

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

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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 offence 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

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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 develop 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.