does not take place. In Germany, there are also penal order proceedings to dispose criminal cases. Public prosecutors may apply for issuance of a penal order if a main hearing does not seem necessary and a prison sentence is to be expected not exceeding one year (with suspension of sentence on probation). These procedures are also expeditious and reduce the burden on the accused.

B. Case Screening by the Police

The police screen the case through evidence gathered by way of conducting investigations before the case file are forwarded to the prosecutor for his/her direction or decision. There are 3 methods of screening conducted by the police.

1. Non-recognition of the Offense

When a report is lodged by the complainant at the police station, the police will review the report and the evidence to determine whether any specific offense has been disclosed. If there is no offense disclosed on the surface of it and it involved only minor/trivial offenses and can be settled between the conflicting parties, the police will not pursue the matter further. In other words the police will not open the investigation paper. Normally, the decision not to take further action will be decided by the senior police officer after the report is referred to them by their subordinate officers.

2. Fine/Pecuniary Penalty by the Police

In Malaysia, Indonesia, Saint Christopher and Nevis, Japan and some other countries, for minor cases such as traffic offenses, the police will issue a ticket to the offender who has committed the offense. The offender is being informed that he/she is being offered a fine/pecuniary penalty. If he/she pays the fine or pecuniary penalty within a certain period, the offense is considered settled. In cases where the offender does not agree with the imposed fine or challenge the breach of offense, the case will be prosecuted in the court as an ordinary case.

3. Incompletion of the Investigation

When investigation papers are completed, the investigative officers will submit the papers (with the evidence gathered) to their superior for their opinion or further screening. The senior officers will then review the evidence collected so as to determine whether there is sufficient evidence to charge or prosecute a person. After being satisfied that the investigation is completed and have gone through the screening process, the papers will then be sent to the prosecutor for screening direction/decision. The final screening is now in the hands of the Public Prosecutor.

III. PROBLEMS IN CASE SCREENING

A. Prosecutor

1. Lack of Knowledge, Skill and Expertise

With the increase of sophisticated, ingenious and technically advanced crimes such as computer crime, security industry crime, etc., the prosecutors are expected to screen cases which are very complex in nature. Some of these cases may require very specialized fields of knowledge, skill and expertise. Hence a lack of knowledge due to insufficient training or inexperience in this complex area, may affect the screening process.

2. Delay in Receiving Files from the Police

Cooperation and coordination between the police and the prosecutors are most important especially in countries where the powers of investigation are vested solely in the hands of the police and not the prosecutor. There are cases where investigation papers are often not sent on time to the prosecutor's office. This is due to the fact that no time frame is given to the investigative officers to complete their investigation papers except in certain countries where the time limit is fixed. Delay in completing and submitting investigation papers could be due to excessive workloads and complexity of the case or too many investigation papers to handle. As such this makes it difficult for the prosecutor to play a supervisory role over the movement of the investigation paper. In such cases where the prosecution has little control over the movement of the investigation papers, screening is lacking as compared to cases where the prosecution undertakes the investigation on its own.

3. Abuse of Power and Corruption

Extensive discretion can lead to abuse of power and corruption, and this can disrupt the screening process and there are incidents where prosecutors have been charged with corruption.

4. Political Influence

Prosecution in most countries is part of the executive branch of the government. Therefore the prosecution can be influenced by political pressure not to prosecute even if there is sufficient evidence against the accused person or vice versa. The prosecution may be pressured to continue or discontinue the case or withdrawal of prosecution. Such external influences can affect the screening process.

5. Lack of Manpower

In countries where prosecutors have the power to investigate crimes, there is a limited number of prosecutors in the Public Prosecutors office. At the same time, the number of cases that must be handled has been increasing. This problem is more serious when the prosecutors office has to deal with prosecution in the court and supervise the police investigation. This excessive workload can to certain extent hamper the screening process.

6. Lack of Budget for the Public Prosecutors Office

It's sad to say that in some countries, there are not even enough law books and journals in the public prosecutors office, not enough supporting staff, not enough computers, etc., whereas the government is fully aware that the public prosecutors office play an important role in the administration of criminal justice. How does one expect a prosecutor to perform screenings well without enough law books or latest case law in their hands. Hence it's a very difficult task to perform.

B. Problems Faced by the Police In Case Screening

1. Lack Of Manpower And Management

There are insufficient police officers to handle too many investigations. Sometimes low motivation in the police force and lack of incentives for officers to work make life more difficult for them. They are also problems with recruitment as the salaries given are not lucrative enough compared to the work done. Sometimes the organization of the personnel is ineffectively managed. Such problems can give rise to ineffective investigation, and can also hamper the proper screening of cases.

2. Lack of Budget, Equipment and other Resources

Lack of equipment and other resources due to budgetary constraints will hamper the effectiveness to the required standard. Budgetary constrains affect training programme, level of skill and thus the efficiency and performances of the police officers.

3. Inadequate Legal and Investigative Knowledge

Some investigators lack adequate knowledge during investigations. They do not know what evidence to look for, how to interrogate the suspects, etc. This could be due to short training at the Police Academy and therefore they become ill-equipped for the job that they take on. Due to advancements in technologies, organized criminals use the modern techniques for which the police are not much trained. Consequently, they face difficulty in completing investigations into offenses committed by use of such modern technologies, thus screening becomes more difficult.

4. Lack of Co-ordination between Prosecutor, Police and other Enforcement Agencies

This will effect the screening process between the relevant agencies.

5. Political Influence

These influences may develp in the course of investigations when high ranking government officials and politicians have direct or indirect interest in the case. Thus their hand becomes very tight and this could prejudice their mind when screening the case.

6. Lack of Legal Materials

It's essential for the police to be updated with the latest legal developments, whether it's case law or a new enactment by the legislature. In some countries, legal materials such as books and other facilities are lacking. As a consequence they may hamper case screening.

7. Abuse of Power

Abuse of power by certain individuals especially senior police officers who handle investigation papers would result in inaccurate screening.

8. Lack of Cooperation from the Public and Witnesses

Witnesses are often unwilling to give cooperation and assistance to the police due to fear, or being intimidated by the accused family, friends, etc. Lack of cooperation will thus make the investigation fruitless.

IV. RECOMMENDATIONS TO IMPROVE CASE SCREENING

A. Sufficient Budget for the Police and Prosecution

Sufficient budget should be given by the government to the police and to the public prosecutors office to improve facilities, salaries, manpower, equipment, and training in the required fields, etc. They should enjoy, not only greater goodwill but also greater financial support. To enhance the skill and expertise, foreign and local experts should be invited to give lectures and guidance to police officers and prosecutors on highly technically-related offenses.

Police officers and prosecutors should be sent to foreign countries for training in complex cases, where such facilities do not exist locally.

Longer periods of training for the prosecutor and the police should be given so that they are able to perform their duties effectively and efficiently.

In Malaysia, police officers who are qualified (after certain years in service and manage to pass certain examinations) are given a place in the faculty of law in various universities.

Apart from that, the government of Malaysia has also set up a Judicial and Legal Training Institute to train not only judicial and legal officers but also other relevant enforcement agencies including police officers to know in depth the legal aspect in discharging their duties. Judges of the High Court, and experts in certain specialized fields are always invited to give a discourse.

B. Independency of Prosecution

In order to ensure that the prosecution is independent, the office of the Public Prosecutor should be guaranteed by having its status protected by law. Having such security, the prosecutor will have no fear to exercise the powers of screening. In some countries, prosecutors can be removed from office through an impeachment process before an appropriate Court or upon conviction of crimes punishable with imprisonment. The term of office of Prosecutor Generals or their equivalent should be established so as to balance the need for continuity with the avoidance of susceptibility to political influence. In addition, upon retirement these officials should be prohibited from running for elective office or from employment with any company which supplies goods or services to the government for a period specified by the law. When the prosecutor exercises his/her case screening discretion in a legitimate fashion, he/she should be immune from criminal or civil sanctions incurred simply as a result of the exercise of that discretion.

C. Checks and Controls on Prosecutors' Decisions

To prevent the abuse of power by prosecutors during the screening of cases, there need to be some checks and controls. One is internal and the other is external.

1. Internal Controls

By superiors, general and special guidelines in performing their duties found in a prosecutors manual, appeal of decisions of non-prosecution to High Public Prosecutors office and appeal to the courts for abuse of prosecutorial discretion, such as selective prosecution.

2. External Controls

In Japan, if the prosecutor decides not to prosecute and the victim is not satisfied with this decision, the latter can apply to the Committee for Inquest of Prosecution. If the Committee rules that the non-prosecution is not proper, the Public Prosecutors office has to re-examine its original position. Also the prosecutor has to give reasons to the victims and other enforcement agencies of his decision not to prosecute.

In the interests of justice, the Public Prosecutor should give reasons for any amendment, reduction or withdrawal of charges in every case. This is important for the purpose of accountability and transparency.

Apart from that, in Japan there is a system which is called quasi-prosecution. The system of quasi-prosecution is as follows: when a complaint or accuser is dissatisfied with the disposition of non-prosecution by a public prosecutor for

an offense of abuse of authority by public officer or violence and cruelty by a special public officer, he/she apply to a district court for a trial. If the application is well-founded, the court must designate an attorney in private practice for the maintenance of public prosecution, who assumes the function of public prosecutor. It can also prevent the prosecutors from abusing their discretionary power which was given to them.

D. Time Frame to Complete Investigation

The investigation and screening of the cases should be undertaken as rapidly as possible, taking into consideration the rights of the suspect, the feelings of the victim, and the overall interests of justice.

E. Increase in the Number of Prosecutors

As for the prosecutor who conducts investigations, to overcome the problem of overwork, it's suggested that the number of prosecutors be increased and prosecutors only investigate selected cases such as corruption against politicians, cases of national interest or other high profile cases

F. Adopt the Variety of Proceedings other than the Trial

Trials are time-consuming and expensive, therefore in order to maintain the efficiency of the criminal justice system as a whole, we should avoid trials if the suspect is prepared to accept his/her guilt, and try to proceed with other procedures when appropriate. As we mentioned before, in Japan there is a summary proceeding, but it is only available when the offender deserves a fine and agrees to the process. If this summary proceeding is applied even when the suspect should receive a sentence of imprisonment, like a penal order proceeding in Germany, taking into due consideration the right of defendant, then only few cases go to trials. Therefore it will contribute to keep the criminal justice system more effective.

It is also useful to introduce the mediation process between the perpetrator and the victim that is practiced in Germany. In Germany, if mediation between the perpetrator and the victim is successful, the files are submitted to the public prosecutors office and the prosecutor can terminate the criminal proceedings or the court can mitigate or dispense with punishment. Thus the mediation process helps to avoid trials, provides an efficient process to settle criminal cases, and establish restorative justice.

G. Coordination between Prosecutors, the Police and other Enforcement Agencies

Coordination between prosecutors, police and other enforcement agencies are important. Police should begin consulting with the prosecutor in early stages of the investigation to establish close collaboration and to solve problems faced by them with regard to criminal investigation. Discussion and meetings should take place more frequently between them. The purpose is to manage and eventually solve any problems faced by investigating officers with regard to criminal investigation. By clarifying and analyzing the actual situation and problems, prosecutors may advise the Investigating Officer of their respective investigation. Thus cooperation in such a form of discourse is paramount to meet the ultimate aim of securing justice.

APPENDIX

COMMEMORATIVE PHOTOGRAPHS

• 120th International Senior Seminar

UNAFEI

The 120th International Senior Seminar

Left to Right:
Above:
Mr. Kim(Korea), Prof. Tachi

4th Row:
Mr. Takagi(Chef), Mr. Inoue(Staff), Mr. Suga(Staff), Mr. Iida(Staff), Mr. Tanaka(Staff), Ms. Nagaoka(Staff), Ms. Yoshida(Staff), Ms. Tsubouchi(Staff), Mr. Nakayama(Staff), Mr. Koike(Staff), Ms. Saito (Staff)

3rd Row:
Mr. Kai(Staff), Mr. Iwakura(Japan), Mr. Yamane(Japan), Mr. Yamashita(Japan), Mr. Itaya(Japan), Mr. Vasquez(El Salvador), Mr. Charles(St. Christopher and Nevis), Mr. Sandhu(India), Mr. Shah(Nepal), Mr. Chesimet(Kenya), Ms. Mitani(JICA), Ms. Hayashi(Staff)

2nd Row:
Prof. Kakihara, Mr. Takeishi(Japan), Mr. Kawai(Japan), Mr. Maru(Papua New Guinea), Mr. Marcos(Brazil), Mr. Azmi(Malaysia), Mr. Seni(Thailand), Ms. Titiek(Indonesia), Mr. Gaguk(Indonesia), Mr. Malik(Pakistan), Ms. Nassuna(Uganda), Mr. Munoz(Chile), Mr. Tibasana(Tanzania), Prof. Teramura, Ms. Matsushita(Staff), Mr. Suzuki(Staff)

1st Row:
Prof. Takasu, Prof. Tanabe, Dr. Suddle(Pakistan), Dr. Kittipong(Thailand), Mr. Boeuf(U.K.), Director Kitada, Mr. Siegismund(Germany), Ms. Siegismund(Germany), Prof. Castberg(U.S.A.), Dep. Director Aizawa, Prof. Miura, Prof. Tsutomi, Prof. Someda, Mr. Miyamoto(Staff), Mr. Eratt(L.A.)