4. Prosecution

I. NORMATIVE BENCHMARKS

A. The Role of the Public Prosecutor

Prosecutors exercise the accusation principle of criminal law: they can accuse an individual of a crime and bring him or her before a court of law. The fair and consistent exercise of the prosecutorial function is critical to the success of rule of law reforms. As a report by the International Commission of Jurists finds, "[r]espect for human rights and the rule of law presupposes a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality."[1] The significance of the prosecutorial function lies in the prosecutor's responsibility to represent the public interest in criminal proceedings. As "representatives of the public interest,"[2] effective prosecutors are vital to improving public perceptions of the criminal justice system. According to Nelson Mandela, "[t]he challenge for the modern prosecutor is to become a lawyer for the people ... [and] to build an effective relationship with the community and to ensure that the rights of victims are protected."[3]

As with judicial and police reform, prosecutorial reform is centrally preoccupied with the twin values of independence and accountability. However, experience with prosecutors varies widely, and there is no universal checklist of steps to achieve either goal. The values of independence and accountability can also conflict as improvements in one may come at the cost of the other. Moreover, lack of public confidence or perceived illegitimacy of prosecutors

[1] "International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors: A Practitioners Guide," Practitioners Guides Series No. 1, International Commission of Jurists Geneva Switzerland, 2004, online at: http://www.mafhoum.com/press7/230S24.pdf.

[2] *Guidelines on the Role of Prosecutors*, Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, September 1990.

[3] Christopher Stone *et al.* "Prosecutors in the Front Line: Increasing the Effectiveness of Criminal Justice in South Africa," online at: National Prosecuting Authority of South Africa, http://www.ndpp.gov.za/NPA/documents/NPA%20Front%20line%2008%2003.pdf.

may limit the gains that improvements in accountability and independence are designed to achieve.

The function of the prosecution is to represent the public in prosecutions against individuals charged with public offences. Public prosecutors are government employees or representatives who "seek justice,"[4] by "engag[ing] in truth-seeking and whose actions are constrained by rules that ensure fairness to defendants."[5] Such a characterization of the prosecutor emphasizes his role as a public servant, reflected in the historical creation of public prosecutors to mitigate the extremes of a purely adversarial system of criminal justice[6] through his responsibility not to simply seek convictions but to uncover the truth without violating the rights of the defendant.

The prosecutor's role varies considerably depending upon the mode of criminal procedure. Common law countries have an adversarial procedure, whereas civil law countries, including many Latin American countries, have, or had prior to recent reforms, an inquisitorial mode of procedure. A key aspect of rule of law reform in many developing countries, particularly in Latin America, has been a move to an adversarial mode of procedure, requiring significant changes to the role of the prosecution. In the Latin American inquisitorial system, "[t]he public prosecutor's office had a bureaucratic role, and active investigation was by law the responsibility of examining judges and in practice the work of police."[7] Prosecutors, consequently, were often described as the "fifth wheel" of the criminal justice system.[8] Reforms to develop an accusatorial model of criminal procedure have greatly changed the role of the prosecutor, who has assumed responsibility for conducting preparatory investigations of crimes.[9]

Some level of prosecutorial discretion seems inherent in the role of the prosecutor. Conceptually, it is possible to imagine a system where the legislature prescribes the criminal offences and requires that every offence is to be prosecuted. In practice, however, it is impossible for prosecutors to ensure that every single infraction of the respective criminal law is prosecuted: "Only an ideal system, provided with unlimited human, technical and financial resources could

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[4] Bruce A. Green, "Why Should Prosecutors 'Seek Justice'?" (1999) 26 *Fordham Urb. L. J.* 607 at 636.

[5] Carolyn B. Ramsey, "The Discretionary Power of 'Public' Prosecutors in Historical Perspective" (2002) 39 *American Criminal Law Review* 1309 at 1317.

[6] *Ibid.* The tradition of private prosecutions that was initially transplanted from Europe was "criticized as elitist, inefficient and vindictive," and public systems of prosecution have become the norm.

[7] Maricio Duce, "The Role of the Public Prosecutor's Office in Latin America's Criminal Procedure Reform: An Overview," online: Centro de Estudios de Justice de la Américas, http://www.cejamericas.org/doc/documentos/reforma-mp2-ing.pdf.

[8] *Ibid.*

[9] *Ibid.* at 3.

reasonably fulfill this principle's ideal."[10] While full enforcement of every criminal law is impossible, Elizabeth Iglesias notes that full enforcement statutes limited to certain offences may be effective, for example in requiring police to arrest the batterer in domestic abuse cases.[11]

The degree of prosecutorial discretion varies significantly across jurisdictions and between modes of criminal procedure. Inquisitorial systems tend to bind prosecutors by the principle of mandatory prosecution, where the prosecutor must prosecute if there is sufficient evidence – though mandatory prosecution is generally softened by exceptions, such as the expediency principle, which allows the prosecutor to close investigations of minor offences if certain conditions are met.[12] In adversarial systems, prosecutors exercise broad discretion in deciding whether to prosecute, and if a decision to prosecute is made, what charge to prosecute the alleged offender with[13] and whether to negotiate and accept a plea bargain.

Elizabeth Iglesias frames the key challenge in relation to prosecutorial reform as a tension between independence and accountability. She writes: if we accept that "prosecutorial discretion is an unavoidable reality, the ultimate question is this: what legal rules and institutional arrangements will ensure that this tremendous power is exercised in a manner consistent with the values of due process and equal protection of the law?"[14] The objective of the UN *Guidelines on the Role of Prosecutors*, signed at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990, is to "assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings."[15] A review of the various recommendations in the UN *Guidelines* makes the importance of both accountability and independence to an effective prosecution clear.

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[10] Andrés José D'Alessio, "The Function of the Prosecution in the Transition to Democracy in Latin America," in Irwin P. Stozky (ed.), *Transition to Democracy in Latin America: The Role of the Judiciary* (Boulder, CO: Westview Press, 1993) 187 at 191.

[11] Elizabeth M. Iglesisas, "Designing Institutional and Legal Structure of Prosecutorial Power," in *supra* note 10, 269 at 281.

[12] K. Ambos, "The Status, Role and Accountability of the Prosecutor of the International Criminal Court: A Comparative Overview of 33 National Reports" (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 89 at 100.

[13] Susanne Walther, "The Position and Structure of the Prosecutor's Office in the United States" (2000) 8 *European Journal of Crime, Criminal Law and Criminal Justice* 285.

[14] Iglesisas, *supra* note 11 at 271.

[15] *Guidelines on the Role of Prosecutors*, *supra* note 2.

B. Independence

The importance of prosecutorial independence to an effective prosecution is confirmed by the UN *Guidelines*, which seeks to ensure that the parameters of prosecutorial employment, including disciplinary investigations, are enshrined in law. The guidelines identify how prosecutors should be selected, promoted, remunerated and disciplined:

- Prosecutors should have appropriate qualifications and training, be selected without discrimination, and be made aware of the ethical duties of their office;
- Promotion of prosecutors should be based on objective factors, such as professional qualifications and experience, and assessed in accordance with impartial procedures;
- Remuneration, tenure, and pensions and age of retirement for prosecutors are to be legally provided for or in published rules;
- Disciplinary procedures for prosecutors must be based on law that guarantees an objective evaluation.

The *Guidelines* also seek to ensure the independence of prosecutors by placing responsibility on the state to protect prosecutors from intimidation, harassment or improper interference.

The location of the prosecution within the executive arm of government complicates greatly efforts toward prosecutorial independence. In common law countries, the chief prosecutor or attorney-general is appointed by the executive. Prosecutorial independence has been maintained in common law systems by prohibiting the executive from directing the prosecution on how to proceed in any given case or class of cases. Given this close yet segregated relationship between the executive and the prosecution, it is useful to follow Philip B. Heyman's suggestion and understand prosecutorial independence as a continuum

> between substantial independence and very substantial dependence on the orders of political superiors ... Few prosecutors' offices have the independence of the United States "Independent Counsel" in setting their own budgets. Few prosecutors' offices are subject to direct orders to bring or drop a case. Most prosecutors fall somewhere between these extremes.[16]

Even in countries where the rule of law has been firmly established, prosecutorial independence is not fully realized and threats to the independence of

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[16] Philip B. Heyman, "Should Prosecutors be Independent of the Executive in Prosecuting Government Abuses?," in Stozky, *supra* note 10, 187 at 191.

prosecutors are still present. Tradition has largely guaranteed prosecutorial independence in Canada, where a constitutional convention allows the Attorney-General, a member of the executive, to issue broad policy directives for prosecutors to follow, but forbids him or her from becoming involved in day-to-day decisions relating to specific cases. But the tradition of prosecutorial independence has proven fallible in Canada. The Canadian *Royal Commission on the Donald Marshall, Jr., Prosecution* identified inadequate prosecutorial independence as a contributing factor to the wrongful conviction of Donald Marshall Jr. Philip Stenning summarizes the findings of the Royal Commission:

> To a great extent, the Inquiry characterized the problems collectively as an indication of an insufficient independence in the prosecutorial process and in the institutions charged with responsibility for prosecutorial decision-making. The independence from unacceptable partisan or personal influence of almost all those involved in the process was considered to be in question, as was the independence of the police from improper pressures by prosecutorial authorities.[17]

On the whole, however, prosecutors in common law countries are generally found to rank highly on the continuum of prosecutorial independence. In a comparative overview of prosecutorial systems in 33 countries, Ambos finds that prosecutors in common law countries are "virtually absolutely independent ... demonstrated by the almost unlimited discretion of prosecutors in the common law system. On the basis of evidence presented by the police the prosecutor decides if he initiates proceedings or refrains therefrom."[18] In prosecuting individual cases, common law prosecutors are responsible only to their superiors within the office of the prosecution, and cannot be directed by other institutions, such as members of the executive.[19] While the executive may issue broad policy guidelines for the prosecution, prosecutorial independence is protected by the fact that government is unable to direct the prosecution in any particular case.

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[17] P. Stenning, "Independence and the Director of Public Prosecutions: The Marshall Inquiry and Beyond" (2000) 23 *Dalhousie Law Journal* 385 at 387, 390. To remedy this dependence, The Royal Commission recommended the creation of a Director of Public Prosecutors (DPP) who would have limited independence from the Attorney-General. England and Wales have a similar Director of Public Prosecutions who oversees the Crown Prosecution Service throughout the country and is appointed by and responsible to the Attorney-General. The report recommended that the Attorney-General only intervene in individual cases after consultation with the DPP, and if the DPP advised against such intervention, the nature and extent of intervention of the Attorney-General be made public. When Nova Scotia implemented the DPP it required consultation with the DPP before the Attorney-General intervenes, but did not include public notice requirements on the extent of the intervention.

[18] Ambos, *supra* note 12 at 95.

[19] *Ibid.* This is known as the principle of hierarchy.

Distinguishing between individual case direction and broad policy direction has been critical to ensuring prosecutorial independence in developed common law countries. Questions have emerged as to whether this distinction can be easily sustained in countries lacking strong rule of law institutions. For example, in Nigeria, it has been reported that "it is not always possible to resist pressure or interference particularly from the executive arm of Government in the discharge of the Attorney-General's responsibilities ... invariably the question becomes how far the public interest approximates to the interests of the regime or Government in power."[20] In such a case, the pervasiveness of the interests of the regime makes it difficult if not impossible to maintain a distinction between individual cases and broad prosecutorial policy.

The requirement for prosecutorial independence is not limited to independence from government interference. Individual prosecutors must feel independent within their own offices to exercise their own discretion and express their dissent if their office makes a decision with which they do not agree.[21] Independence from the police is another important concern as it is generally thought that the prosecutor should be removed from the initial investigation in order to make an objective decision on whether and how to prosecute a case.

The degree of dependence between the police and prosecutors in any given state will depend largely on the allocation of investigative functions between the two institutions. In the US, and most common law jurisdictions, police conduct investigations, and present the case to the prosecutor once they decide the investigation is complete and there appears to be sufficient evidence to warrant prosecution.[22] The prosecutor is not authorized to mandate a police investigation, other than to order further investigations once the prosecutor is already involved. The police monopoly over investigation is justifiable in that "[i]t is undesirable that the prosecution service be made formally responsible for the investigation of crime, as this would tend to blur the distinction between the investigation of crime and the dispassionate decision whether the facts of a given case merit prosecution."[23]

In practice, however, the day-to-day relationship between the police and the prosecution implies that prosecutors are often involved in the investigative proc-

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[20] *Ibid.* at 96.

[21] D'Alessio, *supra* note 10 at 194.

[22] In England and Wales the police function included making decisions on whether to prosecute and what offence should be charged until 1985 when the creation of the Crown Prosecution Services (CPS) required the CPS or barristers to present the case in court. It is still up to the police to make the initial decision to prosecute. See Andrew Ashworth, "Developments in the Public Prosecutor's Office in England and Wales" (2000) 8 *European Journal of Criminal Law* 257.

[23] Ambos, *supra* note 12 at 114.

ess. Susanne Walther, describing the relationship of police and prosecutors in the US, argues, "the ever increasing complexities of substantive and procedural law make the former – the police – routinely depend on the latter – the prosecutor – for legal advice, a fact which in many jurisdictions has evolved into forms of cooperation that provide the prosecutor with considerable influence in the investigation process itself."[24] Changes in the type of crime, including increases in organized crime, drug-trafficking, and money laundering, combined with the inexperience of police in these areas, particularly in developing countries, have led prosecutors to play a more active role in the investigative process.[25]

The desirability of increased influence of prosecutors over the investigation process is controversial. On the one hand, blurring of the investigation and prosecutorial functions has given rise to concerns over the ability of prosecutors to distance themselves from the case to evaluate objectively its merits and then decide whether to prosecute. There is also concern that prosecutorial control over investigations threatens the institutional independence of the police and prosecution services. With respect to Latin America, Maurice Duce writes that "[t]he police have argued that this enters into conflict with their institutional chain of command," which not only threatens the institutional independence of the police but also fails to take into account the experience of police investigators in directing preliminary investigations.[26] However, by increasing cooperation between the prosecutors and police, prosecution-led investigations can increase conviction rates by improving investigation strategies and ensuring that potential problems with evidence are identified early on.[27] The term "prosecution-led investigations" "is not meant to suggest that prosecutors become investigators. Instead, the idea is that prosecutors should guide the strategy and tactics of police investigation, focusing on the collection of evidence that can be admitted in court, rather than simply on discovering facts."[28]

C. Accountability

The importance of prosecutorial accountability is reflected in the UN *Guidelines* in their emphasis on the prosecutor's responsibility to discharge his ethical and legal duties, enforced ultimately through disciplinary proceedings. The *Guidelines* specify that prosecutorial duties include accountability for adherence to human rights standards. Prosecutors must inform the court of, and refuse to take account of, evidence "that they know or believe on reasonable grounds was ob-

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[24] Walther, *supra* note 13 at 288.
[25] Ambos, *supra* note 9 at 114.
[26] Duce, *supra* note 7 at 15.
[27] Stone *et al.*, *supra* note 3 at 34.
[28] *Ibid.* at 33.

tained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights."

The increase in prosecutorial responsibility that has accompanied the transition in several developing countries to adversarial systems of criminal justice has, in addition to its prospective benefits, also given rise to problems of prosecutorial accountability. Mauricio Duce finds that Latin American prosecutors in reformed systems exhibit a "general reluctance to make themselves publicly accountable for their performance."[29] While recognizing that this tendency stems from a variety of complex factors, Duce identifies the failure of prosecutors to conceptualize themselves as agents of the public as a leading factor: "[P]rosecutors do not fully comprehend the concept that society is in fact a client to which the public prosecutor's office is accountable. Personnel in these institutions tend to see themselves as mere judicial operators, and not as agents who fulfill an important social function and must satisfy the community or 'client's' expectation."[30]

There are a variety of mechanisms through which prosecutorial accountability can be achieved. Detailed national or sub-national guidelines governing the exercise of prosecutorial discretion can help to achieve prosecutorial accountability.[31] But as Ramsey points out, discretion "can never be completely formulaic."[32] In countries where prosecutors are agents of the Attorney-General, the Attorney-General may legitimately call on prosecutors for information or explanation regarding prosecutorial duties.[33] Professional disciplinary proceedings within the prosecutor's officer are an important source of accountability, as are more public forms of accountability, such as where prosecutors may need to explain their decisions to police officers investigating crimes, victims, bar associations,[34] and in some high-profile cases, the public at large.[35] In much of the US prosecutorial accountability to the public is easily visible, as misconduct by prosecutors or the District-Attorney herself will become an issue during the elections of the District-Attorney.[36] However, it is not clear that this form of

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[29] Duce, *supra* note 7 at 11.

[30] *Ibid.*

[31] Rory K. Little, "Proportionality as an Ethical Precept for Prosecutors in the Investigative Role" (1999) 68 *Fordham L. Rev.* 723.

[32] Ramsey, *supra* note 5 at 1318.

[33] D.A. Bellemare, "Public Confidence and Accountability in the Exercise of Prosecutorial Discretion," online: http://www.isrcl.org/Papers/2004/Bellemare.pdf.

[34] In *Krieger v. Law Society of Alberta* [2002] 3 SCR the SCC held that prosecutors are not completely immune from the disciplinary procedures of the relevant law society.

[35] Bellemare, *supra* note 33.

[36] Fred T. Zacharias, "The Professional Discipline of Prosecutors" (2001) 79 *N.C. L. Rev.* 721 at 765.

public prosecutorial accountability is desirable. As one author suggests, a prosecutor should not become "the slave of his electorate ... [for] in many matters his duty clearly lies in the defiance of community pressures."[37] The whims of the electorate may not coincide with the duties of the prosecutor, for instance, since the electorate may often not be fully sensitive to notions of fairness to the defendant.[38]

One of the strongest mechanisms of accountability for prosecutors is through judicial review, where decisions made by judges act as a check on prosecutorial discretion. Judges may make rulings adverse to the prosecutor, dismiss the case, or even impose costs in the most egregious cases.[39] Prosecutorial discretion in accepting plea bargains is restricted by judges, who must consider whether to accept a guilty plea, and in the US, grand jury proceedings limit prosecutorial charging power.[40] Developing countries transitioning from inquisitorial systems to adversarial systems may be reluctant to emphasize judicial oversight as a means to achieve prosecutorial accountability as it may seem to resurrect the dominant role of the examining judge and the lesser role of the prosecutor under the inquisitorial system. Elizabeth Iglesias, however, argues that limits on prosecutorial discretion through judicial review can coincide with and support an effective prosecution in an adversarial system. In fact, she argues that the US experience shows that judicial review of prosecutorial conduct "is the most effective mechanism for ensuring that the norms restricting prosecutorial power are routinely respected in individual cases."[41] She cites the doctrine of presumptive vindictiveness as an example of an effective judicial check on prosecutorial discretion: a prosecutor's case will be dismissed if the defendant can overcome the presumption of good faith and non-discriminatory prosecution.[42]

D. Tensions between Independence and Accountability

The tensions between independence and accountability discussed in relation to the judiciary are equally of relevance to the public prosecutor: prosecutors are

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[37] H. Richard Uviller, "The Virtuous Prosecutor in Quest for an Ethical Standard: Guidance from the ABA" (1973) 71 *Mich. L. Rev.* at 1152–3.

[38] Ramsey, *supra* note 5 at 1320.

[39] Prosecutors can also be subject to civil actions for malicious prosecution. See Bellemare, *supra* note 33.

[40] James Vronberg, "Decent Restraint on Prosecutorial Power" (1981) 84 *Harv. L. Rev.* 1521 at 1537–8.

[41] Iglesisas, *supra* note 11 at 274.

[42] To do so, the defendant must prove the following three elements: (1) that other similarly situated individuals have not been prosecuted; (2) that the defendant was consciously and deliberately singled out; and (3) that the basis upon which the defendant was singled out was arbitrary and invidious. See Iglesias, *supra* note 11.

integral to criminal policy and are linked to government, yet must also be distanced from the governmental process, treating all citizens equally and ensuring that prosecutions are not conducted for partisan purposes.[43] The *Royal Commission on the Donald Marshall, Jr., Prosecution* recognized this tension between prosecutorial accountability and independence, writing that "we reject the concept of a totally independent Director of Public Prosecutors (or Attorney-General) who would be accountable to no one except his or her conscience and the law ... the challenge has been to find the model that best reflects the right blend of independence and accountability."[44]

The Italian experience with prosecutorial reform illustrates the difficult relationship between prosecutorial independence and accountability. In the post-war period, Italy steadfastly pursued prosecutorial independence to avoid government interferences of the kind that had occurred in the past. This had the effect of curtailing prosecutorial accountability. Italian prosecutors can take extended periods of absence without affecting their career trajectory, and several prosecutors have used these absences to run for political office, which paradoxically threatens the independence of the prosecution that the reforms were designed to achieve. Prosecutors can largely determine the location of their post even if the functional needs of the system call for transfers; and promotions of prosecutors occur automatically, raising the question of "to what extent protection of independence should be pursued at the expense of real, substantial guarantees of professional qualification and quality?"[45]

In discussing Italy's shortcomings in prosecutorial accountability, Di Federico recognizes the tension between the two values and expresses scepticism that both goals can be "reconciled at the operational level."[46] Nevertheless, he also identifies mechanisms for striking a balance between these values and "observe[s] the tendency to redress the balance between the values of independence and accountability through measures intended to render public prosecution less dependent on the expectations of the governing majority."[47] Distancing the prosecutor from the government is the goal of independence, while mechanisms outside the governing majority can help to ensure that this independence does not go unchecked. One such mechanism for prosecutorial accountability is private prosecutions, which can serve as a check on prosecutorial inactivity. For

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[43] G. Di Federico, "Prosecutorial Independence and the Democratic Requirement of Accountability in Italy" (1998) 38 *The British Journal of Criminology* 371.

[44] Nova Scotia, *Royal Commission on the Donald Marshall, Jr. Prosecution, Commissioners' Report, Vol. 1: Findings and Recommendations* (Halifax: Royal Commission, 1989) cited in Stenning, *supra* note 17 at 389.

[45] Di Federico, *supra* note 43 at 371.

[46] *Ibid.*

[47] *Ibid.*

example, if a prosecutor declines to investigate an individual, perhaps for partisan reasons, a private individual can bring the prosecution herself. For example, England and Spain have adopted this mechanism. In Germany, a judge can issue an order to initiate criminal proceedings if the prosecutor fails to do so. When the government itself may be directly implicated, that is, when high-ranking officials are subject to prosecution, special mechanisms may be necessary to ensure both independence and accountability. The US system provides for independent counsel to investigate high-ranking US officials accused of crimes. If the US Attorney-General believes there are reasonable grounds to warrant further investigation, he or she must first apply to a three-judge panel of the US Court of Appeal for the District of Columbia Circuit (often known as the Special Division) to appoint the independent counsel.[48]

E. Legitimacy

Lack of public confidence in the prosecution is unfortunately common in many developing countries where prosecutors must overcome a history of unequal application of the law. In countries with histories of human rights abuses, prosecution of the perpetrators of such crimes is a critical step in demonstrating the equal application of the law and can also serve as an important public rallying point in support of rule of law reforms. An impartial and effective prosecution service can lend legitimacy to rule of law reforms, particularly in countries transitioning from inquisitorial to adversarial modes of procedure, where the prosecutor can be an important leader in the move to oral advocacy.[49] Prosecutors can also help to anchor criminal justice reforms within the existing community by embarking on diversion programs and community education. Susanne Walther points out that American prosecutors are "political leaders in education, prevention and treatment efforts. In particular, in the vast area of 'diversion', i.e., the handling of cases not considered proper for formal accusation in court, prosecutors have authority to refer suspects who do not wish to contest the charges to pre-trial diversion programs aimed at prevention, education and treatment."[50]

Improving the relationship between prosecutors and crime victims is an important means for improving the legitimacy of the prosecution and the criminal justice system more generally. A study by the South African Law Commission reveals that victims often feel they have been treated rudely and insensitively by the police and ignored by prosecutors, who fail to keep victims

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48 Ambos, *supra* note 12 at 93.
49 Duce, *supra* note 7 at 3.
50 Walther, *supra* note 13 at 289.

up to date with the case.[51] The South African Law Commission finds that the prosecutors have a duty to "recognize and promote the interests of the victim."[52] Prosecutors can discharge this duty by keeping in contact with victims, updating them on the status of their cases, and informing them about the nature of the criminal justice process. Doing so not only benefits the victim, but can also aid the prosecution because victims who feel ignored by the prosecution often make poor witnesses as they are unprepared for examinations and unfamiliar with court procedures. In addition, better treatment of victims can improve the quality of the justice system as a whole: "It is hoped that crime victims who are treated well will be more likely to participate constructively during the investigation and trial ... and report crime in the future, even in the face of intimidation."[53]

II. EXPERIENCE WITH PROSECUTORIAL REFORMS

A. Latin America

The move towards oral advocacy described in Chapter 2 on judicial reform has broad implications for prosecutorial systems that often previously had very narrowly defined duties. The new adversarial systems have restrained the power of judges, who had exercised an almost complete monopoly over cases in the inquisitorial system, and has strengthened the role of prosecutors, who can now direct case investigations.

In Guatemala in 1986, before procedural reforms and while the country was still embroiled in civil war, there were 30 poorly paid, poorly trained prosecutors. In 1992 oral advocacy was introduced, and in 1994 the Public Ministry (prosecution service) was established as an entity formally independent of all three branches of government; by 2002 there were 175 prosecutors in the country. Nevertheless, Guatemala has often failed to redress military human rights violations of the past, a problem that gains particular importance due to the historical context of civil war. In the highly publicized murder case of Bishop Juan Gerardi, the prosecutor assigned to the case reported being subject to anonymous threats and military surveillance and, according to a local citizens' organization (FAMDEGUA), was forced into exile after serving subpoenas on

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[51] South Africa Law Commission, *Sentencing Restorative Justice: Compensation for Victims of Crime and Victim Empowerment* (Pretoria: SALC Issue Paper 7) cited in Stone *et al.*, *supra* note 3 at 26.

[52] *Ibid.*

[53] Stone *et al.*, *supra* note 3 at 26.

military officials.[54] In spite of threats, convictions of high-ranking officers were secured in 2001, but threats to prosecutors remain a problem nonetheless.[55] Further, serious allegations of corruption have been levelled against the Public Ministry. These accusations allege highly politicized appointments despite formal administrative separation and the permeation of the Ministry by former military personnel who, "[i]nstead of taking steps to protect witnesses ... have relayed ... second-hand threats"[56] to witnesses from the military. Finally, the Ministry is accused of incompetence. Unregulated, outdated legal education produces a weak pool of potential prosecutors, while low salaries and low esteem surrounding the prosecutorial office have made it difficult to attract experienced lawyers into the pool.

The effects of a new code of criminal procedure were particularly significant in Chile, where criminal justice had traditionally been run almost entirely by judges relying on written submissions. Establishing a public prosecution office meant the creation of a new institution,[57] and therefore the prosecutor's office is staffed primarily by young, inexperienced professionals. Further, the reform of the justice system produced a prosecutorial system lacking existing procedures; decisions as to whether and how to follow up on cases are left almost fully to the judgment and discretion of individual prosecutors, and the absence of upper echelon supervision creates few incentives to make timely decisions. In order to appease demanding private parties, and in the absence of instructions to act otherwise, prosecutors agree to leave open cases that might otherwise have been quickly closed; as a result, resources are wasted and more importantly prosecutorial caseloads grow to unmanageable levels. In cases where the Public Prosecutor's office has issued regulations, they have often been vague, restrictive and unresponsive to continuing experience.[58] Prosecutors in Chile have also faced some resistance from police. In much of Latin America, under the inquisitorial system police ran investigations quite freely and submitted their evidence to a judge.[59] With the new focus on the importance of prosecutors, police were

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[54] Nathan Heasley *et al.*, "Impunity in Guatemala: The State's Failure to Provide Justice in the Massacre Cases" (2001) 16 *Am. U. Int'l L. Rev.* 1115 at 1142–3.

[55] USAID Office of Democracy and Governance, "Achievements in Building and Maintaining the Rule of Law: MSI's Studies in LAC, E&E, AFR, and ANE" (Occasional Paper Series November 2002, PN-ACR-220) at 70 ["Achievements"].

[56] Heasley *et al.*, *supra* note 54 at 1151.

[57] Cristián Riego, *Comparative Report: "Judicial Reform Processes In Latin America" Follow-up Project* (Judicial Studies Center of the Americas: 2003) at 8, online: http://www.cejamericas.org/.

[58] *Ibid.* at 14.

[59] Linn Hammergren, "Institutional Strengthening and Justice Reform" (USAID PN-ACD-020) at 35.

required to cooperate with and in effect were subordinated to the prosecutorial function.

In El Salvador, early attempts at prosecutorial reform were unsuccessful. In 1983, USAID reacted to an absence of prosecutorial investigation by providing training in sophisticated investigation techniques and establishing a special investigative unit; in the result, they were disappointed by the "ineffectual use of the former and the highly politicized and often abusive operations of the latter."[60] As discussion of a new code of criminal procedure began in the 1990s, reform efforts again focused on the prosecutorial institution, or *Fiscalia*, and found the system deficient in many ways. Remuneration was very low, thus hindering the attraction of qualified personnel, while any hiring or promotion that was done was based on political associations: "Political and personal pressures or simple bribes tended to decide the outcome of most cases – although the judges were the usual targets, *fiscales*[61] also participated in the process."[62] Further, while prosecutors were supposed to work with the police in an investigative role, in practice they rarely did so. Through the mid-1990s, reform was heavily focused on decentralizing organizational structures and training of prosecutors, and not surprisingly into the late 1990s problems persisted. Salaries were still low, staff in prosecutorial offices were lacking in basic administrative skills, and corruption "was a factor in such basic decisions as the distribution of cases."[63] After the new criminal procedures code was finally enacted in 1998 resistance similar to that described in Chile was felt from police unwilling to sacrifice power.[64] In more recent years, budgets have expanded in the *Fiscalia*, and throughout the justice system, officials found to be corrupt, including prosecutors, have been released. Nevertheless, it "is believed that many corrupt officials continue in office; this is a matter of intense public debate and the subject of a recent investigation and report by a special prosecutor."[65]

B. Central and Eastern Europe

During Soviet rule, the prosecutorial function was vested in the Procuracy, a Russian institution holding broad powers of supervision over courts and admin-

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60 *Ibid.* at 38.

61 Members of the *Fiscalia*, i.e. prosecutors.

62 Hammergren, *supra* note 59 at 39.

63 *Ibid.* at 41.

64 IADB, "I'll See You in Court!: New Oral Procedures Give Prosecutors and Defenders the Leading Roles in Criminal Trials" online at: http://www.iadb.org/idbamerica/archive/stories/1999/eng/e1299s8.htm.

65 "Achievements," *supra* note 55.

istrative branches of government. "Invariably party members in excellent standing, they were at the pinnacle of the local power elite,"[66] and are often described as the "eye of the party."[67] In its prosecutorial function, the procurator supervised criminal investigations, had absolute discretion in the granting of search warrants, prosecuted cases in court, and most importantly supervised the functioning of the courts, a power that added a severe accusatorial bias to proceedings and significantly disadvantaged the defence. Acting as a prosecutor in the Western sense has not been a substantial part of the procurator's duties; due to the inquisitorial nature of criminal procedure, as late as 1996 procurators would not even appear at over 50% of trials, as the judge could perform those functions in his or her place.[68]

In 1991, a group of nine academics published a detailed criticism of the Soviet judicial system, demanding that the procuratorial office be reduced to its prosecutorial functions. Forces within the procuracy fought these changes vigorously. Procurator General Valentin Stepankov pushed through a 1992 Law on the Procuracy of the Russian Federation, maintaining the procuracy as an institution "charged with 'supervising the implementation of laws by local legislative and executive bodies, administrative control organs, legal entities, public organizations, and officials, as well as the lawfulness of their acts.'"[69] In 1993, when a draft law circulated "calling for the creation of an independent investigatory agency,"[70] procuracy officials filed a case with the Constitutional Court alleging that a reduction in their authority was illegal. While the law was passed, Parliament failed, at least initially, to provide staff for the agency. In 1993, the office of the procuracy also protested the proposed institution of jury trials; although the law passed, it was a full decade before widespread implementation began. In 1995, the two sides of the debate each submitted draft laws to the Duma for a new law on the procuracy. Not surprisingly, one draft supported the transformation of the procuracy into a purely prosecutorial office and the institution of an adversarial system, and the other the retention of supervisory powers and the then-current system of justice.[71] Under the final law passed by the Duma, "the

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[66] Leon Aron, "Russia Reinvents the Rule of Law" (American Enterprise Institute Online, 2002) online at: http://www.aei.org/publications/contentID.20030206154621 59/default.asp.

[67] Stephen C. Thaman, "Reform of the Procuracy and the Bar" (1996) 3 *Parker Sch. J.E. Eur. L.* 1, at 5.

[68] *Ibid.* at 13.

[69] Gordon B. Smith, "The Struggle Over the Procuracy," in Peter H. Solomon Jr. (ed.), *Reforming Justice in Russia, 1864–1996: Power, Culture, and the Limits of Legal Order* (Armonk, NY: M.E. Sharpe, Inc., 1997) 348 at 358 [Smith, "Procuracy"].

[70] *Ibid.* at 360.

[71] Thaman, *supra* note 67 at 13–18.

Procuracy retained most of its traditional powers and functions,"[72] although it no longer supervised courts.

Smith points out that the battle over the procuracy was far more nuanced than the crusade of valiant reformers attempting to uproot a power-mongering elite. Supporters of the procuracy had argued that, executing a strangely dual function, the procuracy had always been charged not just with the implementation of party policy but also acted as the representative of the citizen against executive action; by way of "procuratorial protests," procurators would, for instance, invalidate the imposition of illegal administrative fines if they found a basis for a citizen complaint. As of 1996, the procuracy received over 100,000 complaints per year resulting in 13,000 formal protests; Smith argues that it is not entirely clear that a court system already experiencing severe backlogs and with its own questions with regard to independence is better placed to address these complaints.[73] Reformers countered that the procuracy often pursued complaints only when it was in the interests of the state, and certainly not when complaints related to powerful party interests.[74] Smith also acknowledges that there is an issue of citizen trust, as the procuracy's history of bias has made many citizens sceptical of its value.[75] The protracted nature of this debate seems to have indirectly impeded the evolution of the prosecution. Reluctant to sacrifice its powers of oversight and assume a greater role in prosecutorial functions, the procuracy fought against changes, such as the jury trial, which would have moved the Russian criminal system closer to an adversarial style.[76] It was only in 2002 that a new Code of Criminal Procedure was enacted. In the meantime, the American Enterprise Institute for Public Policy Research identified in 2002 as problems with the Russian prosecution "meagre salaries, insufficient education and training, and not infrequently outright incompetence among judges and prosecutors alike."[77]

The politicized nature of the procuracy, and hence the prosecution, is also exemplified in the experiences of a series of Procurators General. In 1993, relying on rising crime rates in Russia as a way of emphasizing the importance of a strong procuracy, the institution adopted a strict anti-crime stance. This position placed the procuracy in line with that of the anti-Yeltsin Duma majority

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[72] Gordon B. Smith, "The Disjuncture between Legal Reform and Law Enforcement: The Challenge Facing the Post-Yeltsin Leadership," in Gordon B. Smith (ed.), *State-Building in Russia: The Yeltsin Legacy and the Challenge of the Future* (Armonk, NY: M.E. Sharpe, 1999) 101–22 at 110.

[73] *Ibid.* at 360–61.

[74] *Ibid.* at 353.

[75] *Ibid.* at 117–18.

[76] Thaman, *supra* note 67 at 9.

[77] Aron, *supra* note 66 at 12.

and pulled it onto the side of the Parliament in an emerging conflict between it and President Yeltsin. In April, Procurator General Stepankov arrested two top Yeltsin aides for criminal behaviour, and announced that the procuracy would focus on corruption in the executive rather than legislative branch. In May, the Supreme Court held that Stepankov had committed legal violations in a 1991 investigation; Yeltsin pressured him to resign, and Aleksei Kazannik, a professor with ties to Yeltsin, was appointed Procurator General. In 1994, the Duma awarded amnesty to organizers of the October 1993 coup. Yeltsin opposed the move and ordered Kazannik not to release the prisoners; when Kazannik refused, Yeltsin forced his resignation, and appointed Aleksei Iliushenko. The Duma attempted to frustrate the move by refusing to accept Kazannik's resignation or confirm Iliushenko's appointment, but Yeltsin simply left Iliushenko in place as the "Acting" Procurator General.[78] In 1995, Iliushenko was also forced to resign, and in 1996 was arrested on charges of bribery and abuse of office.[79]

In Bulgaria, the formal subordination of the procuracy to other branches of government and the relaxation of its dependence on the executive occurred more quickly and with less controversy than in Russia. As Holmes points out, the Russian procuracy was "a proud instrument of centralization" on which the "unsteered devolution of power to the regions ... has inflicted great strains;"[80] presumably this centralizing effect was less pronounced away from the upper echelons of the institution in Moscow. In fact, Zdravka Kalaydjieva seems to argue that in Bulgaria problems with the prosecution have stemmed from reform efforts that happened too quickly, without due regard for how a newly independent, depoliticized prosecutorial office would function. In Kalaydjieva's words, "[t]he primary concern of reformers, during this euphoric early period of democratization, was to emancipate the judicial power from executive supervision and to draw sharp lines between the three branches of government, rather than to spell out clearly their appropriate internal functions."[81] Procurators were given life tenure following a three-year probationary period, and were supervised by an independent Supreme Judicial Council. However, according to Kalaydjieva, due to poorly defined duties the oversight of the council has been illusory; for instance, two procurators who were subject to disciplinary procedures by the council and demoted to a lower position were simply re-hired by the Procurator to work in his office, "and the council had no legal means to overrule or even

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[78] Smith, "Procuracy," *supra* note 69 at 361–7.

[79] Thaman, *supra* note 67 at 16–17.

[80] Stephen Holmes, "The Procuracy and its Problems" (1999) 8:1/2 *E. Eur. Const. Rev.* 76 at 78.

[81] Zdravka Kalaydjieva, "The Procuracy and its Problems: Bulgaria" (1999) 8:1/2 *E. Eur. Const. Rev.* 79 at 80.

protest his decision."[82] Further, little attention was paid to legally limiting the discretion of procurators or instituting judicial review of procuratorial action. Accused persons do not appear to have the right to judicial review until trial begins, and until 1998 did not have the right to challenge periodically pre-trial detention orders in court. While for most crimes there is a one-year limit on detention during the process of a criminal investigation, once the procurator has completed his or her investigation there is no maximum time within which an indictment must be heard in court. Procuratorial discretion has also been abused in "dozens" of criminal investigations of journalists who have criticized the procuracy in newspapers. One journalist was even arrested for asking the procurator "provocative questions" during an interview.[83]

In 1991 in Romania a new Constitution entrenched a series of principles of prosecutorial independence in an attempt to break away from the "strong procuracy and ... weak judiciary"[84] that characterized the system under Ceausescu. The prosecution is now a function within the Public Ministry, which is in turn accountable to the Ministry of Justice. Selection, promotion and discipline of both judges and prosecutors are vested in a new institution, the Superior Council of the Magistracy, composed of ten judges and five public prosecutors selected for four-year terms by a joint session of the Chamber of Deputies and the Senate.[85] Potential prosecutors must either undergo a training program at the new National Institute of the Magistracy or pass an examination administered by the Minister of Justice. The Constitution mandates that all selected magistrates are obligated to undergo continuing education at the Institute, but limited funds have restricted the number of courses available. Judges and prosecutors are forbidden by the Constitution to be associated with a political party, engage in public activities with a political official or participate in "the exercise of trading activities, (or) ... the administration or management of trading or civil companies."[86] Potential candidates left off the nomination list by the Council of the Magistracy have a right of appeal to the Supreme Court of Justice, whose decision is then final. According to Viorica Costiniu, Judge of the Bucharest Tribunal, most new prosecutors are young, recent graduates from the University,[87] a circumstance

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[82] *Ibid.* at 81.

[83] *Ibid.* at 83.

[84] Monica Macovei, "The Procuracy and its Problems: Romania" (1999) 8:1/2 *E. Eur. Const. Rev.* 95 at 95.

[85] Recently altered to allow for 17 members.

[86] Viorica Costiniu, "The Judiciary System in Romania" (presentation at the "Global Forum on Fighting Corruption: Safeguarding Integrity Among Justice and Security Officials," Washington, DC, February 24–6, 1999) at 3, online at: http://www.nobribes.org/Documents/GlobalForum99/Romania_Judiciary_GF99.pdf.

[87] *Ibid.* at 2.

that may be partially responsible for an EC observation that Romanian prosecutors are in need of greater training.[88] More recently, in 2002, Romania established the National Anti-Corruption Prosecutor's Office. Formerly a department within the general prosecutor's office, it now holds a "special status" and operates independently of the General Office.

One frequent criticism of the Romanian system is that prosecutors have the right to bring extraordinary appeals against judicial decisions, a mechanism under which final decisions of the High Court of Cassation and Justice (formerly the Supreme Court) are invalidated by the Prosecutor-General and returned to the Court for retrial.[89] Commentators have argued that this power has often been invoked in property disputes in order to "restore the balance in favour of current tenants, among whom are many of the former communist elite."[90] Over the years, the bases under which the Prosecutor can initiate such an appeal have expanded and it has been suggested that judges of the High Court, in retrying such a case, feel enormous pressure to reverse the decision. One prosecutor in particular, Joita Tanase, has attracted attention as a specific example of a politicized prosecutorial function, as he "used the recourse of the extraordinary appeal to invalidate the election of a mayor running against the government party in a village, to rescue the generals who had ordered firing at demonstrators in 1989, and to protect the bankers who had crippled state banks with bad loans in 1994–96."[91] Extended powers under the new anti-corruption system, such as longer preventive detention, create the potential for even broader abuses of power. The EC argues that selection of members of the Superior Council of the Magistracy, charged with nominating proposals for prosecutorial appointments, lacks sufficient transparency. The EC argues further that the placement of the Institute of Magistracy within the Ministry of Justice compromises its independence by requiring approval of budgets and programs by the Ministry.[92]

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[88] European Commission, "Justice and Home Affairs in the EU Enlargement Process – Romania," online at: http://europa.eu.int/comm/justice_home/fsj/enlargement/romania/printer/fsj_enlarge_romania_en.htm.

[89] Though, under Government Emergency Ordinance 58/2003, this power has been repealed in civil cases, it is still in force with respect to criminal decisions.

[90] EECR, "Constitutional Watch: A Country-by-Country Update on Constitutional Politics in Eastern Europe and the ex-USSR: Romania" (2002) 11:3 *E. Eur. Const. Rev.* 39 at 41.

[91] *Ibid.* at 41.

[92] European Commission, *2002 Regular Report on Romania's Progress Towards Accession* (COM 2002 700) at 25, online at: http://europa.eu.int/comm/enlargement/report2002/ro_en.pdf.

C. Africa

The crime rate in South Africa is one of the highest in the world while the conviction rate is among the lowest.[93] This scenario has led USAID to focus its legal assistance to South Africa on the criminal justice system. The agency describes the major changes that occurred in the prosecutorial system in the immediate post-apartheid period. Formerly separate prosecutorial systems were amalgamated into one system called the National Prosecuting Authority. Attempts have been made to tailor hiring so that it would be more inclusive of the marginalized black population, although this often resulted in the appointment of inexperienced prosecutors. To address this problem, USAID has assisted the government in establishing the Justice College. Since its inception in 1997, the Justice College has offered a period of training for aspiring prosecutors by experienced prosecutors. According to USAID, the feedback regarding this first stage of the program was "extremely positive," which led to the expansion of the program to include training for working prosecutors in 1999. This second stage operates with funding from USAID and other donors, and it is expected that the South African government will be responsible for it in the future. Prosecutors have also received salary increases with the hope of reducing their movement to the private sector. With assistance from USAID, a Sexual Offences and Community Affairs Unit has been established within the National Prosecuting Authority; it is intended that the Unit work with NGOs to increase public awareness of domestic violence, sexual offences and child support obligations.[94]

In 1996, 29 specialized courts that deal only with rape cases were established in response to the high number of rape cases and low rate of convictions. Prosecutors in these courts are specially trained in issues surrounding sexual assault and work exclusively in that area. This focus appears to have been successful: in the specialized courts relative to traditional courts, the average time to trial is lower and the conviction rate is higher. Due to these successes, the government plans to add many more such courts. Eventually, the plan is to prosecute all sexual assault cases through these courts.[95]

In 2002 USAID entered into an alliance with the Department of Justice (DOJ) and Business Against Crime (BAC), a non-profit organization. The purpose of the alliance is to render the DOJ more efficient through the decentralization of court support services and an improved case management system. The alliance

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[93] The conviction rate in South Africa is around 8%, online at: http://www.usaid.gov/locations/sub-saharan_africa/countries/southafrica/.

[94] "Achievements," *supra* note 55 at 145.

[95] "S. Africa Finds 'Rape Courts' Work," *The Christian Science Monitor* (January 29, 2003), online at http://www.csmonitor.com/2003/0129/p01s04-woaf.html.

also targets white-collar crime, which has had a particularly negative effect on the South African economy, accounting for 30% of all business failures and consuming 5% of business revenue, and discouraging foreign investment. This objective is addressed through the establishment of courts that are permanently assigned to deal exclusively with commercial crimes, including fraud and corruption. By 2002 the conviction rate in these commercial courts was 94%, with 50% of all accused pleading guilty, and 33% of convictions resulting in jail time with no option to pay a fine. Organized crime is also highly problematic in South Africa, and is therefore the target of a USAID/US DOJ combined project. Finally, given rampant violent crime, much of which is directed against women and children, USAID supports NGO initiatives that provide victim support services, prepare child victims to testify in court, and monitor cases involving domestic and other forms of violence against women and children as they move through the legal system.[96]

D. Asia

Criminal procedure in China was provided for in the 1979 Criminal Procedure Law (CPL) until revisions were made in 1996. Under the terms of the CPL, the procuratorate had discretionary powers to initiate a public prosecution, dismiss a case, exempt a case from prosecution, and remand a case for further investigation.[97] This broad discretionary power often led to abuse of power through corrupt practices by letting a guilty person off the hook or declaring an innocent person guilty. Under the revised CPL, the practice of exemption from prosecution was abolished because of criticism concerning its lack of due process and arbitrary nature. Furthermore, under the revised CPL, supplementary investigations were limited. Previously, there were no limits on the number of investigations the procuratory could request from the police. In theory, a suspect could be held indefinitely as long as the procuratory continued to request further investigations. Between 1997 and 1999, there was an increase in the number of defendants who received a lighter sentence, fine, probation, or other sentences without imprisonment.[98] The courts now handle many of the suspects that would have been exempt from prosecution.

The 1996 revisions to the CPL also introduced the presumption of innocence and the trial procedure moved from an inquisitorial to a more adversarial sys-

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[96] Online at: http://www.sn.apc.org/usaidsa/uss01.html.

[97] Mike P.H. Chu, "Criminal Procedure Reform in the People's Republic of China: The Dilemma of Crime Control and Regime Legitimacy" (2001) 18 *UCLA Pac. Basin L.J.* 157 at 178 ["Criminal Procedure Reform"].

[98] *Ibid.*

tem.[99] In March 1997, the National People's Congress adopted a revised Criminal Code, granting equal protection under the law and a proportional sentencing scheme. In 1995, China's Procurates Law was introduced in order to protect prosecutors from public interference.

After the revised CPL took effect in 1997, acquittal rates rose from 0.66% to 1.03% in 1998 and dropped slightly to 0.97% in 1999.[100] Although the increase in acquittals seems minor, it is unprecedented in Chinese court rulings. The statistic suggests that after the change, judges were not as quick to convict defendants, which is consistent with the presumption of innocence. However, courts are still not free from political interference. In 1999, there was a slight decrease in acquittal rates which was likely caused by higher conviction rates faced by Falun Gong members during the government's crackdown on the organization during that year.[101] Furthermore, extensive investigations by the National People's Congress Standing Committee in six selected provinces, autonomous regions, and cities revealed that the CPL had not been fully implemented.[102] The committee attributed failures in the implementation of revised law to misunderstandings of the law by law enforcement officials.

The Chinese procuracy also continues to maintain broad powers to supervise individual cases. Under these supervisory powers, procuratorates can petition to have cases reconsidered, even when the normal appeal process has been exhausted.[103] In 1999, procuratorates had 14,069 cases reconsidered under such powers, and judgments were revised in 3,185 of these cases.[104]

In Indonesia, one of the greatest problems that the prosecution faces is a lack of education and training, which is part of the larger issue of competence. The Indonesian legal system does not work to advance those who are most competent. In fact, a recent Final Report of the Audit of the Public Prosecution Service of the Republic of Indonesia stated that performance is measured by "loyalty, honesty, and cooperation rather than tangible results."[105] Little has been done

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[99] Li Zhenghui and Wang Zhenmin, "The Developing Human Rights and Rule of Law in Legal Philosophy and in Political Practice in China, 1978–2000", online at: http://dex1.tsd.unifi.it/jg/en/index.htm?surveys?rol/wang.htm.

[100] "Criminal Procedure Reform," *supra* note 97 at 187.

[101] *Ibid.*

[102] Mei-Ying Hung, "China's WTO Commitment on Independent Review: An Opportunity for Political Reform" (2002) Carnegie Endowment for International Peace, Working Paper No. 5.

[103] Randall Peerenboom, *China's Long March Toward the Rule of Law* (Cambridge: Cambridge University Press, 2002) 313.

[104] *Ibid.*

[105] David Cohen, "Intended to Fail: Trials before the Ad Hoc Human Rights Court in Jakarta" (August 2003) The Occasional Paper Series, International Centre for Transnational Justice at 48 ["Intended to Fail"].

to redress this problem. On the formation of the Ad Hoc Human Rights Court, it was suggested that training be provided to public prosecutors.[106] However, most agencies viewed this training as unproductive as the government shows no will in prosecuting cases of violence. In 2000, the Asia Foundation began funding a training program for judges and prosecutors in Jakarta.

The Public Prosecution Service (PPS) in Indonesia has traditionally had a strong military culture. This militarization serves to ensure a commitment to "the values and goals of the state's policies rather than the legal system and values of justice that it normally serves."[107] This militarization has also led to corruption and undue influence within the prosecution. A recent self-assessment report pinpointed strengthening investigative and prosecutorial capacities by fostering inter-agency cooperation and ensuring that investigation and prosecution are free from improper pressures and controls as a necessary goal for Indonesia.[108] In an effort to achieve this goal, an agreement has been reached between the Public Servants Wealth Audit Commission and the Attorney-General and the police to collaborate in the future in providing training on conducting investigations.

In the Philippines, the National Prosecution Service (NPS) suffers from inadequate salaries, lack of core training, no institutionalized system for continuing legal education, lack of physical space, equipment and resources, absence of clear performance indicators, low morale, weak information services and lack of regional autonomy.[109] However, the greatest weakness of the prosecutorial body in the Philippines is that criminal prosecution is mostly privatized. Complainants are forced to hire "private prosecutors" to carry out the work of indolent, incompetent or suborned public prosecutors.[110] The Anti-Corruption Initiative for Asia-Pacific has approached the problem of corruption in the Philippines on three fronts, building up institutional resources, strengthening

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[106] Hilmar Farid and Rikardo Simarmatra, "The Struggle for Truth and Justice: A Survey of Transitional Justice Initiatives Throughout Indonesia" (2004) The Occasional Paper Series, International Centre for Transitional Justice at 49.

[107] "Intended to Fail," *supra* note 105 at 49.

[108] Jak Jabes and Frederic Wehrlé, "Anti-Corruption Policies in Asia and the Pacific: Self Assessment Report Indonesia," ADB/OECD Anti-Corruption Initiatives for Asia and the Pacific (2004) at 6.

[109] Supreme Court of the Philippines, Department of Justice and United Nations Development Programme, "The Other Pillars of Justice Through Reforms in the Department of Justice: Diagnostic Report IX" (2003), online at: http://www.apjr-sc-phil.org/pub-reports.

[110] Harry Blair and Gary Hansen, "Weighing in on the Scales of Justice: Strategic Approaches for Donor-Supported Rule of Law Programs," USAID Program and Operations Assessment Report No. 7 (1994), online at: http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnaax280.pdf.

individual and institutional confidence, and strategic and enhanced private and public sector involvement.[111]

The biggest problem that the Korean prosecution faces is abuse of power. Korean prosecutors do not view their role as subordinate to that of the judge. They view themselves as equals, a mentality that is inconsistent with the adversarial system.[112] Korean prosecutors control prosecutorial powers under the Criminal Procedure Act and through indictments.[113] In the past, public prosecutors have indicted many political dissenters on charges of violating the National Security Law (NSL).

Legislation has been enacted to cut the ties between the prosecution and the ruling party. Previously, it was common practice for top prosecutors faithful to the President or his party to be appointed to prestigious public offices or recruited to the President's party after retirement. In 1997, an amendment to the Prosecution Act provided that the Attorney-General should not be appointed to public office for two years following retirement and it restricted participation by prosecutors in any political party.[114] However, later that year, nine high-ranking prosecutors challenged the constitutionality of the amendment. Korea's Constitutional Court agreed with the applicants, thus demonstrating the need for other measures to ensure the independence of prosecution.

In 2000, Korea adopted some of the recommendations of the Organization of Economic Cooperation and Development (OECD) from its convention on bribery into the Korean Criminal Code. Korea enacted a special law, the Foreign Bribery Prevention Act (FBPA), with the purpose of fully incorporating the OECD into its national law.[115] Currently the set of legal instruments available to combat transnational bribery is more powerful than those used to combat national bribery.

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[111] Simeon Marcelo, "Combating Corruption in the Philippines," ADB/OECD Anti-Corruption Initiative for Asia-Pacific, 4th Regional Anti-Corruption Conference for Asia and the Pacific.

[112] Jae Won Kim, "The Ideal and Reality of the Korean Legal Profession" (2001) 2 *Asian-Pacific Law and Policy Journal* 45 at 55.

[113] *Ibid.*

[114] *Ibid.* at 57.

[115] Jong Bum Kim, "Korean Implementation of the OECD Bribery Convention: Implications for Global Efforts to Fight Corruption" (2000) 17 *UCLA Pacific Basin Law Journal* 245 at 264.

III. CONCLUSION

The evidence reviewed in this chapter suggests that in many developing countries, particularly in Latin America and other countries with historical traditions of inquisitorial rather than adversarial criminal proceedings, prosecutors have played a minor role in prosecuting crimes, relative to the police and the presiding members of the judiciary. In other developing and transition economies, such as the former Soviet Union, prosecutors have played a much larger role and often have been the local eye of the incumbent political regime in overseeing broad applications of laws in local communities as well as legal institutions, including courts. Like police, prosecutors in many developing countries have often been poorly paid, poorly qualified, and poorly trained, and have been vulnerable to corruption by both members of incumbent political regimes and private parties.

With respect to the three classes of impediments to rule of law reform identified in Chapter 1, resource constraints have clearly been a factor in many developing countries, but again as with police reform, without changes in institutional structures and related incentive structures, effectuated by new mechanisms of prosecutorial independence and accountability, simply paying incompetent or corrupt prosecutors higher wages is unlikely to yield significant benefits in terms of improved prosecutorial performance.

With respect to social/cultural/historical practices and beliefs, the change from an inquisitorial to an adversarial form of criminal proceeding obviously necessitates a reconceptualization and expansion of the role of prosecutors. Progress that has been made in many developing countries in this respect suggests that entrenched mindsets as to the role of prosecutors, relative to police and the judiciary, are amenable to change over time. Where prosecutors have been conceived of as agents for the protection of the incumbent political regime (as in the former Soviet Union or China), disentangling the prosecutorial function from the executive arm of government is a larger challenge to the established role of prosecutors, but again experience suggests that at least in some countries (such as China) modest progress has been made in this respect.

With respect to political economy constraints on reforming the role of the prosecutor, obviously these are most acute in military or authoritarian regimes (such as the former Soviet Union), where the prosecutor has been viewed as the local eye of the incumbent political regime. De-politicizing the role of the prosecutor in these countries is obviously a major and largely unmet challenge. Again, as with police reform, external agencies through the provision of financial and technical assistance can support domestic political constituencies committed to a reconceptualization of the prosecutorial function (as we elaborate more fully in the concluding chapter of this book).